



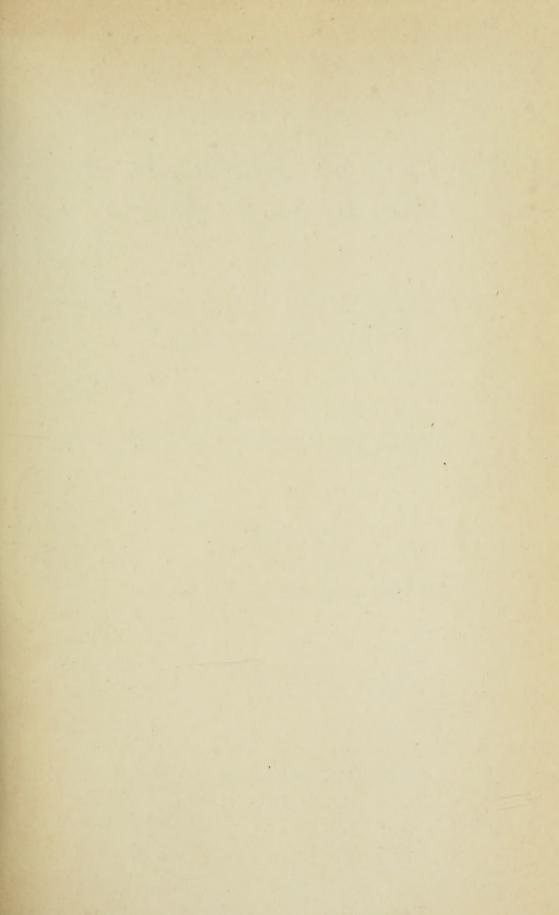
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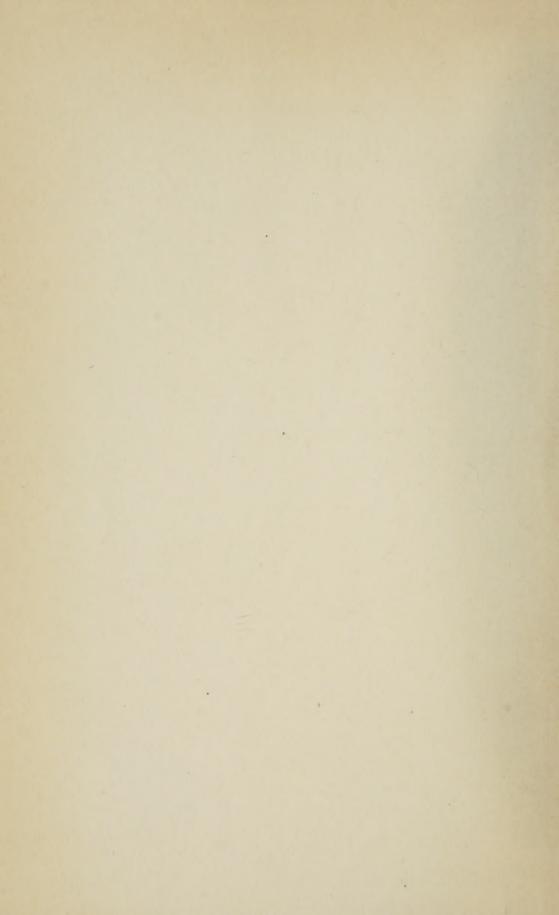












REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

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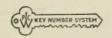
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REPORTS OF CASES

HEARD AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

VOLUME III

FROM AUGUST 12, 1871, TO NOVEMBER 20, 1872

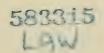
BY J. S. G. RICHARDSON

STATE REPORTER

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1916





JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

Hon. F. J. MOSES, CHIEF JUSTICE. Hon. A. J. WILLARD, ASSOCIATE JUSTICE. Hon. J. J. WRIGHT, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

| 1st | CIRCUIT- | -Hon. | R. F. GRAHAM. |
|----------------|----------|-------|----------------|
| 2 _D | 66 | 66 | JOHN J. MAHER. |
| 3D | 66 | 66 | JOHN T. GREEN. |
| 4тн | 66 | 66 | J. M. RUTLAND. |
| 5тн | " | 66 | S. W. MELTON. |
| 6тн | " | 66 | W. M. THOMAS. |
| 7тн | 66 | 66 | M. MOSES. |
| 8тн | 66 | 66 | J. L. ORR. |

ATTORNEY GENERAL.

D. H. CHAMBERLAIN, ESO.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

TABLE OF CASES REPORTED

| Pa | age P | age |
|-----------------------------------|--|-----|
| Ahrens v. State Bank 4 | 101 Johnstone v. Crooks | 200 |
| Allen v. Harley 4 | 112 | |
| Allen v. Partlow 4 | 117 Kibler v. Bridges | 44 |
| D. 11 - Wil 1 1 | McCants v. Wells. | 569 |
| Bell v. Wheeler 1 | | 577 |
| | McCrea v. Port Royal R. Co | 381 |
| | 226 McGowan v. Lowrance | 356 |
| Bradley v. Rodelsperger | | 242 |
| Buchanan v. McNinch 4 | | 198 |
| Bulow v. Witte | | 254 |
| | | 34 |
| Byrd v. Charles | | 168 |
| Dyld v. Charles | Mowry v. Stogner | |
| Campbell v. Bank of Charleston 3 | | |
| | 298 Norton v. Lewis | 25 |
| Caskey v. McMullen 1 | 196 | |
| Clawson v. Sutton Gold Min. Co 4 | 119 Palmer v. Charlotte, C. & A. R. Co | 580 |
| | | 296 |
| | 77 Pringle v. Dorsey | |
| | 300 Pringle v. Sizer | 335 |
| | 46 | |
| | Redding v. South Carolina R. Co | 1 |
| Cureton v. Watson 4 | | 60 |
| 70 1 60000 | Robertson v. Evans | |
| | Rose v. City of Charleston | 309 |
| De Hay, Ex parte | | 333 |
| Donaldson v. Johnson | | 53 |
| Dupont v. Collins | | 204 |
| Dupont v. Comms | South Carolina Soc, v. Gurney | 51 |
| Farrar v. Farley | | 230 |
| Fleming v. Robertson | | 438 |
| Furman v. Greenville & C. R. Co 4 | | 266 |
| | | 531 |
| Gage v. City of Charleston 4 | 491 | |
| Griffin v. Addison 1 | | |
| Guery v. Kinsler 4 | 423 Trenholm v. City of Charleston | 347 |
| | 74 TT 1 011 | 000 |
| Hebrew Orphan Soc. v. Gurney | 51 Ward v. Cohen | |
| Hinton v. Kennedy 4 | 459 Weatherly v. Jackson | 110 |
| Johnston v. City of Charleston 2 | Welsh v. Davis | 215 |
| Johnston v. City of Charleston 2 | 202 . M.CISIT A. Davis | 210 |
| 3 S.CAR. | (viii)† | |
| | | |

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

3 S. C. *1

*REDDING v. SOUTH CAROLINA RAIL-ROAD COMPANY.

(April Term, 1871.)

[Master and Servant \$\sim 306.]

A master is responsible in a civil action for the tortious act of his servant committed in the course of the latter's employment, and it makes no difference that the act was done willfully and without the knowledge of the master, or even in disobedience of his orders.

[Ed. Note.—Cited in Rucker v. Smoke, 37 S. C. 381, 16 S. E. 40, 34 Am. 8t. Rep. 758; Booth v. J. G. White Engineering Co., 101 S. C. 490, 86 S. E. 33.

For other cases, see Master and Servant, Cent. Dig. §§ 1230-1232; Dec. Dig. \$\sim 306.]

[Master and Servant ⊗=332.]
Whether a servant was acting in the course of his employment when he committed a tortious act is a question of fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. ⊕332.]

[Trial \$\infty\$ 139.]

If there is no evidence at all to sustain the plaintiff's case, the Judge may order a nonsuit; but if any such evidence is given, the case must go to the jury.

[Ed. Note.—Cited in Holley v. Walker, 7 S. C. 144; McCall v. Cohen, 16 S. C. 448, 42 Am. Rep. 641; Carrier & Harris v. Dorrance, 19 S. C. 32; Davis v. Columbia & G. R. Co., 21 S. C. 102; Bridger v. Asheville & S. R. Co., 25 S. C. 26; Polatty v. Charleston & W. C. Ry., 67 S. C. 398, 45 S. E. 932, 100 Am. St. Rep. 750; Stephens v. Southern Ry., 82 S. C. 546, 64 S. E. 601.

For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. =139.]

Before Graham, J., at Charleston, April Term, 1871.

Action by William F. Redding and Julia D. Redding, his wife, to recover damages for injuries to the person of the female plaintiff alleged to have been committed by a servant of the defendant at the depot of the defendant, in the city of Charleston, on the 26th February, 1870.

Mrs. Redding, the female plaintiff, Eliza Brown and Pharaoh Delair, were examined as witnesses for the plaintiffs, and each of them testified, in substance:

That while Mrs. Julia D. Redding was sitting in the ladies' parlor of the South Carolina Railroad Company Depot, at Charleston, in the said County, on the --- day of February, 1870, a man, Charles Wollen, (who, being present in Court, was identified by the witnesses,) approached Mrs. Redding; told

*9

her she was a negro; *that he was instructed by the South Carolina Railroad Company to keep negroes out of that parlor; and, upon her refusal to leave the parlor, seized her and dragged her out, throwing her with violence to the floor upon her face (she being then pregnant,) thereby injuring her.

Mrs. Redding also testified that one month previously the same man, Charles Wollen, ordered her out of the same parlor, telling her he was ordered by the Company to keep negroes out of that parlor. Upon her saying she was not a negro, he apologized and left her. Mrs. Redding also testified that she rode in the first-class car, and, although without a ticket, and without paying any fare, was allowed to continue to her journey's end.

J. B. Martin was then called by plaintiffs. He testified as follows:

I am ticket agent at the South Carolina Railroad; was so in February last. One Wollen was employed as a man "knocking about" the depot. The first thing I employed him for was to attend the ladies' room, to clean it out. He was so employed in February. I do not remember the exact time of this occurrence. I discharged him, I presume, about two or three months after this occurrence. I gave no instructions to keep colored persons out of the parlors, and there were none at that time. That ceased to be as soon as the Civil Rights Bill had passed. I don't know when this Bill was passed, but it was before this. We never interfered with colored persons going in there.

Wollen's employment was, as we had no stewardess for the ladies' room, to keep it clean, sweep it out, and empty the chambers, and such things. That was the only employment he had, and the only authority. I am in charge of the whole premises. After the passage of the Civil Rights Bill, the orders were to make no distinction at all. Persons

went in there as they pleased.

There is a passage here through the building. On the right hand side is the ladies' room, and my office is on the left. I cannot see into the ladies' room from my office. The ticket-window is all of twenty-five feet from the door of the ladies' room. I have never measured it. Mrs. Redding came to the window that night. She told me that she was ordered out of the ladies' room. I said it was without my knowledge or consent. saw nothing more of her. There was a gentleman standing there. The first intimation I had of it was, he said that he would shoot my watchman. I asked him why? He then said that his foster sister had been ordered *3

out of that *room. I told him that it was done without my knowledge or consent. It was not my orders. Nothing was said by Mrs. Redding, or any body with her, with regard to any violence. She said she was ordered out. No complaint was made to me of violence. She said she had been in there several times before, and had not been ordered out. I know that she has been in there and nobody disturbed her. From the window she went to the cars. At no time that night was any complaint made by her or anybody about any violence.

The plaintiffs here rested, and the defendant moved for a nonsuit on the grounds:

That Charles Wollen was not acting within the scope of any employment or agency, direct or indirect, when he excluded plaintiff from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant, extended to its proper agents; and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the Company.

The motion was granted.

The plaintiffs appealed to this Court, on the grounds:

- 1. That the defendants are liable, notwithstanding that the servant acted contrary to their instructions, if he acted as their servant.
- 2. That the servant was acting in the course of his employment.
- 3. That whether the servant was acting in the course of his employment, was a question of fact, and should have been submitted to the jury to decide.

[For subsequent opinion, see 5 S. C. 67.]

Chamberlain, Seabrook & Dunbar, for appellants, maintained the following propositions:

1. If Wollen was at the time acting as the servant of the respondents, but acted in violation of their orders, the respondents are unquestionably liable for his acts, unless they are shown to be willful or malicious.

2. The evidence shows that Wollen was at the time in the course of his employment, and hence the respondents are liable, in the absence of any evidence tending to show that he acted willfully or maliciously.

3. The question whether Wollen was at the time in the course of his employment is a mixed question of law and fact. It was not competent for His Honor, the Circuit Judge, to pass upon the question, but it should have been submitted to the jury under proper instructions as to the matters of law involved.

* A

*They cited upon the first point-Story on Ag., § 452; McManus v. Crickett, 1 East., 106; Middleton v. Fowler, Salk., 282; Wright v. Wilcox, 19 Wend., 343; Richm. Turnp. Co. v. Vanderbilt, 2 Com., 479; Joel v. Morrison, 6 C. & P., 511; Sleath v. Wilson, 9 C. & P., 607; Parkerson v. Wightman, 4 Strob., 363; Weed v. The Panama R. R. R. Co., 17 N. Y., 362; Story on Bailm., §§ 400, 406; Stokes v. Saltonstall, 13 Pet., 181; Shearm. & Red. on Neg., 79; Limpus v. London Omnibus Co., 4 Hurl. & C., 526; The Phil. & Read. R. R. Co. v. Derby, 14 How., 483. Upon the second point-1 Red. on Rail., 383, 512-13, notes, 3d Ed.; Phil. Railway v. Witt, 4 Whart., 143. And upon the third point-Parks v. Ross, 11 How., 393; Richardson v. City of Boston, 19 How., 268-9; Brown v. Frost, 2 Bay, 126; Hopkins v. DeGraffenreid, 2 Bay, 441; 2 Bail., 321; Magrath.v. Isaacs, 2 McC., 23: Clements v. Benjamin, 12 John. R., 299; Pratt v. Hull, 13 John. R., 334; Keller v. The N. Y. Cent. R. R. Co., 24 How., Pr. R.,

Conner, contra, submitted the following points and authorities:

The general rule of law is, that the principal is liable for the acts of his agent, in the course of his employment; but the rule and the limitation of it go together. The act complained of must be within the scope of the employment—within the agency.—Story on Agency, § 456.

The principal is not liable for the torts or negligence of his agent, in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use or benefit.—Story on Agency, § 446: Mc-Manus v. Crickett, 1 East., 106.

The fact that the servant was, at the time of the injury, engaged in the service of his master, is not conclusive of the master's liability. The act causing the injury must have been one within the scope of the authority which the servant had from the master, or which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have.—Shear. & Red. on Neg., 70.

The language of C. J. Kenyon, in Ellis v. Turner, is apposite: The defendants are re-

sponsible for the acts of their servant in tinction at all"-meaning between white and those things that respect his duty under them, but are not responsible for his misconduct in those things that do not respect his duty to them, as if he were to commit assault upon a third person in the course of his voyage. -8 Term., 533. And to the same point is *5

*McClanahan v. Brock: "How can an act of one of the defendant's servants, outside of his employment, and in no way connected with it, be considered as the neglect of his bailment?" And the nonsuit was sustained.-5 Rich., 27; Eastern Counties R. R. Co. v. Broom, 2 Eng. Law & Equity, 406; Crocker v. New London & Willimantic R. R. Co., 24 Conn., 265; Thames Steamboat Co. v. Housatonic R. R. Co., Ibid, 56.

"It is objected that the defendants are not answerable for the tortious acts of their agents or servants, and this is true, if the acts were accompanied with force, for which an action vi et armis would lie, or were willfully done. But the acts complained of were not so done."-Lowell v. Boston & Lowell R. R. Co., 23 Pick., 24.

Alderson, J., in McKenzie v. McLeod, 10 Bingham, 390; (25 E. C. L. R., 187): When the master "has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice, or common sense, the master can be held responsible."

Aug. 29, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. The action was brought by Redding and wife, the plaintiffs, to recover damages for an injury sustained by the wife in the passenger saloon of the defendant. The facts of the case are as follows: While the wife, on the evening of February, 1870, was sitting at the depot of the defendant in Charleston, in the parlor assigned for lady passengers, awaiting the departure of the train for Columbia, which she proposed to take, one Wollen, assuming to have charge of the said room, as the servant of the defendant, informed her that he was instructed to keep negroes out of that parlor; and, on her refusal to leave, he seized and dragged her out with violence—throwing her on her face to the floor. About a month before the same man had ordered her out of the parlor, saying that his instructions were to keep negroes out; and, on being told by her that she was not a negro, he apologized, and further interference ceased. Martin, who had charge of the premises constituting the depot, testified: "That the first thing Wollen was employed for was to attend the ladies' room, to keep it clean, sweep it out, empty the chambers, and such things; that this was his only employment; and orders had, before that time, been given to make no distorespond to the injury? The appointment

colored persons. Wollen was discharged two or three months after the occurrence. Upon the plaintiffs' closing, the defendant mov-

ed *for a non-suit, on the grounds: "That Charles Wollen was not acting within the scope of any employment or agency, direct or indirect, when he excluded plaintiff from the saloon, but was acting without authority. beyond his legitimate employment, and in violation of the instructions and wishes of the defendant extended to its proper agents; and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the company."

The motion was granted, and the plaintiffs seek, by appeal to this Court, to reverse it The relation of master and servant creates rights and obligations which are well defined in the books, not only as between themselves, but as between themselves and third persons. Perhaps, in regard to those last, they are no better or more distinctly stated than in Smith on Master and Servant, 151-'2:

"A master is ordinarily liable to answer in a civil suit for the tortious or wrongful act of his servant, if those acts are done in the course of his employment in his master's service. The maxim applicable to such cases, being respondeat superior, and that before alluded to, qui facit per alium facit per se. This rule, with some few exceptions, is of universal application, whether the act of the servant be one of omission or commission; whether negligent, fraudulent or deceitful; or, even if it be an act of positive malfeasance or misconduct, if it be done in the course of his employment, his master is responsible for it, civiliter, to third persons; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect; for, even if he disapproved of, or forbade it, he is equally liable, if the act be done in the course of the servant's employment."

It would be a difficult undertaking to adduce a single case where the master was not held bound for the tortious acts of his servant, done in the course of his employment. That it was not authorized, or even if it had been forbidden, does not affect the right of redress against the master by a party injured by the unauthorized or forbidden act, for the consequence to the third party is the same, and is to be attributed to the fact that the master has placed the servant in a position where he may do unauthorized acts. On what principle of fairness could it be contended that either the error or folly of employing an incompetent or careless servant, should bring damage to a stranger, while the master, who put him in a position where he might commit the wrong, should be free from all obligation *7

of such improper person *by the master induced the wrong, and if it was committed in the course of his employment, that is, while the relation of master and servant actually existed in the particular service in the discharge of which the servant was engaged, the master is held to answer. He cannot be excused because he did not know of it or disapproved of it, or even had forbidden it, for, notwithstanding his conviction of the impropriety of the act, as shown by his forbidding it, he nevertheless was so careless and negligent, in the selection of his agent, as to subject the public to the chance of its infliction.

To confine the liability of the master only to such acts of his servant, in the course of his employment, as he may have authorized, would give to an irresponsible agent a license to commit torts against the persons of those who, by the nature of his employment, must be brought in contact with him, without any reasonable prospect of pecuniary redress, and would materially affect the subornation of the servant so necessary to the maintenance of the superior condition which the master holds in relation to him. When the community deal with a corporation of the character of this defendant, with diversified departments, and various branches of business incident to the general purpose of its organization, "public policy and convenience" require that they should be responsible for the acts of commission or omission by their agents while in the course of their employment. The Supreme Court of the United States, in Philadelphia and Reading Railroad Company v. Derby, 14 Howard, 486 [14 L. Ed. 502], has affirmed the principles which we think applicable to this case, and, though not necessarily binding on this Court, yet the clear statement of the law in the opinion, having in view the reason on which it rests, and the authorities to which it refers recommends it to our adoption. It was there held that "the master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders." The "course of the employment," in the sense in which it is used in regard to the duties imposed by the particular service, is not to be understood as restricted and confined to the prescribed duties set apart for the performance of the servant. Whatever may be incident to the employment must necessarily belong to it. "To attend the ladies' room" (as Martin, in his examination in chief, says was the duty for which Wollen was employed,) might imply that he was to take charge of it, or, at least, to see to the seating and comfort of passengers who might enter; and this would further imply the duty of putting

out improper *or disorderly persons, and of preventing entrance to an intruder. If by error of judgment, he should forcibly and violently eject a party who had a right to be there, or, in like manner, prevent admission to one entitled to enter, would the defendant be excused upon the ground that he was not acting within the scope of his service? Lord Chancellor Cranworth, in Marshall v. Stewart, (House of Lords,) 33 Eng. L. & E.. 7, says: "We must take a great latitude in the construction of what is being engaged in his employment." That the act was willful, on the part of the servant, is no excuse for the master, if done within the course of his employment.

It was so held, in Philadelphia and Reading Railroad Company v. Derby, in Weed v. Panama Railroad Company, 17 N. Y., 362, in Limpus v. London Omnibus Company, 1 Hurls. and Colt., 562, and in Seymour v. Greenwood, 7 Hurls. and Nor., 354.

Every act is willful which is the result of volition. The principle proceeds upon the ground that the injury, by reason of the willful act, is to be attributed to the negligence and want of care of the master, in the selection of an improper servant, for a particular charge. There is a class of cases where the act of the servant was held not only willful, but malicious, or done to serve some purpose of his own, and the master was excused from liability. They are put upon the ground, that the servant was then acting out of the line of his employment. As in McManus v. Crickett, 1 East, 107, where the servant, in driving his master's chariot, from malice ran it against the chaise of the plaintiff, in which he was riding, and from which he was thrown, and greatly hurt. Kenyon, C. J., delivering the opinion of the Court said:

"Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be held answerable for such acts." In Sleath v. Wilson, 9 Carr. and Payne, 607, Wilde, Serjt, in his argument, said: "The case of McManus v. Crickett is quite a different case; there the servant had a spite against the officer, and drove against him." Erskine, J., said: "It is quite a different case."

It would seem, from the ruling in Seymour v. Greenland, 7 Hurls. and Nor, 335, that the English Courts had, to some extent, modified the views expressed in McManus v. Crickett.

If, then, the issue between the parties before us was to be determined by the fact that Wollen was, or was not, acting in the course

*of his employment, the solution of it was not for the Court, but for the jury. What was included in the course of his employment; what acts or duties the particular service demanded of him; what control he was authorized to exercise over the passengers wait- regards the transactions out of which the ing in the parlor; how far did his particular employment, "to attend the room, to keep it clean, sweep it out," &c., give him a right to interfere at all with passengers within it; whether, having been in the room a month before the transaction, a hired servant, exercising the same authority as on this occasion, so far as ordering the plaintiff from the parlor, saying he was ordered by the Company to keep negroes out of it; all these were circumstances from which the jury was to determine whether Wollen was, in the particular transaction, "in the course of his employment," after being instructed by the Court as to what, in legal contemplation, was understood by the term. When, however, the Judge assumed to decide that "Wollen was not acting within the scope of any engagement or agency, direct or indirect, when he excluded the plaintiff from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant. extended to its proper agents, and that, upon the testimony, the act was the tort of Charles Wollen, for which he is responsible, and not the Company," he undertook to decide an issue which properly belonged to the jury.

If there had been no evidence to sustain the plaintiff's complaint, it would have been within the legitimate province of the Judge to have said so, and to order the non-suit.

Who, however, can read the testimony, and say that, under no proper view which the jury could take of it, could they have differed from his conclusion? Our courts have not been inclined to grant non-suits where there was any evidence offered by the plaintiff which might sustain his action. Where there has been a total failure of testimony, as in Brown v, Frost, 2 Bay, 126 [1 Am. Dec. 633], and Hopkins v. De Graffenreid, 2 Bay, 441, there was nothing to leave to the jury, and it was the duty of the Judge to non-suit; but, as is said in Rogers v. Madden, 2 Bail., 321, the practice of "ordering a non-suit in invitum, for defective testimony, is to be pursued with caution. If a plaintiff has any prima facie testimony, he has the right to the verdiet of a jury upon it."

The motion is granted, and the order set aside.

MOSES, C. J., concurred.

*WILLARD, A. J. While agreeing in the conclusion to which the majority of the Court has arrived, I do not deem it requisite to resort to the general rule, that the master is responsible to third persons for the wrongful act of his servant, as the ground of decision. Where there is no privity between the third person injured and the master, as it

injury arose, it is necessary to refer to the rule of respondeat superior, in order to make the act of the servant, in its legal effect, an act of the master, and thus connect the latter with the damage sustained. But where the master is under an obligation to render a service to such third person, either imposed by law or the contract of the parties, and the damage sustained is a direct consequence of a wrong done in the rendition of such service, the master is liable for such damage, notwithstanding the particular act of the servant may have been unauthorized by the master, and have proceeded wholly from a malicious intent, on the part of the servant, to injure such third person. The wife of plaintiff presented herself to the defendants, a railroad corporation, as a passenger, to be conveyed over their railroad, and, so far as we can know, in conformity with the law, and the reasonable rules of the defendants, and must be regarded as entitled to enjoy the facilities and accommodations offered to passengers by defendants.

The damage claimed is alleged to have arisen, in part, from the act of defendant's servant, in ejecting her from a place where she had a right to be, under the relations she sustained, as a passenger, to the defendants, and in part from the degree of violence employed in the course of ejecting her. It is no answer to such a demand that the act of the defendants' servant was unauthorized, and willful and malicious on his part.

This principle was applied to the relations of a railroad company and a passenger, in the case of Weed v. Panama Railroad Company, (17 N. Y., 362,) and is not affected by what is said in Danner v. South Carolina Railroad Company, (4 Rich., 329 [55 Am. Dec. 678]), of the effect of willful misconduct on the part of a servant, as affecting the relation of the master to third persons.

3 S. C. *11

*FARRAR v. FARLEY.

(April Term, 1871.)

[Assignments for Benefit of Creditors @==245.] One of two joint assignees for the benefit of creditors, purchased, at their own sale, in February, 1856, two tracts of land and a slave, and in January, 1857, he sold the lands at an advanced price: *Held*, That he was chargeable, in his account with creditors, with the price of the slave, and with the advanced price of the lands.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 781; Dec. Dig. @ 245.]

[Assignments for Benefit of Creditors 263.] An assignee for the benefit of creditors who purchases some of the debts at less than their nominal amounts, is not entitled to credits on his account with other creditors, for the full amounts of the debts. He can only claim as dis- | Farley, was made a party defendant and anbursements what he actually paid.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1143; Dec. Dig. ⇐=263.]

[Assignments for Benefit of Creditors = 255.]
An assignee for the benefit of creditors is liable for interest as other trustees are, and a creditor whose debt bears interest at law is entitled to interest as against the assignee.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 797, 1137; Dec. Dig. \$255.]

[This case is also cited in Ex parte Farrars, 13 S. C. 254, as to facts.]

Before Carroll, Ch., at Laurens, June, 1868. In January and April, 1855, Joseph Crews made five séparate assignments for the benefit of his sureties and creditors as follows: On January 18, he made an assignment to Lewis Dial of a number of notes "to satisfy certain judgments and other claims," which Dial held against him; on January 23, he made an assignment to W. R. Farley of other notes to pay the claims held by Dial against him; on April 7, he made another assignment to Dial, of notes to indemnify Dial, as his surety, to certain creditors therein named; on April 10, he made an assignment to Farley and Dial of two tracts of land and a slave named Alfred, with power to sell the same and apply the proceeds to the payment of certain debts of Crews, for which the assignees were liable as his sureties, and on April 13, he made a general assignment to Farley of all his effects, inclusive "of any excess of funds that may arise" from the said previous assignments, in trust: 1, to pay expenses; 2, to fully indemnify the assignees as his sureties; 3, to pay two specified judgments; and 4, to pay all his other creditors in full, or pro rata, who should execute a release of any balance that might be due them.

At the dates of the assignments, the plaintiffs, S. S. Farrar & Brothers, were judgment creditors of Crews to the amount of \$2,417.51, besides interest, and entitled to come in under the trusts of the last assignment, numbered 4. They came in and accepted its terms.

The two tracts of land and the slave Alfred were sold by the assignees on February 4, 1856, on a credit of six months, with interest, and were purchased by Dial; the lands *12

at the price of \$3,800, *and the slave at the price of \$719. Dial complied with the terms of sale, by giving his note to Farley and himself for the purchase money, and on January 23, 1857, he sold the lands to Dr. Fuller at the advanced price of \$5,867.

On April 27, 1857, the plaintiffs filed this bill for account against Farley, Crews and leaving a will, and his executrix, Phæbe M. Court.

swered the bill.

All matters of account were referred to the Commissioner, and he, in 1868, submitted his report, wherein he charged Dial with all moneys which he or his agent had received arising from any of the assignments, and with the price, \$719, at which he had bid off the slave. He refused to charge him with the hire of the slave for one year, and also with \$5,867, the advanced price at which he had sold the lands to Fuller. He also refused to allow the plaintiffs interest on their judgment, or to charge Dial with interest, giving as his reason, that "after the long lapse of time since this suit was instituted, its intricate, complex and voluminous character, the changes produced everywhere by the events of the last few years, and from the fact that the interest would sum very near concurrently on both the debit and credit sides of the accounting, and from the at least apparent uncertainty of fixing the precise time of many of the transactions, the Commissioner doubts if he could have arrived at any more satisfactory and equitable conclusion by an effort to compute interest."

On the taking of the account it appeared that the debts of Crews, which were protected by the several assignments, amounted in the whole, exclusive of the plaintiffs' and one other very inconsiderable debt to J. T. and J. S. Penn, to \$26,477.18, and that Dial had compromised with the parties owning those debts and purchased them all for \$8,522. Dial claimed credit on his account for those debts to their full amounts, and the Commissioner allowed the claim against the objection of the plaintiffs who insisted that the sums actually paid by him were all that he could rightfully claim. The other facts appear in the Circuit decree.

The case came before the Circuit Court on exceptions to the report taken by the plaintiffs, and also by Crews and Dial. The points made by the exceptions will be sufficiently understood from the foregoing statement, and the decree, so much of which as relates to the points decided by this Court, is as follows:

*13

*Carroll, Ch. The parties complainant, as well as defendant, have filed exceptions to the Commissioner's report. Those taken by the plaintiffs will be first considered.

In the statement of the accounts submitted by the Commissioner there is no computation of interest. It is not shown that the moneys received by the defendant, Dial, remained, without fault on his part, idle or unproductive in his hands; nor do any circumstances appear which render it inequi-Dial, who appeared and put in answers to table to compute interest against him, accordthe same. In August, 1860, Farley died, ing to the ordinary course and rule of the "It is rarely disallowed in the adjustment of accounts, for it is rarely otherwise than an equitable claim." The plaintiffs' judgment debt is at law an interest-bearing demand, and in such case it is said this Court is "bound to allow interest."—
Hunt v. Smith, 3 Rich. Eq., 536.

April, 1855, the defendants, W. R. Farley and Lewis Dial, are the assignees. At their sale of the property comprised in that deed, on 4th February, 1856, Dial became the purchaser of the lands and mills, at the price of \$3,800, payable six months thereafter, with

The plaintiffs' last exception (the eleventh) is sustained.

It is contended by the plaintiffs that the defendant, Dial, should be charged with the notes and choses in action, which were comprised in the assignments, dated respectively the 18th and 23d January, and the 7th, 10th and 13th April, 1855, and which he represents to have never been collected. There was no evidence adduced as to the solvency of the persons by whom these debts were due, or whether, with proper diligence, all or any of them might have been collected; the contest at the hearing was upon whom rested the burden of proof. In Styles v. Guy, 16 Sim., Ch. R., 232, the Vice Chancellor remarks: "If an executor is sued for a devastavit in not having recovered a debt due to his testator's estate, all that is necessary for the plaintiff to show is that the debt existed, and that the executor took no steps to call it in. Insolvency cannot be presumed." Whether so stringent a rule should be held applicable to the defendant, Dial, need not now to be determined. The "uncollected assets" referred to amount to more than sixteen thousand dollars. They include the remnant and refuse of the mercantile debts that were due to the Assignor, Crews. It is morally certain that all of them could not have been collected by Dial. In their answer, filed as far back as June, 1859, both Dial and Crews express the opinion that "probably as much as \$1,000 or \$1,500 may be yet realized from debts still outstanding in favor of the assigned estate,' but the residue "they regard as worthless." Though this statement be regarded merely as matter of discharge, and not of itself evidence, it may yet be considered by the Court. In respect of the mere conduct of the cause, *14

certainly proof to some extent *may be adduced as to how much of the debts referred to might, with due diligence, have been collected. No additional delay will result from allowing the parties the opportunity to produce such proof, as the report must be recommitted upon other grounds. A further inquiry before the Commissioner will be directed as to the debts in question. Substantial justice seems to demand it, and the Court, therefore, withholds its judgment as to the 1st, 3d and 5th of the plaintiffs' exceptions; and also as to the first of the specifications, contained in the plaintiffs' 9th exception.

The more important questions in the case remain to be considered, and they are those proposed by the seventh and tenth of the exceptions to the report on the part of the plaintiffs. Under Crews' deed of 10th of

April, 1855, the defendants, W. R. Farley and Lewis Dial, are the assignees. At their sale of the property comprised in that deed, on 4th February, 1856, Dial became the purchaser of the lands and mills, at the price of \$3,800, payable six months thereafter, with interest from the day of sale. On the 23d January, 1857, Dial sold the property he had thus purchased at the advanced price of \$5.867, and the plaintiffs, in their tenth exception, contend that he should be held accountable for the latter sum.

It is the rule of this Court, framed upon public policy, that a trustee, though invested with a general power to sell, is disabled from purchasing the trust property. "A trustee to sell and manage for others," says Lord Eldon, "undertakes in the same moment in which he becomes trustee, not to manage for the benefit of himself."—Lacy, Ex Parte, 6 Vesey, 626. So also "A trustee is never permitted to make any profit to himself in any of the concerns of his trust." Such profit belongs to his beneficiaries.—1 Story's Eq., §§ 322–3.

These principles are not confined to technical trusts, but extend generally to all like fiduciary relations. It has been repeatedly adjudged that they apply to assignments by an insolvent debtor, for the benefit of his creditors. Ex Parte Wiggins, 1 Hill Ch., 353; Lacy, Ex Parte, 6 Vesey, 626. That there were here two assignees, and that only one of them became the purchaser, cannot avail to make valid the sale. In each of the cases last referred to, the purchase set aside was by one of several assignees. In Hill on Trustees, 538, it is said that "the rule of Equity interdicting the purchase of the trust estate by trustees, applies as much to one of several trustees, as to a sole trustee." It is manifest that by the effect of Crews' assignment of the 13th April, 1855, his general creditors *15

have an *interest in the faithful performance of the duties assumed by the assignees, respectively, under each and all of his previous assignments. The result is that the defendant, Dial, should be held accountable for the enhanced price at which he sold the lands and mills to his vendee, Dr. Fuller: and the plaintiffs' seventh exception is to that extent sustained; as also in regard to the hire of the negro Alfred. As to the rents of the lands and mills, the Court perceives no sufficient reason to dissent from the ruling of the Commissioner upon that subject in his amended report, and the residue of the plaintiffs' seventh exception is overruled.

A portion of the assigned effects came to Dial's hands as sole assignee under Crews' assignments of 18th January and 7th April, 1855, and another portion was received by Dial as assignee conjointly with Farley, under the assignment of 10th April. Dial also became the purchaser of the stock of goods included in the assignment to Farley of 13th

April, 1855, at the price of \$3,938.97, Dial titors of Crews was essentially fiduciary, in agreeing with Farley "to apply the aforesaid sum to the payment of the debts of the assignor, Joseph Crews, as provided for" in that assignment. Farley's health failing, and rendering his absence necessary, Crews was left in charge of the assigned effects that were in the hands of Farley, "and thus had access to the notes, books and papers belonging thereto, and made collections," which he paid to Dial. The great bulk of the assigned effects thus passed into the hands and custody of Dial. His possession as to much the larger portion, if not the whole of these effects, was palpably fiduciary.

Between the execution of the several assignments referred to and the filing of the bill on the 27th April, 1859, Dial obtained assignments of all the debts against Crews except that of the plaintiffs and a small demand due J. T. & J. S. Penn. The debts so assigned to Dial amount to \$26,477.18, for which he paid \$8,522.00. These debts Dial now sets up at their full amount, and claims, as assignee of the same, the whole dividend of the assigned effects that would have been applicable to them, if presented by the original creditors. It is charged in the bill that "large sums of money arising from the assets embraced in the assignment aforesaid, instead of being applied to the payment of the creditors, were used by Crews and Dial in compromising with the creditors of the former." In their answer the defendants, Dial and Crews, reply that all the money received by Dial from the assigned effects "was used as a common fund of his own, and he and Crews are unable to state what amount of it was used in buying the debts or purchasing the goods."

*16

*There is no rule of equity better settled, says the Court, than that a trustee shall not be permitted to employ the trust funds for his own benefit. All purchases made with the funds of the trust estate will be considered for the benefit of the cestui que trust. It is no answer on the part of the defendant that he has so mixed up the two funds together that he cannot distinguish the one from the other. A person may sometimes, by mixing the estate of another with his own, subject himself to the loss of both; for it is his own fault "that they have not been kept separate."—Myers v. Myers, 2 McC. Ch., 214 [16 Am. Dec. 648]. The moneys arising from the assigned estate and effects in the hands of Dial seem to have exceeded in amount the price at which he purchased the debts against Crews; and the probability seems to be that those moneys were liberally employed for that purpose. Though Dial had employed his own funds exclusively in purchasing the debts assigned to him, yet he would not be allowed to make profit to himself by the pur-

respect, at least, of the great bulk of the assigned estate, and its proceeds in his custody. How much had been collected out of them, or might be collected, were matters, of necessity, unknown to the great mass of Crews' creditors. They could only obtain information upon the subject from Dial himself, and it was within his power to impart or withhold it, as he pleased. His statements as to the assets of the assigned estate must naturally have had more influence with the creditors than those of another person without his facilities of information. Such means of information at his command he was bound to employ for the benefit of the creditors, and not of himself.

In Lacy, Ex Parte, already cited, one of the assignees of a bankrupt, purchasing dividends of the latter's estate, was held to be a trustee for the creditors or the bankrupt, according to circumstances. "As assignees cannot buy the estate of the bankrupt," says Lord Eldon, "so, also, they cannot, for their own benefit, buy an interest in the bankrupt estate; because they are trustees for the creditors. In that respect," he adds, "there is no difference between assignees and executors, who cannot, for their own benefit, buy the debts of the creditors." See, also, James, Ex Parte, 8 Ves., 337. If trustees or executors buy in any debt or incumbrances, to which the trust estate is liable, for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves; but the other creditors, or legatees, *17

shall have the advantage of it. *Lewin on Trusts, 318, and authorities there cited; 2 Wms. Executors, 1669; American notes, to Woollam v. Heorn, 2 Eq. Lead. Cases, 714. In the transaction under consideration is found the double vice of trustee purchasing for himself an interest in the trust estate, and employing for that purpose the trust fund in his custody. As to the debts of Crews, purchased by Lewis Dial, it is considered that the dividends of the assigned estate, which would have been applicable to them, if retained by the original creditors, cannot be demanded by Dial, except to the extent of reimbursing himself the sums actually paid for their purchase, with interest. After that is accomplished, the debts so purchased by Dial must, as against the plaintiffs and the Messrs. Penn, be treated as extinguished until those creditors have been fully paid. The plaintiffs' tenth exception is sustained to the extent indicated.

If the assigned estate and effects of Crews shall prove sufficient to pay his debts to the plaintiffs and to T. J. & J. S. Penn, without any aid from the "uncollected assets," and without excluding the contested credit for the alleged payment by Dial to Yeakle, Cobb chase. His relation towards the general cred- & Co., then the inquiry hereinbelow directed to be made by the Commissioner as to these | pay the creditors provided for in it, and the matters, will, of course, become unnecessary. Crews makes no complaint against Dial. On the contrary, he co-operated and concurred with him in most of his unauthorized acts, and is understood to be content with all of them. Indeed, Crews unites with Dial in his defence throughout, and, as against him, is entitled to no relief whatever.

The exceptions on the part of the defendants. Crews and Dial, are yet to be consider-No sufficient reason appears for the Commissioner's omission to compute interest upon Dial's demands against Crews, according to the usual course of rules of accounting, as recognized by the Court. To that extent, the third and sixth exceptions of these defendants are sustained. Dial appears to have been fairly credited with all his payments upon Crews' debt to Wardlaw, Walker & Burnside. It is not shown that Dial's just claims, as assignee of Cooper's judgment against Crews, have been disregarded by the Commissioner.

The contract for the slave, Alfred, is considered as executed, and Dial is very properly charged with the price which he agreed to pay, and which, as assignee, he must be held to have received.

The exceptions to the report taken by the defendants, Crews and Dial, (except those numbered three and six,) are overruled.

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*It is ordered and adjudged, that this opinion stand for the decree of the Court.

It is further ordered, that the report be recommitted, and be reformed conformably to the principles of this decree. And it is further ordered, that the Commissioner inquire and report how much of the "uncollected assets" included in the several assignments by Joseph Crews, herein above mentioned, might have been collected by the defendant, Lewis Dial, with due diligence on his part; and that the Commissioner make futher inquiry, and receive further evidence as to the credit claimed by Dial for his alleged payment to Yeake, Cobb & Co., and that he report thereon. And it is also ordered, that the parties have leave to move for such further orders as may be necessary or proper. Let the costs of this suit be paid by the defendant, Lewis Dial.

The Defendants, Dial and Crews, appealed to this Court on grounds which renewed all the points decided against them by the decree of the Circuit Court.

Sullivan, for appellants:

1. It is contrary to law and justice to charge Lewis Dial with the price he sold the land and mills for, when he had previously purchased them at a public and fair sale; and that he ought not to have been charged either with the price of the slave Alfred, or with his hire. That the property sold under the fourth assignment was not sufficient to totally disregarded this nicety. They accord-

plaintiffs not being cestui que trusts under it, have no right to complain.

2. Even if the plaintiffs had any right to complain, they have not exercised it, by electing to have a resale, or to hold Lewis Dial to his purchase.

Sollee v. Croft, 7 Rich, Eq., 34: "When a trustee to sell purchases without leave of the Court, it is at the option of the cestui que trust to have a resale, or to hold the trustee to his purchase."

3. It is unjust and inequitable to charge Lewis Dial with the funds received by W. R. Farley, the sole assignee, under the last and fifth assignment, farther than he actually received them. But, on the contrary, Mrs. Phœby Farley, his executrix, should have been adjudged liable for the amount received and held by her testator, and especially when she made no exception to the Commissioner's report on that subject, as to what he had received under the fifth or any of Crews' assignments.

4. Lewis Dial was entitled to all he re-

ceived, and more than he *did realize, from the assigned estate, and the plaintiffs were entitled to no decree against him, and he should not be subjected to any further accounting.

Young & Tompson, contra:

1. Can these defendants be required to account in this proceeding for the funds received by them under the fifth assignment?

Farley was assignee, and, of course, is accountable. Dial & Crews received certain funds, knowing they were trust funds. This makes them accountable.—Chaplin v. Givens, Rice 3-132; 2 Maddock's Ch., 125.

2. Can they be required to account for the sums received by them under the previous assignments, over and above what was necessary to carry out the objects of said assignments?

The excess of the previous assignments was assigned in express terms, in the fifth assignment for the benefit of these and other creditors, and although this was a mere equity in Crews, he had a right to assign it for the benefit of his creditors.-2 Story's Eq.,

"Trusts in real property, which are exclusively cognizable in equity, are now in many respects governed by the same rules as the like estates at law, and afford a striking example of the maxim, that 'Equitas Thus, for example, they sequitur legem.' are descendible, devisable and alienable, and heirs' devisees and alienees may, and generally do, take the same interests in point of construction and duration as would, under like circumstances, apply to legal estates." 2 Story's Eq., § 974.

"But Courts of Equity have long since

ingly give effect to assignments of trusts, (Vol. 35, 3d Series; ex parte Wiggins, 1 Hill and possibilities of trusts, and contingent interests and expectances, whether they are in real or in personal estate, as well as assignment of choses in action.-2 Story's Eq., \$ 1040.

3. An equity or trust interest may be held in equity, liable for the debts of a party, whether he makes an assignment for that purpose or not.

"Though the mode of procedure is somewhat different, equitable estates are as much liable for debts as legal."—Heath v. Bishop,

4 Rich., 946.

"There is no form or mode by which property, with a present vested right of several enjoyment as to either the corpus or income, may be given to or enjoyed by one, and not be liable for the payment of his debts."-Heath v. Bishop, 4 Rich. E., 46.

*20

*Much more ought this to be done in equity where the owner of the trust, as in this instance, has assigned his trust for the payment of his debts. He assigned this excess, and the creditors accepted under the assignment, and it would now be a fraud to allow him to defeat the assignment upon a pretext like this.

The decree of the Chancellor directs interest to be charged on both sides.

"Interest is rarely disallowed in the adjustment of accounts, for it is rarely otherwise than on equitable claim."-Hunt v. Smith, 3 Rich. Eq., 536.

Can defendant Dial be charged with the enhanced price of the land and mills?

A "trustee to sell and manage for others," says Lord Eldon, "undertakes in the same moment in which he becomes trustee, not to manage for the benefit of himself."-Lacy, ex parte, 6 Vesey, 626.

"A trustee is never permitted to make any profit to himself in any of the concerns of his trust."-1 Story's Eq., § 322.

"A trustee cannot make any advantage to himself in the management of the trust estate."-McNeel v. Morrow, 8 Rich. Eq., 174.

"A trustee cannot act for his own benefit in a contract on the subject of the trust."-Green v. Winter, 1 John Ch., 36; Perkins v. Alexander, 1 John Ch., 397.

It would be in conflict with the above authorities to allow Dial to purchase the lands and mills at his own sale and to resell at a profit.

A trustee has no right to purchase at his own sale, and the Court of Equity will give redress either by ordering a resale, or if it had been resold by the trustee at an advance, by requiring him to account for the advanceed price; and this doctrine applies especially to assignee; and also to one of two or more assignees, who may have bought and resold.-Fox v. McKreth, and the cases there cited; Leading Cases in Equity, Law Lib..

Ch., 353; Hill on Trustees, 538.

The sale of the negro was an executed contract, and Dial will be supposed in equity to have received the purchase money in 1856, when the sale was made, and the purchase made by himself.

Dial compromised the debts against the assigned estate after he was substantially a trustee, and with the assets of the estate.

In this case, there was the double vice of a trustee availing himself of his position and of the trust funds for his own benefit, and he can only be allowed the amount actually paid out by him in these compromises. -Fox v. McKreth, and the authorities there collected.

*21

*Aug. 29, 1871. The opinion of the Court was delivered by

MOSES, C. J. The earnestness with which the argument was pressed in favor of the appellants, has induced us to bestow much consideration on the points it present-We find in them, however, nothing which so affects our minds as to lead to a modification of the decree of the Circuit Chancellor. If we reverse his judgment, and permit Dial, the assignee, to avail himself of the advanced price at which he sold the lands, we would infringe upon a rule fixed and determined, not only by the Courts of Equity in England, but in this State-a rule most salutary in its influence, and one which, by reason of the prejudicial consequences which its enforcement averts, should be jealously watched and preserved.

Mr. Lewin says: "It is a general rule established to keep trustees in the line of their duty, that they shall not derive any personal advantage from the administration of the property committed to their charge."-Lewin on Trusts, 318. Even while it remains in their hands, they are bound so to regard and manage it, that all its profits shall enure to the advantage of those who, by the terms of the instrument establishing the trust, were entitled to its enjoyment. If while the trust exists, he who has the control of it cannot convert its profits to his own use, with how much more reason does the restriction apply, when he attempts to part with the whole fund through a sale for his own benefit. If a deed confers a power to sell, it is to be exercised in favor of those who have an interest under it. Lord Roslyn well said in Whichcote v. Laurence, 3 Vesey, 750, "he who undertakes to act for another in any matter, cannot in the same matter act for himself." From the very circumstance of his thus changing the relation which he bore to the subject of the trust, a presumption arises that he was influenced by motives of private gain. "The principle is that as the trustee is bound by his duty | the cestui que trust is willing to accept it to acquire all the knowledge possible to enable him to sell to the utmost advantage for the cestui que trust, the question, what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the cestui que trust, which he always acquires at the expense of the cestui que trust, no court can discuss with competent sufficiency or safety to the parties."-Lord Eldon in Ex Parte James, 8 Ves., 750.

The question is not to be tested by the fairness of the transaction measured by the adequacy of the price. This consideration does not enter into the doctrine which forbids a trustee for sale himself to become the buyer. The results which would follow the

*22

*allowance of such purchases are fraught with so much danger, that looking to the relations of the parties, the superior advantages of the trustee, and the temptations by which he may be seduced, no exception is allowed to the general rule by shewing the honesty of the particular transaction, and that the cestui que trust has suffered no prejudice. The characters are too inconsistent to be influenced by the same considerations. "Emptor emit quam nimino potest, venditor vendit quam maximo potest."

It would be an unnecessary task to refer to the numerous authorities which sustain the position taken by the decree in regard to the sale of the land. Chancellor Kent, in Davone v. Fanning, 2 John. C., 252, with his accustomed research and examination, has collected the leading cases which maintain the same doctrine, and with his usual elegance of expression reviewed the reasons on which it proceeds; and it is only necessary to refer to his lucid opinion, which, in a concise but perspicuous manner, sustains the conclusions which the Courts have reached on this question.

It is said, however, that if these plaintiffs had any right of complaint, they have not exercised it by either holding Dial to his purchase, or electing to have a re-sale. was competent for the plaintiffs to recognize the re-sale by waiving all claims against the purchaser, Fuller, and to regard the sum which he paid for the property as its true value. If the title had remained in Dial. they could have either held him bound to his bid, or demanded a re-sale.

They may elect to treat the sale to Fuller as the only one made by Dial, and so it must be regarded, if the sale to him was void at the option of the cestui que trust. They were not bound to ask a re-sale. The property had passed into other hands, and if they so prefer, they may claim the purchase money as received by Dial to their own use. The object of a re-sale is only to ascertain if a price can be obtained beyond that which the purchaser gave to the trustee, and if The assignee does not represent himself

as the value, all the objects to be accomplished by a re-sale are attained. Mr. Sugden says: "Where a trustee buys the trust estate at a fair price the sale is seldom called in question, unless he afterwards sell it to advantage, and then the cestui que trust is of course only desirous that the money gained by the trustee on the re-sale should be paid to him. Owing to this circumstance, a purchaser of a trust estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear that a person purchasing with notice of the previous transaction would be liable to the

same *equity as the trustee was subject to." -3 Sug. on Vend., 243. The cestuis que trust here are willing that the purchaser may retain the lands, while they alone look to Dial for the price he obtained.

It is said, too, by the appellants, that these plaintiffs are not cestuis que trust under the fourth assignment, and are, therefore, not in a condition to complain. The fifth assignment (April 13, 1855,) is to secure Dial and Farley against debts and liabilities incurred for Crews, then to discharge to certain judgments, and lastly, to pay and satisfy, in whole, if the funds are sufficient, such general creditors as may come in, and release the balance of their several demands against the assignor, and if not sufficient, to pay such creditors in rateable proportion. The plaintiffs have complied with the condition, and thus acquired rights and interests under it. The four previous assignments were exclusively for the protection and security of the said Dial and Farley. If these plaintiffs, then, can shew, that the purposes of the said assignments have been fulfilled by the payment of all the liabilities for which they provide, or that they have been so nearly satisfied as to leave but a portion of the choses transferred by the fifth applicable to them, it necessarily follows that they have such a direct interest as entitles them to a full account from the assignees of their administration of the property conveyed to them by the fourth assignment. The principle which prevents a trustee from being himself the seller and the purchaser is not restricted to such as alone act under a technical trust, but includes all who act in a fiduciary capacity. The principles laid down with reference to trustees for sale, are of course applicable to all who, though differing in name, are invested with the like fiduciary character."-Lewin, p. 265. They were recognized by our Courts in Ex parte Wiggins, Hill Ch., 353, in reference to the assignee, under an assignment for the Lenefit of creditors.

They apply, too, with still stronger force, to the debts of Crews bought up by Dial. alone, but he holds the fund for the benefit such orders may be taken as are necessary to of all creditors who have an interest in it. In satisfying any incumbrance, good faith and fair dealing require that he should not credit himself on such account with more than he has paid. The assignment provided that if it should be insufficient to meet all the debts of Crews, the creditors were to be paid in rateable proportion. The amount to be so applied might leave nothing for the creditors unwilling to make any abatement, except that to which they were bound by the terms of the assignment, if the assignor

could buy in a portion of *the claims at a sacrifice, and in the distribution of the assets demand that he should receive the full amount apparently due upon their face. At the time of the compromise of these claims by Dial, the presumption is irresistible, that he had in his hands, from the assignments. enough to meet the price he paid for their transfer to him, and yet in view of this fact, it is asked that he be allowed to retain the benefit which the creditor must be supposed to have released. The authorities already referred to reject the proposition, and as we have already said, with increased force.

In the examination of the report, we cannot perceive that Dial has been charged with any proceeds received by Farley, his coassignee, which did not actually go into his hands, or those of his agent, Crews. The Commissioner properly discriminated between the amounts directly due by Farley, and that which was due by Dial, made up of money received by himself and his said agent.

The Court was asked by the counsel for the plaintiffs, at the conclusion of his argument, not to send the accounts back to a referee, that they may be made conformable to the directions of the decree, but at once, by its own judgment, to terminate the case. If it were in our power, we would willingly bring the litigation to an end, but a new examination of the accounts is rendered necessary by the decree, and to this requisition, the exceptions of the plaintiffs to the report in part contributed. The Court cannot undertake the duties which properly belong to its examining officers. "The province of this Court does not extend to a minute examination of long and complicated accounts."-Wright v. Wright, 2 McC. Ch., 195. "The Court of Appeals will not undertake a detailed examination of accounts; these must be settled in the Court below."-Myers v. Myers, Bail. Eq., 33.

We concur with the Chancellor in such parts of his decree as have not been here particularly referred to.

The motion is dismissed, and it is ordered and adjudged that the cause be remanded to

carry out the directions of the decree.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *25

*NORTON v. LEWIS.

(April Term, 1871.)

[Limitation of Actions =10.]

The mere fact that a purchaser from the mortgagor of part of the mortgaged lands, has had actual possession, under his purchase, for a period of ten years after condition broken, is no bar, so far as the purchaser is concerned, to bill against the mortgagor and purchaser for foreclosure and sale of the mortgaged premises. The doctrine of Wright v. Eaves, 5 Rich. Eq., 81, re-affirmed.

C [Ed. [P5d. Note.—Cited in Daniels v. Moses, 12 S. C. 142; Lee v. Buck & Co., 13 S. C. 182; Clark v. Smith, Id., 600; Lynch v. Hancock, 14 S. C. 67, 88; Pegues v. Warley, Id., 188.

For other cases, see Limitation of Actions, Cent. Dig. §§ 32–34; Dec. Dig. \$\sim 10.]

[Mortgages \$\infty\$290, 488.]

It is no objection to a decree for foreclosure against the mortgagor and purchasers from him that several parcels purchased by different purchasers, at different times, are directed to be sold in the inverse order of the dates of the purchases.

[Ed. Note.—Cited in Lynch v. Hancock, 14 S. C. 67, 93; Gregory v. Ducker, 31 S. C. 146, 9 S. E. 780; Kennedy v. Boykin, 35 S. C. 84, 14 S. E. 809, 28 Am. 8t. Rep. 838; Steinmeyer v. Steinmeyer, 55 S. C. 30, 33 S. E. 15.

For other cases, see Mortgages, Cent. Dig. §§ 792, 1418; Dec. Dig. &= 290, 488.]

Before Green, J., at Sumter, April Term, 1871.

On May 20, 1854, William Lewis gave to Jabez Norton his bond, bearing that date, conditioned for the payment of \$8,280, with interest, in five installments, the last of which fell due on January 1, 1859; and further to secure the payment of the said sum of money and interest, according to the terms of said bond, he gave to Norton his mortgage, bearing the same date, of a tract of 414 acres of land in the District (now County) of Sumter. The mortgage was duly recorded.

On May 26, 1855, a judgment by confession was entered on the bond by Norton against Lewis.

Lewis, at various times, made conveyances of parts of the mortgaged premises, as follows: He conveyed to J. R. Kendrick, on October 24, 1854, a lot of 121/8 acres; to H. B. Holliday, on April 14, 1855, a lot of 3 acres; to Sarah Terry, on May 2, 1855, a lot of 6 acres; and to J. L. Bartlett, on February 28, 1856, 189 acres.

On October —, 1856, J. D. Blanding became the purchaser, at Sheriff's sale, of Kendrick's lot. On October 20, 1857, he conveyed about the Circuit Court for Laurens County, that 5 acres thereof to Elijah Pringle. Two other

small parcels thereof he conveyed to differ (And besides these, one of those entitled in ent purchasers, and, a part remaining un-remainder to the parcel of the mortgaged sold, he made an agreement, in October, 1857, entered into possession, and continued in possession until the bill hereinafter mentioned life, and at her death to her children, (the was filed. Blanding was adjudged a bankrupt after the bill was filed, and D. J. Winn was appointed his assignee. Pringle conveyed away part of the lot he had purchased, but of the rest he retained the possession.

On August 1, 1855, H. B. Holliday conveyed his lot to W. M. Wilder, in trust for Susan Newman for life, and after her death for her children. She died leaving several children, one of whom, Hanson Newman, is a minor.

*On January 6, 1861, Sarah Terry conveyed the lots she had purchased from Lewis to Esther Dinkins.

Bartlett made conveyances to different persons of portions, amounting in the whole to about 26 acres, of the 189 acres he had purchased. Among the persons to whom he conveyed was Thomas A. Pack, to whom, on July 26, 1860, he conveyed about 14 acres, in trust for Minerva Evans for life, with limitations over. The balance he retained.

Lewis made several payments on the bond, the latest of which was a payment of \$500, on February 26, 1859, leaving a large balance due and unpaid.

On April 23, 1868, Norton filed this bill for foreclosure and sale of the mortgaged premises against Lewis, and some of the persons holding under him. The bill was afterwards amended, and persons holding portions of the mortgaged premises, whether immediately or mediately under Lewis, were made parties defendant.

The children of Susan Newman were absent from the State and were made parties by publication. For Hanson Newman, the minor, a guardian ad litem was appointed and a formal answer put in.

Lewis died, before the hearing insolvent, and without any personal estate, and having no personal representative, the bill was revived against his heirs at law alone.

Bartlett and Pringle had been in the actual possession of the parcels purchased and retained by them for a period of ten years before the bill was filed, and Ard had also been in possession of the parcel he had bargained These defendants and Pack contested the plaintiffs' right of foreclosure and sale as against them, on the ground that the bill was barred by the statute of limitations.

So much of the decree of the Circuit Court as relates to the points on which the case was taken to this Court is as follows:

Green, J. The protection of the statute of limitations is claimed by some of the defendants, Elijah Pringle, Julius L. Bartlett, Thomas A. Pack, trustee, and James P. Ard.

premises conveyed by William Lewis to H. with J. P. Ard, to sell the same to him. Ard B. Holliday, and by him to W. M. Wilder, in trust for Susannah Newman during her said Susannah Newman being now dead) is a minor, and the Court will protect his rights, whatever they may be.

Before determining which, if any, of the

*97

defendants can be pro*tected by the statute, I will consider the question whether a mortgagee can be barred by the possession during the statutory period, after condition broken, of a purchaser from the mortgagor of the mortgaged premises, or a part thereof, the mortgage having been duly recorded.

In the Courts of this State there have been three decisions upon this question, (Nixon v. Bynum, 1 Bail., 148; Thayer v. Cramer, 1 McC. Ch., 395; Smith and Cuttino v. Osborne, 1 Hill Ch., 340,) and the reasons given by the Court for disallowing the plea of the statute were, that by the Act of 1791 the legal estate remains in the mortgagor, who must therefore be held to be a trustee for the mortgagee; and as the trustee cannot plead the statute against his cestui que trust, neither can a purchaser from him with notice of the mortgage, who must be held to be a trustee

The expressions of opinion in Wright v. Eaves, 5 Rich. Eq., 81, were simply founded on the earlier cases, and must stand or fall with them.

In all these cases there existed one of these conditions, which, according to the decisions in Durand v. Isaacks, 4 McC., 54; Stoney v. Schulz, 1 Hill Ch., 497 [27 Am. Dec. 429], and Mitchell v. Bogan, 11 Rich. Law, 686, rendered the Act of 1791, by its own provisions inapplicable. The mortgagor was out of possession. But this fact with its consequences seems to have escaped the notice of the Court in the previous cases.

In the case of Smith and Cuttino v. Osborne, the Court declares that under the Act of 1791, "as mortgagees, the legal estate in the lands never has been, and is not now, in the complainants or their intestates," and that "neither the plaintiffs or their intestates could have at any time heretofore made claim to these lands by an action at law." "How, then," it asks, "can it be said that the statute of limitations operates as a bar?" From this decision Harper, J., dissented.

In Stoney v. Schulz, the same Judge (Johnson) uses the strongest terms to show that when a mortgagor is out of possession the Act of 1791 is inoperative, and the rights of the mortgagee must be determined according to the rules of the Common Law, by which (p. 491) "there is no question that the mortgagee was entitled to the possession of the land after condition broken, or might have mortgagor, or any one else in possession."

The inconsistency between these two deci-

sions which were heard *by the same Judge, at an interval between them of only seven months, is inexplicable.

Until the decision in Stoney v. Schulz, the Equity Court overlooked the proviso to the Act of 1791, and adjudicating those cases as if there had been no such proviso, refused to allow the plea of the statute of limitations.

In Stoney v. Schulz, the main fact was the same as in the previous cases; the mortgagor had sold and the purchasers were in possession of various parcels of the mortgaged premises, and it was determined that the mortgagor was out of possession, and that the proviso rendered the Act of 1791 inapplicable.

Thayer v. Cramer, and the kindred cases, were based solely on the Act of 1791, as if that Act had no proviso. No other reasons for the inapplicability of the statute of limitations are given than such as are deduced from that Act severed from the proviso.

But having, in their subsequent decisions, given construction to that proviso, and having held that the mortgagor being out of possession by a sale of the mortgaged premises, or of part thereof, to a purchaser who has entered, the condition existed which by the proviso rendered the Act of 1791 inapplicable, and therefore that the legal estate vests in the mortgagee, who can claim the rents and the profits (Stoney v. Schulz, 1 Hill Ch., 500 [27 Am. Dec. 429]) or bring his action of trespass to try title, (Mitchell v. Bogan, 11 Rich., 686.) against a purchaser from the mortgagor who has entered under his purchase, (which doctrine has been recognized by the present Supreme Court in the case of Williams v. Beard.)

It must be held that the case of Nixon v. Bynum, Thayer v. Cramer, Smith and Cuttino v. Osborne, and Wright v. Eaves, have ceased to be authority upon this point, because the premises and reasoning upon which they were based are untenable.

A purchaser from a mortgagor, after condition broken, who has entered under his purchase, is now held to be a trespasser. fiduciary relations exist between them, and the mortgagee, the legal owner, can at once by his action at law evict such purchaser and recover the possession. He has a plain legal right entirely adequate for his protection. Having gained possession of the premises he can exercise his discretion as to his subsequent course, whether he shall hold the land until the rents and profits satisfy his debt, or whether he shall apply to have the purchaser's equity of redemption barred and foreclosed, and a sale of the property made.

*29

maintained a possessory action against the Davidson, Bail. Eq., 427, if the case be founded on a legal right, such an one as is generally enforcible at law, then the rule is the same in equity, although the party is compelled by some circumstance to come into equity for relief, and the statute will run from the accrual of the cause of action. The mortgagee has no personal claim against the purchaser for any part of the mortgage debt. All he can claim against such purchaser is the land and its proceeds, that they may be subjected to the mortgage. His remedy at law is ample. There is no reason for a mortgagee in possession coming into equity unless he is dissatisfied with the possession of the land in the stead of his money.

I am at a loss to perceive any reason why the mortgagee should be protected, against such a purchaser, from the operation of the statute. His action of trespass to try title is barred at law by the adverse possession of the purchaser for ten years. A bill for foreclosure in this State is in effect a possessory action; that the rights which attach to the purchaser from the mortgagor may be vested in the purchaser at the sale for foreclosure, thus divesting the purchaser from the mortgagor of all his rights and evicting him from the land, for the Court will attach him if he does not surrender possession.

Why should not such a bill be also barred? "When by reason of the mortgagor being out of possession, the legal estate is vested in the mortgagee, he can occupy no other or higher position than the mortgagee at common law. All the rights and equities which attach to the one, the other is entitled to, and no more."-Williams v. Beard.

In Drayton v. Marshall, Rice Eq., 373 [33 Am. Dec. 84] a mortgagee, at common law, was held to be barred by the adverse possession for the statutory period of the heirs of the mortgagor. In that case it is said: "It is believed that no case can be put, in which a man knows that another claims, and is in the enjoyment of, what belongs to him, and neglects to pursue his claims at law, where there is nothing to prevent his doing so, that he will not be barred by the statute."

I regard the case of Drayton v. Marshall. therefore, as conclusive upon the point I have been discussing.

I must hold that the statute of limitations is a good and valid defence in behalf of Elijah Pringle and Julius L. Bartlett as to the parcels of the said mortgaged premises, described in their answers as still in their possession, and as having been possessed by them adversely for ten years before the filing of this bill.

*30

*Hanson Newman, one of the tenants in common, entitled to the parcel of land de-*Now, as the Court says, in Thayer v. scribed in the pleadings as conveyed by William Lewis to Holliday, and by him to W. M. and of the lot of land now belonging to D. J. Wilder, trustee, is a minor. Though not pleaded by him, the statute is a protection to him, adverse possession of the parcel in which he is interested having been held under the deed to said W. M. Wilder, as trustee, for ten years.

Protection to him involves protection to his co-tenants.

Thomas A. Pack, trustee, and his cestui que trust, were not parties defendants to the original bill. They have been brought in by amendment. Possession had not been held by them for ten years at the filing of the original bill.

The statutory period was completed a few days before the filing of the amended bill.

Pack pleads the statute of limitations, but I cannot regard him as entitled to its benefit.

The original bill prayed for a sale of the whole of the mortgaged premises, and though he was not then made a party to it, yet I cannot think possession by him after the filing of that bill should be reckoned in computing the period of his adverse possession.

J. P. Ard alleges that he has been in possession of a parcel of the mortgaged premises, under an agreement to purchase from J. D. Blanding, for ten years, and claims the benefit of the statute. Ard had been in possession for ten years when J. D. Blanding became a bankrupt, and his estate vested in D. J. Winn, his assignee.

And I must hold that the plaintiff is barred as to this parcel of land.

Various of the defendants have the equity, that the parcels of land now subject to the lien of the mortgage, be sold in the inverse order of the sales by William Lewis, and by purchasers from him, for the satisfaction of the mortgage debt, and as the parcels held by Elijah Pringle, J. L. Bartlett, D. J. Winn, assignee, and by the remaindermen under the deed to W. M. Wilder, Trustee, are protected by the statute of limitations, and cannot be sold, those of the defendants respectively, who are entitled to have said last mentioned parcels applied to the mortgage debt before their own is so applied. are entitled as against themselves to have the mortgage credited with the value of any such parcel which but for the operation of the statute of limitations would be so previously sold and applied.

The parcels of the land which were conveyed by Lewis were liable to be sold and applied in the following order:

*31

*[Here follows a statement of the order.] It is adjudged and decreed that so much of the bill as prays for the foreclosure and sale of the parcels of the mortgaged premises, which was conveyed to W. M. Wilder, Trustee, and of the parcels of land conveyed to J. L. Bartlett, and to Elijah Pringle, which have not been conveyed by them respectively,

Winn, assignee, which has been in possession of J. P. Ard, be dismissed, and that the plaintiff pay the costs of E. Pringle, J. L. Bartlett, D. J. Winn and J. P. Ard,

And that it be referred to Charles Mayrant, Esq., as Referee to inquire and report the amount of the mortgage debt, and what amounts should be credited thereon for sales made under this case of part of the mortgaged premises, and for sales of other property of William Lewis, applicable to the plaintiff's judgment and execution at law.

That he also inquire and report what is the value of each of the parcels of the mortgaged premises now belonging to E. Pringle, J. L. Bartlett, D. J. Winn, assignee, and the remaindermen under the deed to W. M. Wilder, Trustee.

The plaintiff appealed to this Court on the grounds:

1. That the bill was not barred as against the defendants, Bartlett, Pringle, Ard and Wilder, by their possession for ten years.

2. That the Circuit Judge erred in directing the different parcels of land sold in a certain order. The order should have been to sell the whole as one parcel.

Moise, Hamilton, J. S. G. Richardson, for appellant.

Haynsworth, Fraser, contra.

Aug. 29, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The question in the case is, whether a purchaser with notice, from a mortgagor, of part of the mortgaged land, can avail himself of the defence of having held the land for the period purchased by the statute of limitations. The defendants who resort to this defence, do not allege anything in the character of their possession amounting to an active opposition to the claim of the mortgagee, but rely on the naked fact of holding as purchasers under title derived from the mortgagor. The decree declares, that the possession of all the grantees "has been absolute and in accordance with their deeds, without any acknowledgment of the mortgage," except as to one of the grantees, as to whom there was a question of actual acknowledgment.

*32

*This conclusion of facts does not show a state of controversy, as to the defendants' possession, such as might, when commensurate with the statute period of limitations, establish adverse possession, as a proposition of fact.

The question is resolved into this: Does the naked fact of possession, for the statute period, of land bound by a mortgage, by a purchaser with notice, holding under a deed from the mortgagor, constitute a bar to foreclosure? Wright v. Eaves, 5 Rich. Eq., 81,

distinctly decides that it does not. Chief | fective reasoning, must be regarded as rest-Justice Dunkin, in that case, declares that such is the settled law of this State. It would be supposed that a declaration so clear and explicit, coming from a source so eminent and judicious, and sustained, not 'only by the judgment of the Court, but by the concurrence of all the Judges who heard the case, would have been regarded as finally decisive of this point.

The Circuit decree re-opened a controversy, maintained with much ability on both sides, but which appeared to have ended with Mitchell v. Bogan, 11 Rich., 686.

In Thayer v. Cramer, 1 McC. Ch., 395, Judge Nott unfortunately referred to the mortgagor in possession as a trustee for the mortgagee, and hence concluded that neither he nor his grantee could hold adversely to the mortgagee. Although that conclusion standing by itself would have led to the judgment pronounced by the Court, yet the opinion lays down a proposition more difficult to controvert, and leading to the same conclusion. He holds that as the mortgage was recorded, the purchaser must be regarded as having notice, and holding subject to the incumbrance. To sustain this last proposition it is not necessary to trace any of the elements of a trust in the relation of mortgagor and mortgagee. A mortgage of land is a legal lien, and the effect of such lien upon a purchaser with notice is a legal doctrine. There was no necessity for resorting to the peculiar ideas of equity, in order to solve the questions then before the Court.

Doubt has been thrown on the correctness of the reasoning in Thayer v. Cramer, so far as the idea of a trust is involved. Such a doubt was expressed by Judge O'Neall in Thayer v. Davidson (Bail. Eq., 412). But the legal doctrine advanced by Thayer v. Cramer stands supported by numerous cases, and is as well supported as the concurring opinion of able Judges and an unbroken line of judicial determination can support it.

The decree regards the authority Wright v. Eaves as prejudicially affected by its relation to Thayer v. Cramer, and the

cases *following that, and considers that it must stand or fall with them. We find it much more difficult than this would imply, to get rid of the deliberate judgment of the Court of highest authority. To show that the reasoning on which a judgment has been placed is defective, is not always enough to unsettle the authority of such judgment. The question in such case is whether there is any valid reasoning to support it. But it is going much too far to say that because an early case advanced an untenable reason for its judgment, that a subsequent judgment, following the authority of the former without giving express sanction to the deing upon such error.

Drayton v. Marshall, (Rice Eq., 373 [33 Am. Dec. 84]), is not at variance with the foregoing. That case holds, that when there is an actual denial of the right of the mortgagee, manifested by acts of opposition to such right, commensurate with the reriod prescribed by the statute of limitations, there is an adverse possession, in the legal sense, such as to bar the mortgagee's right. That case is distinguishable fom the present, as here it is sought to make out the adverse possession from the naked fact of the possession of the land, while in that case there was a real and active controversy between the parties, based on an actual conflict of claims, and maintained by acts on the part of the purchaser characterizing his possession as irreconcilable with the mortgagee's claim of right.

The Act of 1791, (5 Stat., 170,) has no bearing on the present question. The practical effect of that Act was to leave in the mortgagor in possession, an estate determinable on the contingency of his relinquishing possession. On the happening of such contingency the statute estate was gone, and the parties stood on their rights as existing previous to the statute.-Williams v. Beard, 1 S. C., 309.

The fact that the mortgagor retained possession of part of the mortgaged premises is unimportant. So much of the mortgaged premises, the possession of which was transferred by the mortgagor to a stranger to the mortgagee, passed from under the operation of the statute. We are not called upon at the present time to determine whether the alienation by the mortgagor of part of the mortgaged premises takes the whole mortgaged land out of the operation of the statute.

In all these cases where the rights of a purchaser, in possession, were considered, the question was, necessarily, outside of the statute, for the fact of possession being in a *34

purchaser evidenced its *being out of the mortgagor.—Stoney v. Shulz, 1 Hill Ch., 465 [27 Am. Dec., 429]; Smith v. Osborne, 1 Ib., 340.

That portion of the decree that orders that the mortgaged premises be sold in the inverse order of the sales made by the mortgagor is not subject to objection. The mortgagor secures the application of the entire proceeds of the mortgaged land, or so much as may be necessary, for the payment of the mortgage debt, while the order of sale satisfies the equities as among the purchasers.

The decree, so far as it adjudges that the claim of the mortgagee to a sale of the mortgaged premises is barred by the possession of the defendants of the land mortgaged, must be set aside, and the complainant is entitled to the usual decree for the sale of the tract, also, consisted originally of two parmortgaged premises.

The causes will be remanded to the Circuit Court for a decree of foreclosure in conformity with the foregoing determinations.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 34

MASSEY v. DUREN.

(April Term, 1871.)

[Adverse Possession = 116.]

Trespass to try title. Plaintiffs claimed all the lands within the lines of a survey and plat made in 1829, which they gave in evidence as their color of title. The lands consisted, beas their color of title. The lands consisted, be-fore the survey, of two adjoining parcels, hav-ing different owners, and plaintiffs claimed to have acquired title since the survey to all the lands within its limits by adverse possession, under an actual occupancy for ten years on one parcel. Defendant claimed the other parcel, but parcel. Defendant claimed the other parcel, our proved neither a paper title nor an actual occupancy for ten years. The presiding Judge charged the jury "that if they find that the plaintiffs or their tenants had held possession that held a learned by them for the on any part of the land claimed by them for the ten years after the survey was made, that such possession would extend to the limits of that survey, regarding that survey and the plat produced of the same as color of title indicating the extent of their claim, together with the deeds upon which the survey was made."

Held, That in this there was error, and new trial ordered.

[Ed. Note.—Cited in Godfrey v. E. P. Burton Lumber Co., 88 S. C. 138, 70 S. E. 396.

For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. 516.]

[Adverse Possession =101.]

Occupancy for ten years of one of two adjoining parcels of land included within the lines of a plat held as color of title, held not to confer title by adverse possession against the owner of the other parcel.

[Ed. Note.-For other cases, see Adverse Possession, Cent. Dig. § 579; Dec. Dig. 5 101.]

[Adverse Possession 58.]

Title by adverse possession cannot be acquired where no trespass is committed against the owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 279-281; Dec. Dig. &= 58.]

[This case is also cited in Duren v. Strait, 16 S. C. 468; Same v. Kee, 26 S. C. 221, 222, 2 S. E. 4, as to facts.]

Before Thomas, J., at Lancaster, February Term, 1870.

This was an action of trespass to try title. The plaintiffs claimed all the lands included within the lines of a survey and plat of the lands made for them, or those under whom they claimed, in the year 1829, by J. *35

H. Blair, a deputy surveyor. *They consisted, before the survey, of two adjoining parcels of land, one called the Walker tract, and the other the Robinson land. The Walker ants, or the tenants of some of the parties

cels, one of them being part of a tract granted in 1788 to George Johnson, and conveyed to Andrew Walker in 1796, and the other a tract granted to Walker in 1792. The Robinson land consisted of part of the tract granted in 1788 to George Johnson, and afterwards conveyed to Brice Miller, and of a tract granted in 1794 to Brice Miller. In 1795, Miller conveyed to Jane Robinson.

The plaintiffs gave in evidence a number of deeds and other papers, besides the grants, but failed to prove a paper title in themselves to the Robinson land, which the defendants claimed, and which was the only land in dispute in this action. They relied upon Blair's plat as color of title, and proved an actual occupancy for ten years and upwards upon the tract granted to Walker, and some possession, but not for ten years, upon that part of the tract granted to Johnson which was within the limits of the tract called the Walker tract.

The defendants failed to prove a paper title in themselves to the Robinson land, and their evidence to prove title by adverse possession was entirely insufficient.

The case was heard in this Court upon a report of his Honor the presiding Judge, which concluded as follows:

"Defendant's counsel on the trial requested that I should charge the jury that actual pedis possessio by the plaintiffs or their tenants, or the tenants of some of the parties under whom they claim, on the Robinson land, was necessary to entitle the plaintiffs to recover that land.

"I considered, and so instructed the jury, that if they find that the plaintiffs or their tenants had held possession on any part of the land claimed by them for the space of ten years after the Blair survey was made, that such possession would extend to the limits of that survey, regarding that survey and the plat produced of the same, as color of title indicating the extent of their claim, together with the deeds aforenamed upon which the survey was made.

"The jury found a verdict covering all the lands embraced in the Blair survey, the George Johnson grant, the Walker grant and the Brice Miller grant, referred to in this case.

"The defendants moved before me for a new trial upon the grounds annexed to this statement, but, being satisfied with the findings of the jury, I refused the motion."

*36

*The defendants appealed, and now moved this Court for a new trial, on the grounds:

1. Because it is respectfully submitted his Honor should have charged the jury, as requested by defendant's counsel, that actual pedis possessio by the plaintiffs or their ten-

under whom they claim, on the Robinson would extend to the limits of that survey; reland, was necessary to entitle the plaintiffs to recover that land.

- 2. Because the only possession proven on the part of the plaintiffs was on the George Johnson grant and the Walker grant, and none whatever on the Brice Miller grant; and the plaintiffs proved title only to the Walker land and part of the George Johnson grant, and none whatever to the Brice Miller grant, and the jury erred in finding the last named land for the plaintiffs.
- 3. Because the proof was that the Robinsons and the defendants were the only persons ever in possession of the Brice Miller grant, and the said grant is called for as the Robinson land in the deed of William Mc-Kenna produced as part of plaintiffs' chain of title, and the jury erred in finding said land for the plaintiffs.
- 4. Because defendant, since the finding of the jury, has discovered convincing evidence that there never was any tenancy or possession by the plaintiffs or their tenants, on the Robinson land, before the year 1853, and the tenancy or possession by them, after the year 1853, was only for two or three years, and could not, in any event, confer upon them title to said land.
- 5. Because the verdict of the jury was contrary to the evidence adduced on the trial.

Allison, Kershaw, for appellants:

The plaintiffs, as the heirs of one Thos. and Jane Massey, claimed the land in dispute by adverse possession, relying on the mass of paper testimony as affording them color of title.

Defendant, Wylie R. Duren, claimed for his infant son, Thos. R. Duren, under Brice Miller, under deed of said Miller to one Jane Robinson, of date 1st December, 1795, and for color of title he relied on power of attorney and deed in pursuance thereof from one Wm. Robinson, heir of Jane Robinson, to Thos. R. Duren, dated in 1858. Copy grant to Brice Miller of date 24th September, 1794, embraces (as we contend) a portion of this land. Deed from Vickory to Miller bears date 14th December, 1792, and deed from Miller to Walker 25th January, 1796. Duren's house is outside the George Johnson grant, but within the Brice Miller grant, and

*37

*also outside of the Walker grant. The location of the Robinson land includes the whole of the Brice Miller grant and the George Johnson grant. The Circuit Judge declined to charge the jury that actual pedis possessio by the plaintiffs, or their tenants, on the Robinson land, was necessary to entitle the plaintiffs to recover that land, but charged that if they find that the plaintiffs, or their tenants, had held possession on any part of the land claimed by them for ten years after the

garding that survey, and the plat produced of the same, as color of title, together with the deeds upon which the survey was made. Plat of survey by J. H. Blair made in 1829. It is not pretended that the George Johnson and Walker grants cover the whole of the Robinson lands.

He who goes into possession of land, under a contract to purchase, holds adversely to all the world, except him from whom he bought. -Bank v. Smyers, 2 Strob., 28.

Possession of a part under any of the titles, affording color, is a legal possession of only the whole comprehended within that title.-1 N. & McC. Rep., 374.

To acquire title by possession against a grant, there must be actual pedis possessio within the limits of the grant for ten years; a constructive possession arising from an actual possession outside of its limits is not sufficient.—Slice v. Derrick, 2 Rich., 629.

There can be no constructive adverse possession of land against the owner where there has been no actual possession which he could treat as a trespass, and bring action for, and when a tract of land within the limits of three separate grants, was adversely held against the eldest grantee—held that the possession could not be extended by construction to land outside the limits of the eldest grant. -Steedman v. Hilliard, 3 Rich., 103.

Moore, for respondents:

I. Plaintiff's possession actually commenced in 1816. The limits of the possession were defined by the Blair survey made for their ancestor July the 11th, 1829, and included the Walker, the Johnson and the Brice Miller grants, resurveyed again when he became the exclusive owner under the four deeds of the Commissioner in Equity, made 1st November, 1842.

But conceding that their possession did not *38

commence until the *Blair survey in 1829, their thirty years' possession from that time would be more than sufficient to raise the presumption of a grant, or of any intermediate conveyances of the land embraced in the plat .-Gray v. Bates, 3 Strob., 500.

II. The defendant does not pretend that he has any title, and utterly failed even to locate the Jane Robinson deed under which he endeavored to take shelter upon any portion of the land claimed by plaintiffs.

III. Without the aid of legal presumptions the plaintiffs showed a chain of title to the Walker and Johnson grants, but because they were unable to show a similar chain of paper title to the Brice Miller, nearly the whole of which is however covered by the location of the Walker grant, by Blair in 1829, the defendant relying upon the principle decided in the cases of Slice v. Derrick, 2 Rich., 629, and Steedman v. Hilliard, 3 Rich., 103, seeks Blair survey was made, that such possession protection under the Brice Miller grant, as to that portion of the land upon which the possession of part of the whole tract emtrespass was committed lying outside of the braced in such survey. The survey embraced George Johnson grant.

But the principles decided in those cases do

not apply here.

1st. Because, in the language of the Report itself: "there was also some possession by tenants of the plaintiffs on the George Johnson grant in the field now cultivated by the defendant Duren, according to the proof, for several years." Now a glance at the plat of survey in this case will show that a large part of this field is outside of the George Johnson and within the Miller grant, the house in which the tenants lived being within the latter (the Miller) and outside of the former.

2d. Because in the case of Slice v. Derrick, the Court intimates what was afterward, in the case of Gray v. Bates, clearly decided, that twenty years' possession under a plat covering the "locus in quo," as well as the possessio pedis, would raise the presumption of a deed co-extensive with the plat.

3d. Because, in the cases of Slice v. Derrick, and Steedman v. Hilliard, title was shown in some other besides the party in possession, which was not done in this case.

IV. The question of fact as to the possession of the plaintiffs under title or color of title having been submitted to the jury, this Court will not disturb their verdict, the more especially as it was approved of by the presiding Judge.

V. Plaintiff's constructive possession good, at all events, against every person except Brice Miller, or one proving title from him.-Bank v. Smyers, 2 Strob., 28; Crosby v. *39

Floyd, 2 Bail., *116; Giles v. Pratt, 2 Hill, 439; Goudelock v. Massey, 2 Strob., 188.

Aug. 29, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The appellant seeks to set aside a verdict for the plaintiffs in an action of trespass to try titles. The only exception before us brings up the question of a mis-direction of the jury by the Circuit Judge.

The land claimed as held by the defendant is described as the Robinson tract. The plaintiffs proved possession by actual occupancy of a tract described as the Walker tract, adjoining the former. Plaintiffs also offered proof of temporary possession by their tenants of a part of the Robinson tract; but neither the time of its commencement, its duration, the nature of such possession, nor the designation of the part or portion of the Robinson tract where such possession was had, is in proof as the case is presented to us. The plaintiffs also proved a survey made in 1829, claiming such survey to be in conformity with the deeds set forth as their title, and as in effect an assertion of title in their behalf, sufficient to refer their actual ing trees, and establishing monuments.

the Walker tract and the greater part of the Robinson tract. All that is disclosed in regard to their survey is contained in the following language "the larger square represented in said plat, and marked by black lines, indicates the lines of a survey of the Walker grant made by J. H. Blair in 1829," and a mere allusion to such survey, still less definite, in another part of the report. Circuit Judge charged the jury that if they find that the plaintiffs or their tenants had held possession of any part of the land claimed by them for the space of ten years after the Blair survey was made, that such possession would extend to the limits of that survey, regarding that survey and the plat produced of the same as color of title, indicating the extent of their claim; together with the deeds aforenamed upon which the same was made."

Under this charge the jury could not do otherwise than find a verdict for the plaintiffs for the whole tract embraced in the Blair survey, for the possession by the plaintiffs of the Walker tract, part of the lands embraced in such survey, was undisputed. The charge enabled the plaintiffs to obtain a verdict without reference to their paper title and solely on the strength of their adverse possession.

The evidence of possession within the tract

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claimed and held by *the defendant was not of that full, clear and undisputed character that could warrant a direction by the Judge, virtually dispensing with the functions of the jury. If the charge can be supported, it must be by the fact of the possession by the plaintiffs of a tract of land over which the defendant makes no claim. This brings the case distinctly within the point ruled in Steedman v. Hilliard, 3 Rich., 101. It was there decided that to make a possession adverse, it must be of that which is claimed by one against whom it is alleged as adverse, or, in other words, that he who has an adverse possession, must stand as a trespasser until his possession is ripened into a title by lapse of time, as against all parties bound by such adverse possession. There is no reason to question the correctness of this general proposition.

Under the charge it was not necessary for the plaintiffs, in order to obtain a verdict, to make out as matters of fact, that the making of the Blair survey was an act of trespass on their part that exposed them to an action by the defendant, assuming him to have title. The charge treats the survey, exclusively, as an act of assertion on the part of plaintiffs, declaratory of the extent of their claim, and not as a dealing with the soil by way of entering upon it, running lines, mark-

making the survey as an act of trespass on the part of the plaintiffs. But if such a line of argument could be resorted to, it would not avail, for upon the evidence that fact could only be made out by a verdict. If it appears at all that the survey was the act of the plaintiffs, or of those whose act the plaintiffs have a right to make available. it is to be made out as an inference from facts proved, and not as a fact receiving distinct proof, and such an inference of fact can only be drawn by the jury.

This charge is clearly a misapplication of the rule stated in Eiferts ads. Read. (1 N. & M'C., 374, note). It is there said by Judge Smith, with the approbation of the majority of the Judges, as follows: "I am, therefore, of opinion that, on a fair construction of the statute, possession of a part, under any of the titles enumerated in it, is a legal possession of the whole comprehended within that title." He adds also: "but where the occupant has no title in writing to himself or those under whom he claims, I think he ought to be confined to his actual occupancy, because he has no evidence that his claim extends farther." Eifert ads. Read is a fair instance of the proper limit of the rule there

*41

laid down, in the lan*guage already quoted.

In that case the plaintiff claimed, under a senior grant, the land held by the defendant, as part of a larger tract of land conveyed to plaintiff by such senior grant. The defendant relied on adverse possession under color of a junior grant, purporting to convey a portion of the land covered by plaintiff's senior grant. Defendant could only establish possession by actual occupancy (pedis possessio) as to a part of the land embraced in his grant, and the question was, whether under color of his grant such actual occupancy of a part was a sufficient possession of the whole embraced in his grant for the purpose of making title by adverse possession. It did not appear, as a fact in the case, that the plaintiff had exercised any actual occupancy within the limits of the defendant's grant during the period the latter had held adversely to the plaintiff. There was no question of conflicting occupancy in the case, although there clearly was a question of conflicting possession. Now, it is to be presumed that the plaintiff had possession by actual occupancy, within the limits of his grant, though outside the limits of defendant's grant. If the rule laid down in Eifert ads. Read admitted of no exceptions, plaintiff in that case being in possession of the land embraced in the senior grant, by the actual occupancy of part, was in fact and in law in possession

of the whole, even of that part of which de-

fendant had possession by actual adverse oc-

The charge cannot be supported by any ar-labsurdity—an actual possession in the plaingumentative attempt to establish the fact of tiff through the operation of the rule, and at the same time and place an adverse possession by the defendant, the nature of which latter possession excludes the idea of any other possession. It shows very clearly that the kind of possession which results under the application of the rule, gives way before an actual adverse occupancy, precisely as the presumption of a fact gives way to the actual proof of such fact. But Eifert ads. Read goes a step beyond, holding that the rule that possession of part held under color of title is possession of the whole held according to such color of title, gives way as against such actual adverse occupancy. still further limits the operation of that rule in its favorable effect upon the plaintiff's rights, allowing such adverse occupancy to operate in favor of the defendant beyond the place where it was actually exercised, and still further by allowing the sphere within which such adverse occupancy should act by way of displacing all other possessions to be defined by the very rule in question. So that not only did the rule cease to operate in favor of the plaintiff when the occupancy

*42

*of the defendant begun, but it actually operated from that time in favor of the defendant based on the fact of such adverse occupancy.

It might have been argued in that case, as to the land included in defendant's grant, but not actually occupied by him, that, as defendant's claim to possession at that point was merely what was ascribed to him by the operation of a rule of law, it was no better than the plaintiff's claim to possession at the same place, for that was also ascribed to him by the same rule of law. Both had actual occupancy, under the terms of grant, of part of the thing granted, and both were, therefore, within the rule, and, such being the case, the plaintiff ought to prevail by the strength of better title. The conclusion of the Court, in that case, in favor of the defendant's claim to possession, outside of his actual occupancy, appears to be in harmony with the idea advanced in Steedman v. Hilliard. It was not the mere fact of occupancy, but the fact that such occupancy was adverse, that was decisive of the point. The plaintiff's occupancy, in Eifert ads. Read, was not adverse to the defendant, for the defendant made no claim where it was exercised, but on the other hand the defendant's occupancy was adverse to the plaintiff's claim, and this constituted the difference. The rule in its operation gave way before an adverse occupancy; it ceased to operate in favor of the plaintiff, and began to operate against him on the new basis of right involved in defendant's claim, as enforced by the adverse character of his occupancy. But suppose that it had appeared in Eifert ads. Read. cupancy. There would have been a manifest that during the time defendant claimed under the operation of the rule to have had possession up to the limits of his grant, the plaintiff had exercised actual occupancy within such limits, would the Court have established the defendant's right under the operation of the rule over the very land actually occupied by the plaintiff, and against his superior title? Clearly not; the union of the better title, with the fact of actual occupancy, would have precluded such a result.

The case before the Court is very similar, though not identical, with the one just supposed. Had the defendant here made title, clear and undisputed, to that portion of the land claimed and actually occupied by him, the case would have been strictly parallel.

Although, for the purpose of inquiring into the correctness of the charge, the plaintiff must be regarded as relying on adverse possession merely, yet it cannot be assumed that the defendant has a paper title as against such claim. For the purpose of the present question, we must consider both as resting *43

on possessory titles. *Now it is clear that the possession of the defendant is adverse to that of the plaintiff; but so far as the occupancy of the Walker lot is concerned, the plaintiff's possession is not adverse to the defendant, for the defendant makes no claim there. It does not yet appear whether defendant's title, by adverse possession, is complete by lapse of time-for that fact could only be ascertained by a verdict, and under the charge the jury cannot be assumed to have rendered a verdict on that questionbut whether defendant's title, so far as it depends on possession, is choate or inchoate, the character of his possession is adverse, and the rule that possession of part is possession of the whole is operating in his favor and against the plaintiff, within the limits of his color of title, and will continue so to operate until the relations of the parties become changed, either as matters of fact or by operation of law. But on the other hand no such operation of the rule results in favor of the plaintiff as it regards the possession of the Walker tract, for, as we have seen, it is not adverse to any claim of defendant. Had the Circuit Judge confined himself to laying down as an abstract proposition of law, the rule that possession of part of the land held under color of title is possession of the whole, it could not be successfully alleged that he had misstated the law. In that case, if the defendant had deemed it essential to his case, that the proposition thus laid down in general terms should be limited by excepting from its operation a case where there was an actual adverse occupancy within the limits of the color of title, it would have devolved upon him to bring such limitation to the attention

der the operation of the rule to have had of the Court, in order to make ground for an possession up to the limits of his grant, the exception by a refusal to charge.

But that was not the form of the charge. The Judge assumed to define the rights of the plaintiffs under the general rule above stated, and if he deduced those rights without regard to a limitation or exception to which the general rule, in its application to the facts of the case, was subject, the direction itself became erroneous, and advantage could be taken of it, by an exception to the charge, without superadding a request to charge embracing the terms of the limitation or exception contended for.

The only issue opened to the jury by the charge was, had the plaintiff held possession of any part of the land embraced within his color of title for a period of ten years? The charge then proceeds to declare the consequences in point of law of a finding for the plaintiffs upon such issue of fact, namely,

*44

that such possession would ex*tend to the limits of the survey, or, in other words, that the plaintiffs would stand in the same legal position as if they had held a complete and exclusive dispossessio of the whole tract during such period of ten years. This cannot be the law of the case, unless it takes into account, not only the general rule of law bearing on it, but such limitations and exceptions as, under the facts, the general rule is subject to in such case.

It had appeared that the defendant had, for some length of time not ascertained, held some portion of the land within the limits of plaintiffs' color of title, by an actual adverse occupancy, and as we have seen, the time during which defendant had so held was not to be counted to the plaintiffs as any portion of the ten years that they were compelled to make out; yet the form of the charge was such as to allow the jury to count this very period of adverse occupancy to the plaintiffs as part of their ten years. It is not necessary now to consider the legal bearing of the fact of a temporary possession on the part of plaintiffs within the lands held by defendant, nor of the survey regarded as an act of trespass. We cannot assume that the facts bearing on these questions are fully before us, as they are not necessarily involved in the matter of the exception. Nor do the rulings of the Circuit Judge involve any aspect of the law in its bearing on these questions, so as to become the subject of review in this Court.

The verdict must be set aside and a new trial ordered.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 44

KIBLER v. BRIDGES.

(April Term, 1871.)

[War @==31.]

The homestead exemption under the Military order of April 11th, 1867, known as Order No. 10, could not have been allowed at a sale in December, 1867, to foreclose a mortgage of the premises executed in February, 1866—the Military commander having had no power to impair the obligation of the contract.

[Ed. Note.—For other cases, see War, Cent. Dig. § 212; Dec. Dig. ≈ 31.]

[This case is also cited in Kibler v. McIlwain, 16 S. C. 552, as to facts.]

Before Thomas, J., at Lancaster, April Term. 1870.

This was an action of trespass to try title to recover the possession of a dwelling house and appurtenances and twenty acres of land, part of a tract of about nine hundred acres of land, which in February, 1866, was owned by James D. McIlwain.

*45

*In the month and year mentioned, McIlwain mortgaged the whole tract to the plaintiff, and under a decree for foreclosure the mortgaged premises were held by the Commissioner on the 2d December, 1867, and conveyed to the plaintiff, he being the purchaser at the sale. The conveyance did not in terms exempt the premises in dispute in this action from its operation, but the defendant, who held under McIlwain, claimed that they were exempted by virtue of the Military order of April 11th, 1867, known as Order No. 10. The Commissioner who made the sale testified that although his deed included the homestead and twenty acres of land, he did not sell them; that McIlwain demanded his homestead before the sale, and it was allotted to him.

The presiding Judge instructed the jury that, by virtue of the Military order above mentioned, the title to the dwelling house and appurtenances and twenty acres of land remained in McIlwain, notwithstanding the sale and deed of the Commissioner. The jury found for the defendant.

The plaintiff moved the Circuit Court for a new trial, and his motion was overruled. He appealed to this Court.

[For subsequent opinion, see 5 S. C. 335.]

Moore, for appellant. DePass & Clyburn, contra.

Aug. 30, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. This was an action to recover possession of the dwelling house, out buildings, and twenty acres of land embraced in a tract containing about nine hundred acres, which had been mortgaged to plaintiff in 1866 by one James D. McIlwain.

In 1867 proceedings were instituted in the Equity Court for a foreclosure, under which, by order of the Court, the said mortgaged premises was sold on the 2d December, 1867, and conveyed to the plaintiff by the Commissioner. The defendant has not produced any title whatever to the dwelling house and twenty acres of land which he claims, but claims the same under McIlwain, and McIlwain claims the homestead under the seventh paragraph of General Order, No. 10, issued from "Headquarters, Second Military District," Charleston, South Carolina, April 11th, 1867, which is as follows: "In all sales of property under execution or by order of any Court, there shall be reserved out of the property of any defendant who has a family dependent upon his or her labor, a dwelling

*41

house and ap*purtenances, and twenty acres of land for the use and occupation of the family of the defendant, and necessary articles of furniture, apparel, subsistence, implements of trade, husbandry, or other implements, to the value of five hundred dollars." By the Act of Congress, passed March 2d, 1867, entitled "An Act to provide for the more efficient government of the Rebel States," the powers and duties of the military commanders of the district, created by the said Act, were defined.

The object contemplated by Congress in dividing the Rebel States into military districts, and placing a military commander over each of them, was for the protection of the life and property of the citizens in those States, and to govern them more efficiently in accordance with the constitution and laws of the United States; therefore it became the duty of those placed in command to endeavor to enforce obedience to the constitution and laws of the United States. The Constitution of the United States provides against any State impairing the obligation of a contract. The military commanders who were placed over and had charge of the military had no more right or authority to issue and enforce orders, the provisions of which were contrary to the constitution and laws of the United States, than a State. Therefore General Order, No. 10, is to be construed as not interfering with vested rights. In this case the homestead is claimed as against a mortgagee. By the very condition of a mortgage, the mortgagee, in default of payment by the mortgagor, has a right to have the mortgaged premises sold, and the proceeds applied to the payment of the mortgaged debt. homestead cannot therefore be held out of premises that have been mortgaged. This doctrine has been held by this Court, and fully set forth in the case of Shelor v. Mason, the year to the extent of \$1,500. The matter of the lien was several times spoken of

The order of the Court below must be set aside, and a new trial ordered.

WILLARD, A. J., concurred.

MOSES, C. J., absent at hearing.

3 S. C. 46

CURETON v. GILMORE.

(April Term, 1871.)

[Agriculture \$==11.]

P made advances to G in the Spring on the faith of G's verbal promise to give to P a lien on his crop of the year to secure the advances. G died suddenly in June, without having given the lien. On bill to marshal the assets of G's estate, which was insolvent, Held, That P was not entitled to payment out of the proceeds of the crop as a lien creditor.

[Ed. Note.—Cited in Creech v. Long, 72 S. C. 31, 51 S. E. 614.

For other cases, see Agriculture, Cent. Dig. § 27; Dec. Dig. &==11.]

*47

[Agriculture \$== 11.]

*A party making advances to one engaged in the cultivation of the soil must comply strictly with the conditions of the Act "to secure advancements for agricultural purposes," or he will acquire no lien on the crop.

[Ed. Note.—Cited in Whilden & Co. v. Pearce, 27 S. C. 48, 2 S. E. 709.

For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. \$\sim 11.]

[Specific Performance 39.]

Where a party has been guilty of gross negligence, specific performance will not be decreed in his favor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 114; Dec. Dig. \$\sime 39.]

Before Thomas, J., at Chester, November Term. 1870.

This was a bill to marshal the assets of the estate of W. T. Gilmore, who died insolvent in June, 1867.

James Pagan presented a claim against the estate amounting to \$914.23 for agricultural supplies furnished Gilmore in the Spring of 1867, to enable him to make a crop, and claimed payment out of the proceeds of Gilmore's crop of that year, as a lien creditor.

The facts were as follows: Pagan was a merchant of the town of Chester, and in the year 1867 he did a large business in making advances to planters secured by liens on their crops. Gilmore was a planter living on his plantation about six miles from the town of Chester, and engaged in the cultivation of the soil. In the Spring of 1867, Pagan made advances to Gilmore to the amount of his claim, on the verbal promise of the latter to secure the advances by a lien on his crop of

the year to the extent of \$1,500. The matter of the lien was several times spoken of by the parties, Gilmore always promising to give it, and during the time he was receiving the supplies he went to Pagan to make out the papers, but Pagan was too busy to do so. The lien was not taken, and Gilmore died suddenly on the 7th June, 1867. His crop of that year realized over \$3,000.

The matter was referred to a referee, who reported in favor of Pagan's right to be paid as a lien creditor. Some of the specialty creditors of Gilmore excepted to the report, and his Honor the presiding Judge sustained the exception.

Pagan appealed to this Court, on the grounds:

1. Because, from the proof, it was clear that Pagan had advanced the supplies to Gilmore upon the faith of his express promise to give an agricultural lien on the crop then being made by Gilmore, and that Gilmore's sudden death alone prevented the execution of the lien; and thus having performed fully his part of the contract, Pagan has an equitable lien on the property promised to be secured to him, and should have been paid out of the proceeds of the crop which, without those advances, could not have been made.

2. Because His Honor the presiding Judge, *48

sitting as a Judge in *Equity, erred in not being guided by that important rule of Courts of Equity, in considering what ought to have been done as done; and as it was not controverted that the creditor having done his part, could, in equity, have compelled a specific performance from the debtor, if alive, there was no sufficient reason for the adoption of a different rule, now that he is dead; the assumption on the part of the presiding Judge that the creditor was himself in fault, not being founded in fact or sustained by the testimony.

Brawley, for appellant:

A Court of Equity looks upon a thing agreed to be done, as actually performed, and considers that the same shall relate back to the time when it ought to have been done originally.—3 Blackstone, 439; Fonblanque Eq., 40, 41; 1 Sug. on Vend., 171.

Where the Court is satisfied that a claim is just, fair, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, it is as much a matter of course to decree specific performance, as it is at law to give damages; equity not regarding the outward form, but the inward substance and essence of the matter.—Fon. Eq., 31, 40, 41; 3 Cowen, 445, 505; 2 Stor. Eq., § 715.

advances to Gilmore to the amount of his claim, on the verbal promise of the latter to decree a specific performance of a contract secure the advances by a lien on his crop of is not dependent upon or affected by the

form or character of the instrument which | Ford, 4 Bro., 494; Smith v. Clay, Amb., 645. was to have been, or is the evidence of the agreement; and if the Court is satisfied that it was the intention of the parties, upon a good or valuable consideration, to contract a perfect and binding obligation for a specific object, it will lend its aid to carry into effect the agreement of the parties; so far as the same is consistent with natural justice.-2 Story Eq., §§ 714, 715; Fonb., Bk. 1, Ch. 1, § 7.

Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party, in case of his death, to the same extent as he himself was bound by it; the fact of the existence of creditors of the deceased makes no difference, for it is a general rule, that whenever a right in equity attaches against a person, that equitable right binds all persons claiming under or against that person who had not special liens on any of the property-general creditors being in all cases bound by a particular equity.—Reid v. Gaillard, DeS., 2, 552; Bates v. Dandy, 2 Atk., *49

*207; Sugd. on Vend., Ch. II, § 3, *p. 130; Grant v. Craigmiles, 1 Bibb, 203; Powell on Mortg., pp. 459 and 460.

If the contract is binding on the parties the legal effect is the same, whether it is in writing or by parol.-Massey v. Ilwaine, 2 Hill Ch., 428; Frederick v. Frederick, 1 P. Wms., 710; Batten on Specific Performances, pp. 329, 336, 338, 369; Burn v. Burn, 3 Ves., 576.

McLure, Brice, contra:

The specialty creditors of W. T. Gilmore, appellees, resist the reversal of the Circuit decree:

First. Because a lien on Gilmore's crops did not inure to the appellant, Pagan, by reason of his non-compliance with the requirements of the Act "to secure advancements for agricultural purposes." These requirements are conditions precedent to a lien: and appellant not having a lien under the Act, equity will not make and establish one for him.—13 Stat., 380, Act of 1866; Martin v. Price, 2 Rich. Eq., 441.

Second. Liens, mortgages, &c., whether legal or equitable, apply only to property in esse. The Act "to secure advancements for agricultural purposes," provides for a lien on property not in esse, but to be producedthe lien is purely statutory, and the requirements of the Act must be strictly complied with.—Kelly v. Hotel Co. et al., McMul. Eq., 431.

Third. Equity will not consider "that to have been done which ought to have been done," and thereby cure the laches and assist the negligence of the party asking its aid.—Thompson v. Dulles, 5 Rich. Eq., 391; Lloyd v. Collett, 4 Bro., 469; Fordyce v. which the advances, if made from time to

Fourth. By A. A. 1789, Sec. XXIII, 5 Stat., 111-Where any person shall die after the first day of March "the crop shall be assets in the executors' and administrators' hands, subject to debts, &c." Sec. XXVI of the same statute prescribes the order for the payment of debts. To uphold secret liens would be practically to set aside this statute, and open a door for fraud and illegality. and defeat the just claims of creditors.

Sep. 4, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. Some time during the month of March, 1867, one James Pagan, a commission merchant, doing a large business in making advances to planters, secured by agricultural liens, made advances to one W. T. Gilmore, who was a planter, upon the *50

faith *of the said Gilmore, promising to give a lien upon his then growing crop. Gilmore died suddenly, in June of the same year, without having given the said Pagan a lien on the crop as agreed.

Administration on his estate was granted to complainant, and bill filed to marshal the assets of the estate, which was insolvent. The claim of the said Pagan was allowed by the Commissioner, before whom it was established, and he (Pagan) reported as being a creditor standing "upon a high equitable ground." To this report exception was taken, which was sustained by the decree of the Circuit Judge, from which decree the said James Pagan appeals.

There is no dispute as to Pagan furnishing Gilmore with that which was requisite to raise the crop, and that a good crop was raised that year. These facts are well established by the testimony. It is clear that Pagan had no lien upon the crop of the deceased, as a statute was made to create an agricultural lien, and no lien could be created without strictly complying with that Act, which will be found in Vol. 13, p. 380, and reads as follows: "That if any person or persons shall make any advance or advances, either in money or supplies, to any person or persons who are engaged, or are about to engage in the cultivation of the soil, the person or persons so making such an advance or advances, shall be entitled to a lien on the crop, which may be made during the year, upon the land in the cultivation of which the advances so made have been expended, in preference of all other liens existing or otherwise, to the extent of such advance or advances: provided, an agreement, in writing, shall be entered into before any such advance is made to this effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed beyond

time during the year, shall not go, which agreement shall be recorded in the office of the Register of Mesne Conveyances for the District, in which the person to whom the advances are made resides, within thirty days from its date."

By this Act it is perceived that there were certain duties to be performed by the party to make the advance or advances, as well as the other party, who was to receive the advance or advances, previous to any money or supplies being delivered to the party of the second part. This Act is plain and complete for the protection of all parties to the contracts created by it. Pagan, according to his own testimony, began to make advances to Gilmore in February. The Act provides that "an agreement in writing shall be entered into before any such advance is made."

*51

Those who violate *the law must expect to abide the consequences. When a person comes into a Court of Equity to ask the Court to compel specific performance of a contract, he must first show that all has been done that could be done on his part to comply with the law; because where there is negligence and neglect of duty, as is plainly shown in this case, and that is left undone which ought to have been done by him who asks the aid of the Court, equity will grant no relief. It is very clear to this Court that it was in consequence of the laches of the appellant that he did not have a lien upon the crop of the deceased; and it is a well settled rule of equity that where there is gross negligence, the Court will not lend its aid to complete the contract, for to do so would be to encourage and foster negligence in parties making contracts. In Fonblanque's Treatise on Equity, 1st Book, p. 391, he says: "He, therefore, who demands the execution of an agreement, ought to show that there has been no default in him in performing all that was to be done on his part; for, if either he will not, or through his own negligence cannot, perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual. And, upon this reasoning, it is that where a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific performance in his favor, especially if circumstances are altered." The same doctrine is fully sustained by our own Court in the case of Thompson v. Dulles, 5 Rich. Eq., 391.

It is ordered that the decree be affirmed, and the appeal dismissed.

WILLARD, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 51

THE SOUTH CAROLINA SOCIETY v. GURNEY, County Treasurer.

THE HEBREW ORPHAN SOCIETY v. GURNEY, County Treasurer.

(April Term, 1871.)

[Prohibition \$\sim 29.]

The Court of Common Pleas has no jurisdiction to decide an application for prohibition upon a case agreed upon under Section 389 of the Code—Section 475 of the same Code expressly providing that its provisions should "not affect proceedings by mandamus and prohibition."

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 78; Dec. Dig. \$29.]

Before Graham, J., at Chambers, March, 1871.

This was an application for a writ of

prohibition to restrain *William Gurney, County Treasurer of Charleston County, from the collection of certain taxes assessed against the plaintiffs.

A case was agreed upon by the parties to be submitted without action under Section 389 of the Code.

The questions submitted were (1) whether the plaintiffs were institutions of purely public charity, and (2) whether the Court had jurisdiction of the subject-matter so as to grant the relief asked for.

His Honor made no decision upon the first question, but upon the second he decided that the Court had no jurisdiction.

The plaintiffs appealed to this Court upon both questions submitted by the case agreed upon.

Hayne, Nathans, for appellants.

Chamberlain, Attorney General, contra.

[The arguments of counsel are omitted, as they did not touch upon the ground upon which the case was decided.]

Sept. 15, 1871. The opinion of the Court was delivered by

MOSES, C. J. It appears by the brief that the Circuit Judge refused the application for the prohibition for want of jurisdiction. He has not set forth the reason which induced his conclusion, and we are, therefore, left to determine for ourselves how, as the Judge of a Court, invested by the Constitution with power to issue writs of prohibition, he did not regard himself authorized to consider the point made by the proposed case before him.

The course of practice heretofore prevailing in the Courts of this State in regard to such a writ, was to file a suggestion stating the grounds on which it was prayed, followed by a rule requiring the party against whom it was sought, to shew cause, at a stated time and place, why it should not issue.

ure to shew cause, the right to the writ was determined.

The Code, in all actions to which it applies, has introduced a new feature in the practice. By Section 389, "parties to a question in difference which might be the subject of a civil action, may in that action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have had jurisdiction of an action, had it been brought." The parties in the cases before us resorted to this course, and if it was applicable to the remedy through which they sought relief, and no other valid objection was interposed, it was the duty of the Judge to entertain the application, for *53

the purpose and effect of the provi*sion of the Code, in this particular, are to subject the parties as fully to the judgment of the Court as if one of them had been brought before it by due process, properly served, in the name and at the instance of the other.

The Code, however, in Section 475, enacts "that until the Legislature shall otherwise provide, the second part of this Act shall not affect proceedings by mandamus or prohibition." Section 389 is included in the said second part, and the form of procedure in relation to the writ of prohibition therefore remains as it stood before the adoption of the Code.

As we are not furnished with the view which controlled the decision of the Circuit Judge, if it is apparent, as it must be conceded it is, that though invested with power to grant a writ of prohibition, he can only exercise it in a case actually pending before him, and that the form in which these parties presented the issue was not appropriate to the remedy they selected, how can we undertake to say, in the face of the express exception in the Code, that his conclusion is erroneous. The motion is refused and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 53

SMITH v. KING'S MOUNTAIN RAIL-ROAD COMPANY.

(April Term, 1871.)

[Trial @==252.]

Action to recover damages for the loss of cotton deposited by plaintiff on the platform of defendants, a railroad company, at their depot, and there burned by the negligence, as alleged, of defendants. There was some evidence that of defendants. There was some evidence that the agent of the company had refused, on the application of plaintiff, to give a receipt for the cotton. The presiding Judge charged the jury, cotton. The presiding Judge charged the jury, that if the company refused to receive the cotton for shipment when offered by the plaintiff

On the return of the defendant, or his fail- they would be responsible in this action for any damage sustained in consequence: Held, That the charge was irrelevant, and no ground for new trial, there being no evidence that damage was sustained in consequence of such refusal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ©=252.]

[Carriers = 131.]

The declaration did not charge that defendants received the cotton in their character of common carriers, and the presiding Judge charged the jury that they might find the defendants liable as such for the loss of the cotton. On appeal by defendants, held, that in this there was error, and new trial ordered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 569, 570; Dec. Dig. \$\sim 131.]

Before Thomas, J., at Yorkville, March Term, 1870.

This was an action on the case. The declaration contained three counts. The first charged that in consideration that plaintiff, at defendants' request, delivered to them one *54

hundred bales of cotton; de*fendants promised to take due and proper care of the same; that they did not take such care of the cotton, and that through their negligence it was burned. The second charged that defendants, at their request, had the care of the cotton, and did not take due care of the same, whereby it was lost to the plaintiff. The third was as follows:

"For that whereas, the said defendants have been and still are common carriers of cotton and other articles, for hire, by railway, from Yorkville to Chester Court House, in the State aforesaid; that said defendants are possessed of a depot in Yorkville, at the terminus there of their said railway, known as the King's Mountain Railroad, for the storage and reception of cotton, grain and other articles to be transported on said road; that on the platforms and sheds of said depot, said King's Mountain Railroad Company commonly and usually suffered and permitted farmers and planters, hauling and bringing cotton, grain and other produce to the town of Yorkville for sale, there to put and place said cotton, grain or other produce, there to remain until sold in Yorkville, and then to be shipped for the purchaser over said road to the town of Chester, and that said King's Mountain Railroad Company, in consideration of the premises, and that planters and farmers as aforesaid would so place their cotton, grain and other produce on the platforms and sheds of the said depot at Yorkville, undertook and faithfully promised to take due and proper care thereof, and deliver the same when sold to the purchasers thereof. And said plaintiff in fact says that on, &c., at, &c., first aforesaid, he being one of the planters of York District, and desirous of selling his cotton in the town of Yorkville aforesaid, caused to be hauled to said town and placed on the

platforms of said depot of said company, one hundred bales of cotton, of him said plaintiff, of the value of four thousand dollars, there to remain until sold and delivered by him; and that in consideration thereof, said defendants then and there undertook and faithfully promised they would take due and proper care of said one hundred bales of cotton until sold by plaintiff and delivered by him. And said plaintiff says that after placing said one hundred bales of cotton on the platforms of the depot of defendants, as aforesaid, he bargained to sell the same to W. D. & J. C. Miller, of Yorkville. the said defendants not regarding their duty in that behalf, did not nor would take due and proper care of said one hundred bales of cotton so placed at their depot as aforesaid. but wholly neglected so to do, whereby plaintiff was prevented from delivering the same

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to *said W. D. & J. C. Miller, and by and through the negligence, carelessness and improper conduct of said defendants, said one hundred bales of cotton, of the value aforesaid, were burned and destroyed and wholly lost to the said plaintiff."

The brief upon which the case was heard in this Court contained, besides a copy of the declaration, copies of notes of the evidence, the report of the presiding Judge, and the notice and grounds of appeal.

The evidence tended to show that it was the custom at Yorkville for planters bringing cotton to that town for sale there to deposit it on the platform of defendants at their depot, where it would remain until sold and shipped by the purchaser; that the platform was three or four feet from the track of defendants' road; that in March, 1860, the plaintiff hauled to Yorkville for sale there eighty-one bales of cotton, which he deposited on defendants' platform; that a few days after the last lot was deposited, the plaintiff bargained with W. D. & J. C. Miller, of Yorkville, to sell the cotton to them; that on the same day, and before the sale was completed, twelve of the eighty-one bales were burned on the platform; that the fire commenced immediately after the arrival at the depot of an engine of defendants; that the day was windy; that the spark catcher of the smoke stack of the engine was so defective as to allow big sparks to escape, and that the engine, when it ran up by the side of the platform, was throwing off sparks freely.

The plaintiff testified that the President of the company showed him where to deposit his cotton on their platform, and that before the cotton was burned he applied to the agent of the company for a receipt for the cotton, and it was refused. The President and agent denied these statements.

The verdict was for the plaintiff for \$1,330. His Honor, the presiding Judge, made a report of the case, which is as follows:

"This action was brought because the plaintiff alleged that the defendant had burned his cotton through negligence in not providing their engine with an efficient spark-catcher. The cotton was on the platform of the depot at Yorkville. The plaintiff stated that he demanded a receipt for the cotton on the day it was burned, and failing to get one, he was engaged in selling it, when it took fire, as the engine came up. He had bargained it, and they were only waiting for the scales to weigh it. No money had been paid, or any of the cotton transferred. It was proven

*56

that the custom of cotton buyers was *not to consider cotton sold until weighed, as it was sold by the pound.

"The platform had been used by the planters of York as a place of deposit for their cotton. Plaintiff said that the President of the road requested him to haul his there. He had been in the habit of hauling to Columbia.

"The spark-catcher was proven to be in bad order, and the fire occasioned by it.

"The last clause of the declaration will be appended to this report."

The defendants appealed to this Court on the grounds:

- 1. Because, inasmuch as the evidence showed that the railroad company had never contracted to receive and keep the plaintiff's cotton for him, no liability attached to the company as bailee, and the verdict of the jury was erroneous.
- 2. Because, even if the company did undertake the custody of the cotton, there is no pretence that they were to be paid for so doing; and as a mere naked depositary they could only have been held liable, had the loss of the cotton been occasioned by gross negligence on their part, of which there was no evidence before the jury.
- 3. Because his Honor, the presiding Judge, erred in charging the jury that if the company refused to receive the cotton for shipment when offered by the plaintiff, they would be responsible in this action for any damage which the plaintiff sustained in consequence thereof; although there is no charge in the plaintiff's declaration that the company ever refused to receive the cotton.
- 4. Because, although the plaintiff, in his declaration, does not charge that the company received the cotton in the character of common carriers, his Honor charged the jury that they might find the company liable as such, for the loss of the cotton, in which charge it is respectfully submitted there was error.

5. Because his Honor refused, when requested by defendant's counsel, to charge the jury that inasmuch as the declaration contains no allegation of a refusal on the part of the railroad company to receive the plaintiff's cotton, the said company could not be

held liable for such refusal, even if the same, declaration, whether he was guilty of neglihad been established by the evidence, in which, it is submitted, his Honor erred.

6. Because his Honor refused, when requested in the same manner, to charge the jury that if the plaintiff had ordered the shipment of the cotton, and subsequently con-*57

tracted for the sale of the *same, that it amounted to a revocation of the order to ship, in which it is also submitted his Honor erred.

7. Because the verdict of the jury was contrary to the law and evidence.

Smith, Moore, for appellants. Wilson, contra.

Sept. 15, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The action below was case for negligence in the care of property delivered to defendants for transportation, whereby such property was in part destroyed by fire.

Under the declaration, plaintiff could have recovered, though it should appear that the fire that caused the damage had not originated through the negligence of defendant, provided he made it to appear that at the time of the injury the defendants were charged with its protection, and that through want of a due discharge of this duty the property had become exposed to the fire that caused the damage.

The evidence disclosed the fact that the fire was communicated by sparks from the defendant's locomotive engine. There was evidence tending to show that the sparks issued from the engine in consequence of defective condition of the spark-catcher. The evidence also involves a question, whether there was negligence in placing the property, or allowing it to remain, in the position it occupied relative to the engine, as amounting to an imprudent exposure. The property was cotton, and its position was on an open platform, close by the track on which the engine must necessarily pass.

The solution of these questions, in their bearing on the liability of defendants, depended, in some respect, on the question, whether they were charged with custody of the property as common carriers, or in any other character. If they were so charged, it was not necessary to trace the fire to the defective condition of their engine, provided there was negligence on their part in allowing the property to be unduly exposed to the fire. If, on the other hand, the property must be regarded as in the custody of plaintiff, then it became necessary to show that the fire originated with the defendants, through their negligence. Assuming that the plaintiff was alone responsible for the position and exposure of the property, then it became a question, apart from the frame of the gence that conspired to produce the damage. *58

*It is impossible for us to determine, from the case before us, what view of the legal bearing of these questions of fact, raised by the evidence, was presented to the jury. It appears probable that the case was submitted to the jury as wholly depending on the question whether the defendants were liable as common carriers. This is an inference from what is said about the charge, the charge not being before us. If such was the aspect presented, then we must conclude that the verdict was based on the conclusion that defendants were common carriers. We must also conclude that the question whether the plaintiff was guilty of negligence, which conspired to produce the damage, was not passed upon by the jury, for that question would naturally arise only in the event that the defendants were held not to be responsible for the custody of the property at the time of the fire.

This case comes to us on grounds of appeal, and the report of the Circuit Judge, in conformity with the former practice in the case of appeals to the Court of Appeals, having been tried and the appeal taken before the Code of Procedure went into operation. This mode of bringing up cases, though imposing an onerous duty on the Judge, was, when that duty was carefully performed, well adapted to the Court of Appeals, as that Court considered both matters of law and fact, and looked to the substantial justice of the case. We are, however, confined to a review of the decisions and rulings of the Circuit Judge on points of law involved in the case. If we find that there was error in the rulings, we have then to ascertain whether such error may have affected the verdict. Where the rulings or charge lay down an abstract proposition of law, its merits can generally be examined independently of the other rulings or directions given in the case. both as it regards its correctness and its pertinency to the issue in hand. But where the Judge in charging the jury applies the law to the evidence, by declaring the relative rights of the parties, in the event of the finding of a matter of fact, unmixed with any question of law, it is generally important that either the whole charge, or an outline of the view presented, should be brought before us, in order to ascertain the bearing of any particular proposition of law involved, that may be the subject of review.

The case in hand appears to be one of the latter class. This conclusion is not drawn from the statements of the report of the Circuit Judge, for that is entirely silent as it regards the directions given to the case in point of law, but is drawn from the state-

ments in the *grounds of appeal in view of the silence of the report on the subject. The matters of fact set forth in the report are no aid to us here, as we can only deal with a questions of law.

Deriving our conclusions, then, as best we may, from the grounds of appeal, we proceed to consider the special matters presented by these grounds.

The first and second grounds involve only the correctness of the verdict in point of fact, and cannot be considered here, as we have repeatedly held.

The third ground is an alleged error, in charging that if the company refused to receive the cotton for shipment when offered by the plaintiff, they would be responsible for any damage which the plaintiff sustained in consequence thereof. The proposition is irrelevant to the case, as there was no damage shown as the result or consequence of the refusal of the defendants to receive the goods. Assuming the truth of the plaintiff's case, the whole damage was the consequence of negligence as to the condition and use of the defendants' engines, a cause entirely independent of the one involved in the statement of the charge. It is possible that the jury may have mistaken the bearing of this proposition, but that fact is not made out be-

The fourth ground is as follows:

"Because, although the plaintiff, in his declaration, does not charge that the company received the cotton in the character of common carriers, his Honor charged that they might find the company liable as such for the loss of the cotton." It is very difficult to determine what inference the jury would naturally draw from this statement, if made in the terms here laid down. They might have regarded it simply as a ruling that the plaintiff was not to be prejudiced by the want of a formal averment in his declaration, or they might have concluded that the Court had found in the case sufficient facts undisputed to warrant the legal conclusion that the defendants were chargeable as common carriers. The expression "that they might find the company liable" implied that they were at liberty to do so. If it was to be understood that under the evidence they were at liberty so to find, it was, in effect, taking the question of fact out of the hands of the jury, and so they would be apt to consider. In the imperfect state of the report, we cannot but conclude that the latter would be the natural inference for the jury to draw from the statement. Upon this ground there must be a new trial.

*60

*The fifth and sixth grounds involve matters not pertinent to the real issue before the jury. The seventh, and last, is general and not entitled to particular consideration.

There must be a new trial.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 60

ROBB & LOWNDES v. PARKER.

(April Term, 1871.)

[Removal of Causes \$== 11.]

l'etition by defendant, a citizen of Michito remove to the Circuit Court of the United States for the District of South Carolina, an action pending in the Circuit Court of the State, wherein a citizen of New York and a citizen of South Carolina were plaintiffs-the cause of action being a bond given by defendant to a citizen of South Carolina, and assigned by the latter to plaintiffs, and the matter in dispute exceeding the sum of \$500, exclusive of costs: *Held*, that the Circuit Court of the United States for the District of South Carolina had no jurisdiction of the cause, and petition dismissed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. € 11.]

[Removal of Causes 🖘 11.]

A cause is not removable, under the Judiciary Act of Congress of 1789, to a Circuit Court of the United States, unless the cause was originally cognizable by that Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. —11.]

[Courts 307.]
A Circuit Court of the United States has no jurisdiction of a case unless each of the parties is competent to sue, or liable to be sued in that Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. \$\sim 307.]

[Courts \$\sim 310.]

The Circuit Court of the United States for the District of South Carolina has no jurisdiction of an action against a citizen of Michigan, brought by two plaintiffs, one of whom is a citizen of New York, and it makes no difference that the other plaintiff is a citizen of South Carolina.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. \$310.]

[Courts \Leftrightarrow 280.]

Upon questions of jurisdiction, under the Judiciary Act of Congress of 1789 depending upon citizenship, the Court, as a general rule, looks only to the parties to the record, and not to parties beneficially interested.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 818; Dec. Dig. \$280.]

[Bonds \$\sim 88.]

By an Act of the State of South Carolina, the assignee of a bond is the legal owner, and may sue thereon in his own name.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 89; Dec. Dig. & SS.]

[Courts \$\sim 312.]

Where the assignees of a bond sue thereon in a State Court, in their own names as plain-tiffs, the question whether the Federal Court has jurisdiction, depends upon the citizenship of the assignees, and not upon that of the assignor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 869, 870; Dec. Dig. €⇒312.]

Before Graham, J., at Charleston, April Term, 1871.

Petition to remove a cause in the Circuit Court of the State, wherein James Robb and Charles T. Lowndes, Trustees, were plaintiffs, and John Parker was defendant, to the

Circuit Court of the United States for the such further or other order or relief in the District of South Carolina.

As this is the first case of the sort to be found in the reports of the State, the proceedings are given in full.

The petition, after stating the names of the parties to the cause, plaintiffs and defendant, proceeded as follows:

*To the Circuit Court of the State of South Carolina, for the County of Charleston:

I. The petition of John Parker shows that an action has been brought in this Court against the petitioner, by the plaintiffs above named.

II. That this action is brought upon a bond executed by your petitioner, jointly and severally with George W. Parker and George H. Gale, and delivered to Theodore D. Wagner, whereby your petitioner bound himself in the sum of ten thousand dollars for the performance of the covenants of a lease, executed by said Theodore D. Wagner to George W. Parker, of a moiety of the Mills House, a hotel building in the city of Charleston, which said bond has been assigned to plaintiffs.

III. That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, as appears by summons and complaint.

IV. That the plaintiffs in this action are C. T. Lowndes, a citizen of South Carolina, and James Robb, a citizen of New York. That the petitioner is a citizen of the State of Michigan.

V. That the assignor of the chose in action, under whom the plaintiffs in this action claim, is a citizen of the State of South Carolina.

VI. That the petitioner now does enter his appearance in this action, but has not done so heretofore.

VII. That he hereby offers good and sufficient security for his entering in the next Circuit Court for the District of South Carolina, on the first day of its session, copies of the process against him in this action, and also for his there appearing and entering special bail in the action, if special bail were originally requisite therein, according to the law and practice of the United States and its Courts.

Your petitioner therefore asks that the said cause may be removed for trial into the next Circuit Court, to be held in the district where the same is pending, to wit: into the next Circuit Court for the District of South Carolina, on 4th Monday in November next, at Columbia, pursuant to the provisions of the said statutes of the United States, in such case made and provided, and that this Court do accept the surety offered by your petitioner as aforesaid, and do proceed no further in the said cause, and for

premises as may seem just.

The petition was signed by the petitioner and his attorneys, J. N. Nathans and Porter & Conner, and verified by the petitioner.

His Honor made the following order:

*62

*The defendant having this day entered his appearance in this cause, and at the same time filed a petition praying for a removal of this action to the Circuit Court of the United States, for the District of South Carolina, pursuant to the Act of Congress of the United States in such case provided, and offered the surety as therein provided by a bond now filed: It is ordered that the plaintiffs show cause on Thursday, 27th April, at 91/2 A. M., at a special term of this Court, to be held at Charleston, why the prayer of the said petition should not be granted.

The following notice to the plaintiffs' attorneys was served on them:

Take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were, on the 24th day of April, A. D. 1871, filed in this Court, and upon the bond of the petitioner and his sureties, a copy of which is also annexed, this Court will be moved at a special term thereof, to be held on Thursday, 27th instant, at 91/2 A. M., that the petition be granted, and this cause be removed to the Circuit Court mentioned in the petition, and that this Court accept the surety offered, and proceed no further herein, and for such further and other relief as may be just.

The following is the condition of the bond, in the penal sum of \$1,000, given by the petitioner and J. N. Nathans, as surety, and filed in the Clerk's office:

I. Whereas the above named James Robb and Charles T. Lowndes, trustees, have commenced an action in the Court of Common Pleas for Charleston County, State aforesaid, against the above bounden John Parker.

II. And whereas the said John Parker has entered his appearance in such action in said Court, and at the same time has filed his petition for the removal of the cause into the next Circuit Court, to be held on the fourth Monday in November next, at Colum-

Now, therefore, the condition of the above obligation is such that if the said John Parker shall enter in said Circuit Court, on the first day of its session, copies of the process against him in said cause, and shall also then and there appear and enter special bail in the cause, if special bail was originally requisite therein, according to the law and practice of the United States and its Courts, then these presents and obligations shall be void, or otherwise to remain in full force.

*The following is the final order made by his Honor the presiding Judge:

A petition having been filed by the defendant in this cause at the time of entering his appearance herein on the 24th day of April, 1871, praying for the removal thereof into the Circuit Court of the United States for the District of South Carolina, pursuant to the Statutes of the United States, in such case made and provided; and the said petitioner having offered good and sufficient security, pursuant to the directions of and as required by the said statute, now, on motion of J. N. Nathans and Porter & Conner, of counsel for the petitioner, and after hearing Messrs. Magrath & Lowndes, the counsel for the plaintiffs, it appears to the satisfaction of this Court that the present suit is commenced in this Court by citizens of South Carolina against the citizen of another State, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

And it is hereby further declared and ordered, that this Court accepts the surety offered by the petitioners, and that the said cause be removed for trial into the next Circuit Court of the United States for said District of South Carolina, pursuant to the said statutes; and that this Court do proceed no further therein, and that all proceedings in this Court in the said cause be and the same are hereby stayed.

The plaintiffs appealed on the following grounds:

I. That under the laws of the United States the said order of removal ought not to have been made.

II. That one plaintiff being a citizen of the State of New York and the defendant a citizen of the State of Michigan, the Circuit Court of the United States in the State of South Carolina has not jurisdiction of the

III. That the bond filed in the cause is insufficient, because the surety thereon is an attorney of the Courts of South Carolina.

Magrath & Lowndes, for appellants: The chief question in the case is this:

Can an action, brought in the State of South Carolina, by a citizen of New York and a citizen of South Carolina, against a citizen of Michigan, who was found in the State of South Carolina at the time of serving the process, be removed to the Circuit Court of the United States, for the District of South Carolina?

*64

*I. The case is to be governed by the provisions of the 12th Section of the Act of 1789.

II. Under this Section such cases only are removable from the State Court to the Circuit Court of the United States, as might, under the laws of the United States, have been brought before the Circuit Court of the United States by original process.

has not jurisdiction of an action in which one plaintiff is a citizen of the State where the action is brought and the other plaintiff a citizen of another State.

I. The Act of 27th July, 1866, relied on in the argument for the defendant, § 1, 14 Stat., 306, by its terms applies-

1st. To actions against an alien and a citizen of the State where the action is brought.

2d. To actions by a citizen of the State in which the action is brought, against a citizen of another State and a citizen of the State in which the action is brought.

The Act of March 2d, 1867, § 1, 14 Stat., 558, also relied on for defendant, applies to actions between a citizen of the State in which the action is brought, and a citizen of another State, when one of the parties will make and file in the State Court an affidavit, stating that he has reason to and does believe that from prejudice or local influence, he will not be able to obtain justice in the State Court.

The provisions of these statutes have no direct bearing on the case under discussion, and do not, even by implication, enlarge the jurisdiction of the Circuit Court of the United States.

II. "If a suit be commenced in any State Court against any alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, and the matter in dispute exceeds the aforesaid sum of \$500, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of his entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the District where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and such copies being entered as *65

aforesaid in such Court *of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."—Act 1789, 1 Stat., 79, § 12.

"If this suit could not have been maintained under the 11th Section of the Judiciary Act, (Act 1789) if it had originated in this Court, it cannot be removed to this Court under the 12th Section, so as to subject the party to the jurisdiction of this Court."-Beardsley v. Torrey, 4 Wash. Cir. R., 286.

"Looking to the 11th and 12th Sections of the Act, (1789,) as to this point (i. e., of juris-III. The Circuit Court of the United States | diction) it seems absolutely impracticable to

make any solid distinction between them."—Story, J., Smith v. Rines, et al., 2 Sumn., 346.

III. "The Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. * * * And no civil suit shall be brought before either of the said Courts against an inhabitant of the United States, by any original process in any other District than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."-Act 1789, 1 Stat., 78, § 11.

Under the terms of the Act, it is clear that Robb, if the only plaintiff, could not have brought this action.—Shute v. Davis, Pet. C. C., 431. Could he have done so with Lowndes, the other plaintiff?

"The Court understands these expressions, i. e., the suit is between a citizen of the State where the suit is brought and a citizen of another State, to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the Federal Courts."—Strawbridge v. Curtis, 3 Cr., 267.

This principle has been uniformly maintained.—New Orleans v. Winter, 1 Wheat., 91; Cameron v. Roberts, 3 Wheat., 596.

"It is a well settled rule, and, indeed, has not been denied by the defendant's counsel, that when the jurisdiction of this Court de-*66

pends *on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each must be competent to sue in the Courts of the United States."—Ward v. Arredondo, 1 Paine Cir., 410.

In Smith v. Rines, just quoted above, the cause which had been removed to the Circuit Court was remanded, because some of the parties were not subject to the jurisdiction.

"It is clear that no suit can be removed from the State Court by either party, where some of the parties, plaintiffs or defendants, are citizens of the State where the suit is brought, and the others of a different State."
—Wilson v. Blodget, 4 McLean, 363.

"If the jurisdiction depend on the character of the parties complainant, and they consist of a number of individuals, every one of them must be competent to sue."—Adams v. Douglass, McCabon, 235.

"The citizenship of each individual must be such as to make the suit removable." Brightley's Digest, quoting—Hubbard v. Northern R. R. Company, 25 Verm., 715; Board of Missions v. McMaster, 4 Am. L. R., 529; Welch v. Tennent, 4 Cal., 203.

The argument was urged that this case can be removed because it could have been removed if it had been brought by the assignor of the plaintiffs. The answer is that there can be no removal where there could not have been original jurisdiction, and this argument would prevail only, if it can be shown, (what is not pretended,) that the plaintiffs could have originally brought their suit in the Federal Court, because their assignor could have done so.

In Bushnell v. Kennedy, 9 Wal., 387, the right of removal was sustained, although there was no allegation that the assignors of the plaintiffs could have sued in the Federal Court. But in that case the suit as regards citizenship of the parties could have been well brought in the Federal Court, and the only principle established was that the limitation or jurisdiction imposed in cases of assignment by the eleventh Section of the Act does not apply to cases under the twelfth Section. Its purpose, says the Court, was under the eleventh Section to prevent frauds on the jurisdiction, but it has no office in the twelfth Section. The Court decides nothing as to the other restriction upon jurisdiction arising out of citizenship, and leaves the law on that point unchanged. In fact, the twelfth Section, in express terms, imposes that restriction.

The other question in the case is whether
*67

an attorney of the State *Court is "good and sufficient surety." Rule X, Rules of Practice, it is submitted, decides the question in the negative.

Porter & Conner, contra:

Robb and Lowndes are assignees of Wagner.

Wagner is a citizen of South Carolina.

Parker is a citizen of Michigan.

If the suit were by Wagner v. Parker, the right to sue in United States Courts would be clear, and the right of removal to United States Court would be clear.

Is the right lost because suit is in name of assignee, instead of in name of assignor?

Under the 11th Section of Judiciary Act, the assignor of a chose in action not negotiable is to be deemed the party plaintiff, and if he is competent to sue the defendant, the United States Court has jurisdiction.—Irvine y. Lowry, 14 Pet., 292.

The question always is, who are the real parties in interest?—Smith v. Kernochen, 7 How., 216; McNutt v. Bland, 2 How., 15; Sheldon v. Sill, 8 How., 441.

The Courts have jurisdiction in a case between citizens of the same State, if the

plaintiffs are only nominal plaintiffs for the party, or the suit is between a citizen of the use of an alien.—Brown v. Strode, 5 Cr., 303. State where the suit is brought, and a citi-

The real party in interest is the assignor. The assignee can have no greater rights than his assignor had.—Sere v. Pitot, 6 Cr., 335.

One of the rights existing at time of the contract was the right to be sued in United States Court.

The creditor cannot, by assignment, deprive defendant of this right, and select the forum.

The right of assignee to sue is by statute of South Carolina, 1798, (5 Stat., 330.)

At common law, action would have to be in name of obligee of the bond.

The Act only authorizes assignee to sue in his own name.

And the result, that whether the suit is to be in the United States Court or State Court, depends upon whether the assignee sues in his own name or in name of assignor, and the jurisdiction depends not on the real interest, but on the technical mode of proceeding.

Suppose they sued "T. D. Wagner for the use of C. T. Lowndes and Jas. Bobb," then the case of Irvine and Lowry is exactly in point.

*68

*Sept. 15, 1871. The opinion of the Court was delivered by

MOSES, C. J. Robb, a citizen of New York, and Lowndes, a citizen of South Carolina, brought their action in the Circuit Court, for the County of Charleston, against Parker, a citizen of Michigan, as assignees of a bond executed by Parker to Wagner, who is a citizen of South Carolina.

Parker (at the time of his appearance) filed a petition in the said Court, praying that the cause may be removed for trial into the next Circuit Court of the United States, to be held in the District where the same was pending, pursuant to the statutes of the United States in such case made and provided. The order having been granted by the presiding Judge of the Circuit Court of the said County of Charleston, the plaintiffs, by appeal, move this Court for its reversal, and among the grounds is the following:

"That one plaintiff being a citizen of the State of New York, and the defendant a citizen of the State of Michigan, the Circuit Court of the United States, in the State of South Carolina, has not jurisdiction of the cause."

By the eleventh Section of the Judiciary Act, (1 Stat., 78,) it is provided, "that the Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law, or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a

party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." The jurisdiction so conferred is controlled by a limitation, which denies "cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

The twelfth Section of the same Act provides for the removal of causes from State Courts, by the following enactment: "That if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit was brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum of \$500, * * and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the District where the suit is * it shall then be the duty pending, *69

of the State Court to accept the surety *and proceed no further in the cause; and the cause shall then proceed in the same manner as if it had been brought there by original process."

The petition must be considered as claiming the removal of the cause from the Circuit Court of the State to that of the United States, under the said twelfth Section, because there is no averment in his petition, which can bring its prayer within any of the provisions of the other Acts of Congress in relation to the same subject-matter.

The eleventh Section of the Act of 1789 defines the jurisdiction of the Circuit Courts, and it would seem to be a proposition too evident by its mere announcement to require the support of argument, that no cause could by virtue of the twelfth Section be transferred from a State to a Circuit Court, which was not originally cognizable in such Court.

The same principles which govern its jurisdiction, under the eleventh Section, regulate the right of removal under the twelfth.

The case of Bushnell v. Kennedy, 9 Wal., 387 [19 L. Ed. 736], holds that the limitation of jurisdiction imposed by the eleventh Section of the Act, in cases of assignment, does not apply to causes under the twelfth Sec-This is a different construction from tion. that which had theretofore been supposed to be given by the Supreme Court. It has, however, no application to the matter submitted for our judgment, because Wagner, while he held the bond, could have sued Parker in the Court of the United States. It may be of significance in one regard, and that is, that the Court which is of final authority in questions of this character, in the construction of the statutes which regulate the jurisdiction of

the citizenship of the parties before such Courts, the test, than that of those who may have an interest in the issue involved, but yet are not in the cause, either seeking to enforce rights as plaintiffs, or resisting demands as defendants.

It has been held in various cases that only such parties as by original process might have been brought before the Circuit Court are removable to it from the State Court, under the said 12th Section.—Smith v. Rines, 2 Sum., 238 [Fed. Cas. No. 13,100]; Beardesly v. Torrey, 4 Wash. Cir. Rep., 286; Wilson v. Blodget, 4 McLean, 363 [Fed. Cas. No. 17,792].

The Federal Courts have no jurisdiction, unless each of the parties be competent to sue, or liable to be sued, in those Courts.-New Orleans v. Winter, 1 Wh., 91 [4 L. Ed. 44]; Ward v. Arredondo, Paine, 410 [Fed. Cas. No. 17,148]; Coal Company v. Blatchford, 4 Wall., 172 [20 L. Ed. 179].

*70

*Chief Justice Marshall, delivering the opinion of the Court, in Strawbridge et al. v. Curtiss et al., 3 Cranch, 267 [2 L. Ed. 435], said: "The words of the Act of Congress are, 'where an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State.' The Court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the Federal Court; that is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those Courts.'

The argument on the part of the petitioner is, that under the 11th Section of the Judiciary Act, the assignor of a chose in action not negotiable is to be deemed the party plaintiff, and if he is competent to sue the defendant the United States Court has jurisdiction.

This proposition not only so connects the 11th and 12th Sections as to make them indivisible, in the face of the ruling in Bushnell v. Kennedy, but subjects the rights of the assignees to the relation which the assignor once bore to the instrument, although by the assignment he has parted with his interest by an absolute transfer. It is also urged that the question always is, who are the real parties in interest? In responding to that question, is the Court to look beyond the record, and extend its inquiry outside of the facts which the brief before it presents?

It is not difficult to understand, in Browne v. Strode, 5 Cranch, 303 [3 L. Ed. 108], and McNutt v. Bland, 2 How., 10 [11 L. Ed. 159], where it appeared by the pleadings who were the real parties in interest, how the Court sustained the jurisdiction, though the suits were in the name of a nominal plaintiff of the same State as that of which the defend- ord? In a suit, for example, brought by or

the Circuit Courts, is more disposed to make ant was a citizen. It was because, by positive law, the real parties could not use their own names, but were obliged to sue in those of a public officer, who had no interest in, or control over, the case.

> The character of the parties must in general be ascertained by the record. rights or interests did Wagner, so far as appears by the pleadings, have in the bond? The assignment transferred whatever he so had therein to Robb & Lowndes, and the Act of 1798, 5 Stat. at Large, 330, empowered them to bring suits in their own names, reserving to the obligor any discount or defence which he would be entitled unto, had the action been brought in the name of the obligee. The plaintiffs in the suit below had the legal right to the bond. Our Act of 1798 "turned the right of the assignee of such an instrument as the Act relates to from an equitable

*71

to a legal *right, so as to enable him to sue in his own name."-See Jervey v. Strauss, 11 Rich., 382.

Such has always been considered by our own Courts the effect of an assignment under the Act. Wagner and Lowndes thus appear in the action with the legal title and the right to sue in the State Courts; and yet it is contended that although they are themselves incapable of suing in the United States Courts, they can be transferred to that jurisdiction because their assignor, if he had retained the bond, might have there brought action upon it.

Can the right of action by these plaintiffs in the United States Court be determined by the relation which Wagner, the assignor, bore to the defendant Parker? What control could Wagner exercise over the suit if it was removed as prayed? So far as appears by the record, he did not originate it, cannot discontinue it, or otherwise direct the course of its proceedings. Without the ordinary power of a plaintiff over his own suit, his relation to the cause is to be regarded so potential, that it is actually to be the test through which its cognizance by the Courts of the United States is to be determined.

Does the Judiciary Act, in regulating the jurisdiction of the Circuit Courts as between citizens of different States, depend on the character of those having the real interest, or of those who are the parties directly before them? Let the clear and emphatic language of Chief Justice Marshall, in Osborne v. The Bank of the United States, 9 Wheat., 856 [6 L. Ed. 204], decide: "The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the recagainst an executor, the creditors or legatees late after verdict, and is without sufficient of his testator are the persons really concerned in interest; but it has never been suspected that if the executor be a resident of another State, the jurisdiction of the Federal Courts would be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction is, that jurisdiction is neither given or ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just *72

*stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the Court? The plain and obvious answer is, because the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record.'

Holding that the 12th Section of the Act of 1789 does not include the parties to the cause, the motion is granted, and it is ordered and adjudged that the order of the Circuit Court be reversed and annulled.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 72

CRAVEN v. ROSE.

(April Term, 1871.)

[Appeal and Error \$\ighthanpoond 238.]

A motion in arrest of judgment cannot, in first instance, be made in the Supreme Court, but must be made in the Circuit Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1389; Dec. Dig. &—238.]

[Easements \$\sim 61.]

In an action on the case to establish a private right of way by prescription, over defendant's land, it is necessary to show, not merely a user for twenty years, but also that the user was adverse; but where the evidence does not put in issue the character of the user, it is not error for the presiding Judge, in charging the jury that there must have been a user for twenty. jury that there must have been a user for twenty years, to omit to add that such user must have been adverse, and explain what amounts

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. €==61.1

[Easements \$\sim 69.]

In such an action, proof that defendant, and be under whom he claimed the land, also

used the way, is immaterial.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. \$\infty\$=69.]

[Pleading \$\ightharpoonup 433.]
Objection to the declaration that it does not set forth with sufficient certainty whether plaintiff claims by grant or prescription, comes too

ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1469; Dec. Dig. \$2433.]

[Easements & 26.]
Where proprietors of adjoining lots contribute strips of land to form a lane common for the use of both, and one after he has acquired a right of way by prescription over the other's strip, puts an obstruction on his own strip, that does not destroy his right of way over the other's land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 80; Dec. Dig. © 26.]

[Appeal and Error \$\infty\$ 1004.]

The Supreme Court cannot grant a new trial for excessive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. € 1004.]

Before Thomas, J., at Yorkville, March Term, 1870.

This was an action on the case for obstructing a private way. His Honor made a report of the case for this Court, which is as follows:

"This was a suit ordered by Chancellor Lesesne, in a decree in equity for damages. He had granted a perpetual injunction against the defendant obstructing the lane in question.

"The lane which had been obstructed was situated between the lots of plaintiff and defendant, in the town of Yorkville, and had been used by them and the former occupants of the two lots for fifty years. Occasionally, during that time, gates had been erected *73

*at the street entrance of the lane by the defendant and his predecessors, but free access was never denied to the plaintiff or his predecessors. The lane terminated at the rear of their lots, and was used only by the parties. The obstructions were thrown up on the defendant's side of the lane. He dug a well, threw out the dirt, mounted cotton bags upon it, and there was evidence that he, or some one, put a gas-pipe on the top of the bags, like a piece of artillery. The plaintiff's wife testified to facts of an aggravating nature upon the part of defendant. This defendant denied.

"I left the question of damages to the jury, charging them as set forth in the sixth ground of appeal. They found \$600 for plaintiff."

The defendant appealed, and moved this Court in arrest of judgment, and, failing in that motion, then for a new trial, on the grounds:

First. Because His Honor erred in charging the jury, that if they believed the plaintiff, or any of the persons under whom he claims title, had uninterrupted use of the lane in dispute, for a period of twenty years, then the plaintiff was entitled to recover; whereas it is submitted that His Honor should have charged the jury that the use

jury what amounted to such adverse use.

Second. Because His Honor erred in charging the jury, that the plaintiff was entitled to recover, although it was proved that the plaintiff and his friends, and those under whom the defendant claimed, used said lane in common during the whole time since it had its origin; that the plaintiff had proven such adverse, continuous and exclusive use as entitled the plaintiff to prescribe there-

Third. Because the plaintiff, in framing his declaration, should have set forth, with sufficient certainty, whether claimed by grant or prescription, which he has not done.

Fourth. Because His Honor should have charged the jury that said lane, being originally by a contribution of three feet of plaintiff's and nine feet of defendant's lot, and so continued until 1847 or 1848, when a former owner of plaintiff's lot obstructed the same by erecting a chimney on the lane, covering at that point the whole of the three feet belonging to plaintiff's lot, was such an obstruction as extinguished any right by prescription that might, previous to said time, have been acquired; or, in any event, would be barred after ten years.

Fifth. Because the said defendant, and those under whom he claimed, used said lane in common with plaintiff and his privies,

*74

*nine feet of which belonged to them, and there was no such adverse use as entitled the plaintiff to prescribe therefor.

Sixth. Because the damages given by the jury were excessive, and against the charge of His Honor, as it was proved that the defendant put the obstructions in said lane on his own lot, and under legal advice, to try the question of right claimed by the plaintiff.

Seventh. Because the verdict is, in other respects, contrary to law and the evidence.

Smith, for appellant:

There was no evidence of continuous, exclusive and adverse use of the lane.-Rowland v. Wolfe, 1 Bail., 56; Campbell v. Wilson, 3 East., 294; 2 Stark, 664; Pierce v. Richardson, 5 Rich., 186; Lawton v. Rivers, 2 McC., 452; Watt v. Trapp, 2 Rich., 121; Ferguson v. Witsell, 5 Rich., 280.

Wilson & Witherspoon, contra.

Sept. 16, 1871. The opinion of the Court was delivered by

WILLARD, A. J. This was an action of trespass on the case for obstructing a private way claimed by plaintiff over the land of defendant. The plaintiff obtained a verdict.

A motion in arrest of judgment cannot, in the first instance, be made here, but must be made before the Circuit Court. It appears, however, that judgment has been entered upon the verdict, so that the defendant | tion of the adverse character of the plaintiff's

must be adverse, and have explained to the is in a position to take advantage of any erroneous rulings or decisions of the Circuit Court. The first exception involves the proposition that, in stating the rights of the parties, it was error for the Circuit Judge to charge that, if the jury believed the plaintiff, or any persons under whom he claimed title, had uninterrupted use of the land in dispute, for a period of twenty years, then the plaintiff was entitled to recover, without adding that such use must be adverse, and unless he explained to the jury what amounted to such adverse use.

This proposition involves two considerations: first, whether it was indispensable to the proof in support of the plaintiff's demand, that it should appear that his use of the way was adverse to the right of the defendant as owner of the soil; and, second, whether, under the evidence, the statement of such proposition was requisite.

What must be shown to establish a right of way over the land of another is well and fully stated in Lawton v. Rivers, 2 McC., 445 [13 Am. Dec. 741]. The result of what was

*75

held in that case is, that one pre*scribing for a right of private way over the land of another, must show use, occupation and enjoyment of the identical way claimed, under and in conformity to the right alleged, and adverse to the right of the owner of the land over which the way is claimed, continued and uninterrupted for a period of not less than twenty years next preceding action brought.

What the character of that user must be, so as to render it adverse to the right of the owner of the land, has to some extent been considered and settled by our Courts. Rowland v. Wolfe, 1 Bail., 56 [19 Am. Dec. 651], it was held that "merely passing over an uncultivated and unenclosed forest, which is common to every one, cannot, by any lapse of time, give a right to any individual." The same proposition is advanced in Lawton v. Rivers, 2 McC., 445 [13 Am. Dec. 741], and was applied in Watt v. Trapp, 2 Rich., 136.

It is not necessary to show that the user was, during the period of prescription, the subject of controversy between the parties; on the contrary it is said in Lawton v. Rivers, on the authority of Lord Cooke, that it must be shown to be peaceable.

It is enough, if the user of the way cannot be reconciled with the right of the owner of the land otherwise than by supposing a license or grant, and in that case, if sufficient time has elapsed, the law presumes a grant.

It was requisite, therefore, to a verdict for the plaintiff, that it should appear that the right of way claimed by him was adverse to the right of the defendant in the sense above stated.

If the evidence put in dispute the ques-

user of the way, and if the Circuit Judge, in stating the rights of the parties under the law, in effect, excluded this consideration from the matter submitted to the jury, then such ruling would have to be regarded as erroneous.

But the evidence presents no such ground of dispute. The way had been used for the required period over land enclosed and occupied by the defendant, and during a portion of the time the plaintiff had, in order to use it, opened a gate placed by defendant at the entrance of the lane. It therefore followed that if the user was of the character stated in the evidence, it was necessarily adverse. The jury have found these facts in favor of the plaintiff, and their finding must be regarded, in view of the only legal conclusion that can arise from the evidence, as substantially ascertaining the character of the plaintiff's user as adverse to the right of defendant as owner of the land. Under *76

*these circumstances we cannot hold that the omission of a formal reference to the necessity of proving an adverse user was erroneous.

The proposition involved in the second exception is, that the user of the land by the plaintiff, in common with the defendant, precluded the plaintiff from claiming an exclusive or adverse possession in himself. proposition is again advanced under the fifth exception. It does not follow, because the defendant used the way or allowed others to use it, that it was to be regarded as in a legal sense an user in common. Defendant's right of way resulted from his ownership of the land; plaintiff's user, as established, is to be ascribed to prescriptive proof of a grant from defendant. There is here no community of interest, traceable to a common title, that can preclude the plaintiff from maintaining in himself a several right to the way in question. It follows that the fact that defendant used the lane was immaterial to the issue, and no error is involved in failing to submit it to the consideration of the jury. The objection to the declaration comes too late, after verdict, and is without sufficient ground. It was enough for the plaintiff to count on a possessory title, without alleging whether the grant in which it had its origin is susceptible of direct proof or only to be presumed.

The fourth exception involves the proposition that when proprietors of contiguous lands contribute strips of land to form a lane common for the use of both, and one of such proprietors interferes with the common use, to any extent, by placing an obstruction to such use on any portion of his land included in the lane, the other proprietor is at liberty to assume the exclusive use of his

portion of the land covered by the lane, and to exclude the other from the use of the same. To give any force to this proposition it must be assumed that the right of way in question exists either by grant or prescription, for if otherwise it is not to be regarded as a fixed right, but as depending on a license, which, being withdrawn, the privilege ceases. In the case of a right derived by grant or prescription, the only effect of such an interference would be to give the injured party a right to an action for his damages, or, if the nature of the interference admitted of it, a remedy by injunction. It cannot be regarded as in the nature of a partition of a common right of way, for the parties are not connected as tenants in common of a right of way, but each has a several right of way over so much of the other's land. They are connected only as it regards the consideration upon which the user is supposed to depend. To conceive that they are tenants in common of a right of way would

*77

involve *the idea of one having a right of way over his own lands, which cannot be. What might be the effect of such an interference, in the case supposed, as should amount to the entire destruction of the right of way of one over the lands of the other, in respect of the correlative right of the former, need not be considered, for such a case is not involved in the proposition put forth by the defendant, nor in the evidence before the jury.

The fact of interference, on the part of the plaintiff, with the lane, might be of importance, had that interference changed the identity of the way so that plaintiff could not make claim to the same way for the whole period of twenty years; (Lawton v. Rivers, 2 McC., 445 [13 Am. Dec. 741];) but the interference complained of is of an entirely different character. The right of way claimed in this action is over the land of defendant, whereas the obstruction, as alleged, was on the land of plaintiff; nor was the obstruction such as at all affected the identity of the way within the rule laid down in Lawton v. Rivers. This exception is not well taken.

If the evidence in the case is fully before us, it is difficult to understand how damages could have been given to the amount of \$600; but we are not authorized to set the verdict aside on the ground of excessive damage; authority for that purpose is possessed by the Circuit Court.

The appeal must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 77

CREIGHTON v. PRINGLE.

(November Term, 1870.)

[Husband and Wife \$\ightharpoonup 31.]
A deed of marriage settlement, after declaring the uses, trusts and limitations of the settlement, contained a clause empowering the trustees to sell, &c., the proceeds to be held subject to the same uses, &c., "as are hereinafter set forth," &c. Held that the term "hereinafter" must be read hereinbefore.

[Ed. Note,—Cited in Waring v. Cheraw & D. Co., 16 S. C. 425.

For other cases, see Husband and Wife, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig. 🗪31.]

[Husband and Wife \$31.]

A mistake, apparent on the face of the deed, may be corrected without the aid of extrinsic evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. €=31.]

[Husband and Wife = 31.]

A power contained in a deed of marriage settlement, authorizing the trustees to sell or exsettlement, authorizing the trustees to sell or exchange, and re-invest, on the written request of baron and feme, or the survivor, and hold the proceeds, &c., "to the same uses, trusts, intents and purposes, and subject to the same declarations and limitations," as are set forth in the deed, is not exhausted by a sale of the original corpus but attaches upon the proceeds, and the corpus, but attaches upon the proceeds, and the property purchased therewith.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 190; Dec. Dig. \$31.]

[Trusts \$\infty\$=192.]
*Where a power authorizing the sale of trust property, or the investment of trust funds requires the observance of certain formalities, as for instance, the written request of a cestui que trust, such formality must be strictly observed.

[Ed. Note.—Cited in Manning v. Screven, 56 S. C. 82, 34 S. E. 22.

For other cases, see Trusts, Cent. Dig. § 245; Dec. Dig. \$\infty\$192.]

[Trusts C=218.]

Bonds given in 1858 or 1859, and well secured by mortgages or real estate, and a bond given in 1853, and secured by a mortgage of slaves, were collected in Confederate currency by a trustee in April or May, 1863, and the proceeds invested in Confederate bonds: Held that the trustee, if he had a discretion to collect and re-invest, which was denied, had committed a breach of trust in receiving payment in a de-preciated currency, and investing in Confederate bonds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 310-313; Dec. Dig. ⊇218.]

[Trusts @== 181.]

A trustee, holding bonds payable to himself, has the legal estate, and, in the absence of fraud or collusion, may discharge the obligors by accepting payment in a depreciated currency; though as between the trustee and cestui que trust, such acceptance amounts to a breach of

[Ed. Note.—Cited in Pickens v. Dwight, 4 S. C. 362; Koon v. Munro, 11 S. C. 153; Hyatt v. McBurney, 18 S. C. 217, 220.

For other cases, see Trusts, Cent. Dig. § 234; Dec. Dig. \$\infty\$181.]

[Trusts @=218.]

Where a trustee committed a breach of trust by receiving Confederate money and investing it in Confederate bonds, the receipt of interest in Confederate money by a cestui que trust, who was sui juris, did not amount to such acquiescence as precluded her from complaining of the breach of trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 310-313; Dec. Dig. \$\sime 218.]

[Trusts \$\infty\$ 131.]

By deed of marriage settlement the property, real and personal, of feme, was conveyed to trustees, to the joint use of baron and feme during their joint lives, then to the use of the survivor for life, remainder to the issue of feme, with limitations to the use of the trustees to preserve contingent remainders, and with power to the trustees, on the written request of baron and feme, or the survivor, to sell or exchange, and reinvest, and hold the proceeds, &c., subject to the same uses, trusts, limitations and declarations: Held that the legal estate remained in the trustees, notwithstanding the statute of uses, it being necessary for them to retain it in order to carry out the purposes of the settlement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. € 131.]

[Trusts \$\infty\$ 131.]

Where the trust is to preserve contingent remainders, or where the trustee has duties to perform in the execution of the trust which make it necessary for him to have the legal estate, the use will not be executed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. €=131.]

[Trusts \$\infty\$ 131.]

Trusts of personal property are not within the Statute of Uses.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. \$\sim 131.]

Before Johnson, Ch., at Charleston, November, 1867.

The case is fully stated in the decree of his Honor, the Circuit Chancellor, which is as follows:

Johnson, Ch. In the year 1821, Ann Mc-Pherson and James Creighton were married, and a short time before their marriage they executed a deed of marriage settlement, by which they conveyed all the property of the former, which consisted of lands and negro slaves, to James McPherson, James E. Mc-Pherson and James R. Pringle, "and to their heirs and assigns," for them "and the survivors of them, and the heirs, executors, administrators, and assigns of such survivor," to hold, after the solemnization of the marriage, subject to the following trusts, to wit: For the use of Creighton and wife during their joint lives, and for the use of the survivor for life; and after his or her death, for the use of the child or children of the wife, who might be living at the death of the survivor, the child or children of any deceased child to represent the deceased parent.

After specifying the parties for whose benefit the property was to be held, the following clause occurs in the deed, to wit: *79

"And it is *further stipulated and agreed upon by and between all the parties to these presents, and the true intent and meaning hereof is, that in case the said James Creighton and Ann McPherson shall, at any time hereafter, during the coverture, or the survivor of them at any time after discoverture shall think fit, and beneficial to their interest or the interest of the survivor of them, the said James Creighton and Ann McPherson, to have the aforesaid real and personal property, or any part thereof so granted, released and transferred to them, the said James Mc-Pherson, James E. McPherson, and James R. Pringle, sold and disposed of, or exchanged for other property, real or personal, and the sale moneys invested in public or private stock, or in any bank stock or fund, or laid out at interest on private security, or in the purchase of any other estate, real or personal, that then the said James McPherson, James E. McPherson, and James R. Pringle, or the survivor or survivors of them, and the heirs, executors, and administrators of such survivor, on being thereunto requested in writing by them, the said James Creighton and Ann Mc-Pherson, jointly, if in their joint life time, or by the survivor of them, the said James Creighton and Ann McPherson, if after the death of either of them, shall absolutely sell, dispose of, convert or exchange the same or any part thereof, as the case may be; and from and immediately on such sale, exchange or substitution or investment, have and hold the moneys arising or to arise from such sale, exchange or substitution, and the property, real and personal, stocks, certificates, choses in action, or other evidences of debt, acquired by means thereof, to and for and upon the same uses, trusts, intents and purposes, and subject to the same declarations and limitations as are hereinafter set forth, limited and declared of and concerning the hereinbefore granted, released and assigned premises, and to and for no other use, intent, or purpose whatsoever."

In the subsequent portion of the deed, there are no "uses, trusts, intents, purposes, or declarations and limitations" set forth.

The three trustees named in the deed, after the marriage, took possession of the property, and continued to manage it, in accordance with the terms of the conveyance, until the year 1840, when James R. Pringle, who survived the other two, died, leaving the defendant, James R. Pringle, and three other children surviving him.

In 1837, James Creighton died, leaving surviving him his widow, Ann Creighton, and four children, to wit: Susan, who has since

*80

in*termarried with John S. Mitchell; Ann, who has since intermarried with J. Fraser Matthewes; John McP. Creighton and James M. Creighton, who died in 1862, leaving one child, Martha Ann, who is still an infant, surviving him. All of whom, as remaindermen, are made parties, as complainants, in the Bill.

The trust property was managed exclusively by Mrs. Creighton, from 1840 until the early part of 1853, when, upon her application to the Court of Equity, by petition, George M. Coffin and the defendant, James R. Pringle, were, by the order of the Court, appointed and substituted as trustees, in lieu and stead of the original trustees, and, by the terms of the order, were invested with the same power and charged with the same trusts as those mentioned in the deed.

On the first day of February, 1853, Mrs. Creighton requested George M. Coffin and James R. Pringle, as trustees, in writing, to sell the land conveyed in the deed of marriage settlement to Loftus C. Clifford for the sum of \$28,025, and to take his bond, conditioned for the payment of the same, in one, two, three, four, and five years from that date, bearing interest from date, and payable annually, and to secure the same by a mortgage of the land; and also to sell all the negro slaves belonging to the trust estate, to Loftus C. Clifford, for the sum of \$30,210, and to take his bond, conditioned for the payment of the same, on the same time and terms they were directed to take the other bond, and to secure the same by a mortgage of the negroes. The sales were made and the bonds were taken by the new trustees, in accordance with the terms of the written request.

For several years the interest on these bonds were collected by the trustees, as it became due, and was paid over by them to Mrs. Creighton, and in 1858 or 1859, George M. Coffin, who was the active trustee, with the knowledge and consent of James R. Pringle, received from L. C. Clifford \$20,082, as a part payment of the principal due on the bond, conditioned for the payment of \$30,210, and invested the same, without requiring the written request of Mrs. Creighton, in the separate bonds of different persons, each of which was well secured, at the time, by mortgage of real estate, and in 1861, he received, with the consent of his co-trustee, from L. C. Clifford, on the same bond, as a part of the principal due on the same, \$1,150, and invested in Confederate States scrip of the \$15,-000,000 loan, which, I think, was done on the written request of Mrs. Creighton.

*81

*On the 30th of June, 1862, George M. Coffin, after having duly executed his will, in which James R. Pringle and William C. Bee were appointed the executors, died, leaving the same in full force, and since his death, the executors named in his will, as such, qualified, and are now executing the same.

In March or April, 1863, James R. Pringle, as surviving trustee, received Confederate

notes in payment of the principal of the Londs which George M. Coffin had taken for \$20.082, and, about the same time, received in the same currency \$2,970.30, from L. C. Clifford, as a payment of a part of the principal on the bond which he had given for \$30,210, and invested the whole amount of \$23,052.30 in the bonds of the Confederate States of America.

There is no evidence from which I can infer that Mrs. Creighton had requested, in writing, James R. Pringle to make the collections, or that after making them she had so requested him to invest the amount in Confederate bonds, though, from the whole evidence, I am satisfied that soon after it was done she was informed of the fact, notwithstanding there is much that is conflicting in the testimony.

The bill was filed for the removal of James R. Pringle, and the appointment of a new trustee in his place, and for a decree against him and the estate of George M. Coffin for the amount of principal which they had received from Clifford, on his bond, during the life time of Coffin, with interest, and a decree against James R. Pringle for the amount of principal which he received from Clifford on his bond, after the death of Coffin, with interest, on the ground that under the powers conferred upon them by the deed of marriage settlement, they had no right to receive payments of any portion of the principal of the Clifford bonds under any circumstances; and especially, not without the written consent or request of Mrs. Creighton; and in case of failure in sustaining the propositions settled above, the bill prays for a decree against James R. Pringle for the whole amount he collected and invested in Confederate States bonds, on the ground that he should not have received payment of bonds which were given before the commencement of the war in Confederate States Treasury notes, after they had become greatly depreciated in value, and that, after receiving them, they should have been invested in better securities than they were.

In the argument of complainants' solicitors, it was insisted that by the terms of the deed of marriage settlement, the common law heir at law of James R. Pringle, Sr., was the
*82

trustee of the pro*perty, and that all the acts of the appointed trustee were done without any legal authority, and that they were therefore void. Had the heir at law at common law of James R. Pringle, Sr., upon his death, asserted his right to manage the trust estate, I think that his claim would have been well founded; but having failed for thirteen years to do it, the action of the Court in making the appointment of new trustees, without requiring him to be made a party for the purpose of enabling him to assert his rights, must be sustained, and especially as he is not now

before the Court asserting his rights, and as the parties in the bill make no complaint that the appointment was improperly made.

After the trust property was once transferred by the trustees, upon the written request of Mrs. Creighton, could there be any further dealing with the corpus of it by them; and if so, was it necessary for them to get even the written request of her before doing it, are the important questions to be decided in the case, and are questions of difficult solution and upon which I have not been able to find any authorities.

Where bonds and other choses in action are given to trustees to hold for the benefit of specified parties, without any direction in the instruments conveying them as to the manner of collecting and reinvesting, the established rule seems to be, that the trustees have the same right to collect and reinvest the funds collected which they would have in collecting choses in action due to themselves, and reinvesting the proceeds, provided it be done judiciously. Does the deed of marriage settlement in this case specify "how the moneys arising or to arise from such sale are to be collected or reinvested" by the trustees?

All that is stated in the deed is, that they are to hold them "to and for and upon the same uses, trusts, intents, and purposes, and subject to the same declarations and limitations, as are hereinafter set forth, limited and declared of and concerning the hereinbefore granted, released and assigned premises, and to and for no other use, intent or purpose whatsoever." Is there enough in the deed, taking it as a whole, to justify the Court in concluding that the word "hereinbefore" must be substituted for the word "hereinafter" in the above. If so, I think it necessarily follows that no change of investment of the Clifford bonds, or any portion of them, could be made by the trustees without first getting the written request of Mrs. Creighton for that purpose, and that even the payments made by Clifford, beyond the interest, could not be sustained. I am strongly disposed

*83

*to think that the former of the two words was intended for the latter; but having no authority to sustain me in so deciding, I must take the deed as I find it, and give due force to the words as used, and, in doing that, my judgment is, that the trustees had the right to collect the Clifford bonds and to reinvest the proceeds without requiring the written request of Mrs. Creighton for that purpose, just in the same way as if they had been conveyed to them in the deed without any restrictions as to their collections, and the reinvestment of the proceeds. Was it. judicious to make the collections that were made, at the time they were made, in Confederate States Treasury notes? The evidence is, that the most prudent and judicious persons were in the habit, at the time the notes, that were well secured, in Confederate survivor of the three named trustees, his, money, which, according to our decisions, is the true test, and, as I think, the correct one.

After the collections were made was it judicious to invest the money in Confederate This was sanctioned by the Act of bonds? the Legislature of 1861, by the constant practice of this Court, by the habit of our most prudent business men, and by the complainant, Ann Creighton, in selling her house and lot in the city of Charleston, in 1863, and in investing the proceeds of the sale in Confederate bonds. From the previous decisions in this State, there can be no doubt upon that

The defendant, James R. Pringle, holds for the complainants the bond of L. C. Clifford, conditioned for the payment of the sum of \$30,210, and the other bond, on which there is a balance of principal due, amounting to the sum of \$6,082.33, and interest is due on each of the above amounts from the 10th day of January, 1864.

James R. Pringle makes no objection to the appointment of a new trustee in his place, and from what I infer to be the state of feeling between the parties, I think that another trustee should be substituted to execute the trusts of the deed.

It is ordered and decreed, that the above opinion be taken as the judgment of the Court.

It is also ordered and decreed, that it be referred to Master Gray, to ascertain and report a fit and proper person to be appointed trustee in the place of James R. Pringle, and also the terms on which he should be appointed.

It is ordered and decreed, that further orders may be taken at the foot of this decree. And it is also ordered and decreed, that *84

the complainants do pay *their costs, and that the defendant, James R. Pringle, do pay the costs of the defendants.

The complainants appealed, and now moved this Court to reverse the decree, upon the grounds:

- 1. Because, as by the deed of settlement the power to "sell, dispose of, convert or exchange" the settled property, is given to three trustees by name, or "the survivors or survivor of them, and the heirs, executors, and administrators of such survivor, to be exercised by them, as the agents of the tenants for life, only should they, the trustees, be thereunto" requested in writing by them or by the survivor of them, without such written request, this power had no existence, or remained dormant.
- 2. Because James R. Pringle, the defendant, and Mr. George Coffin never did or could execute, under the deed of settlement, this or any other power, either as agents or trustees, for the reason that by the express lim-

payments were received, of collecting old itations of the said deed, on the death of the the "survivor's, heirs, executors, or administrators," became the trustee, through whom alone the power could be effectually exercised; their possession, therefore, of the property after January, 1853, was not under and by virtue of the deed, but merely as the agents of the life tenant, with notice of the trusts and the existence and rights of the remaindermen.

- 3. Because the decretal order of the Court. substituting Messrs, Coffin and Pringle, with their consent, in the place of the three deceased trustees, was made upon the ex parte application of Mrs. Creighton, to which neither of the remaindermen nor the successor of the surviving trustee (in whom alone was the legal estate), were parties, or even had notice. The Court, upon such an application, could confer no other or greater power than could Mrs. Creighton herself, without the aid of the Court; in taking possession, therefore, under this order, with full knowledge of the limitations of the deed of settlement, they made themselves, as to the remaindermen, trustees in their own wrong, and subjected themselves thereby to the responsibilities of rightful trustees, without acquiring any of their powers, rights, or immunities.
- 4. Because the Chancellor has assumed that it is not competent for any one to complain that Messrs. Coffin and Pringle were not the rightful trustees, or call in question their acts, except the "heir, executor, or administrator of the survivor of the original trustees," and as he is not before the Court complaining, and has never complained. even the remaindermen whose rights, though *85

vested, had not, *and have not yet come into possession, are bound, and must submit to the consequences of their mal-administration.

- 5. Because if in the sale of the settled property to Mr. Clifford in 1853, the power "to sell, dispose of, convert or exchange," was legally exercised, it was also thereby exhausted; and no other or further power remained either in the trustees or Mrs. Creighton; the power to change or vary the investments at pleasure, is by the deed given to no one.
- 6. Because if the power was not exhausted, and Messrs. Pringle and Coffin were regularly in, under the deed, as trustees, yet the investment by them, in 1858 and 1859, of trust moneys, in the bonds of Dr. Heriot, Mrs. Heriot, and Mrs. Perroneau, and in 1861 in a Confederate bond, not having been made on "the written or any other request of Mrs. Creighton," were not in conformity with the conditions of the power; but, as the said investments, with the exception of the Confederate bond, were subsequently approved by Mrs. Creighton, and, with the ap-

probation of the remaindermen, from thenceforth became a part of the trust property, "subject to the same uses, trusts, intents, and purposes as are set forth, limited, and declared of and concerning" the property originally settled, and to no other use, intent, or purpose whatever, it was incumbent on the said trustees to shew that in permitting the obligors, in April, 1863, to pay their bonds with Confederate notes, at their par value, and reinvesting in Confederate bonds, they acted on the written request of Mrs. Creighton, and in good faith.

7. Because if Mrs. Creighton, the tenant for life, is concluded by her subsequent approval of the various changes made in the trust estate by Messrs. Pringle and Coffin, or by Mr. Pringle, as survivor, of which there is no evidence, as the Chancellor admits, the remaindermen certainly are not, but his Honor has entirely overlooked their rights; they are the children of the marriage, and, therefore, purchasers for valuable consideration of the trust estate; the decree ought, at least to have been in their favor.

8. Because a trustee has only such powers as are expressly conferred on him by the instrument creating him trustee, and to which he must refer his acts; none will be implied—he is the creature of the deed. The Chancellor is, therefore, wrong in assuming that if the word "hereinafter," in the deed, though in by mistake, cannot be read "hereinbefore," as it should be, if necessary, the power of the trustees was unlimited, and the

*86

written request of Mrs. Creighton *not necessary to empower them to exchange the said bonds for worthless paper, and reinvest in still more worthless bonds.

6. Because, if, as a general rule, a rightful trustee may, without the consent or knowledge of his cestui que trust, receive payment of bonds held by him in trust, and payable in gold, whenever the obligors may offer to pay, it certainly is not the right of a trustee, especially one in his own wrong. to exchange such bonds for an equal amount of unsecured, depreciated paper currency; and if there ever was in this State any law or custom, or course of business having the force of law, as the Chancellor seems to think. which gave to obligors the right to tender such paper as a legal satisfaction of their bond, and imposed on the holders the obligation to receive the same as equal to gold, the said law or custom, or course of business, was in violation of the obligation of contracts, and the Constitution of the United States; still less is it the right of a trustee. whether in rightfully or of his own wrong, to exchange such paper without the consent of his cestui que trust, for depreciated and depreciating bonds, unsecured and payable upon a contingency, and retain them until they became worthless.

10. Because if Messrs. Coffin and Pringle were rightfully in as trustees, they did not, in the management of the trust estate, act with good faith and that care and circumspection which a man of ordinary prudence would exhibit in the conduct of his own affairs.

11. Because the currency for which the bonds of Dr. Heriot, Mrs. Heriot, and Mrs. Perroneau, were exchanged by Mr. Pringle, was not, in any sense of the word, money, or the representative of money, and it, as well as the bonds purchased with it, were void in their inception by the first Article, tenth Section, of the Constitution of the United States. It is not, therefore, sufficient to refer to the fact that such paper was current and generally received as money, or was legalized by the Act of 1861. It is not the right of a trustee, especially one in his own wrong, to jeopardize the trust property by a doubtful investment.

DeTreville, Campbell, Rutledge & Young, for appellants.

McCrady & Son, Dunkin, W. A. Pringle, contra.

Brief of appellants' counsel:

This case may be considered under the following aspects:

I. As if these trustees were in, regularly, under the deed, and invested with all powers belonging to the original trustees, i. e., as if the case was against the original trustees.

*87

*II. As if these trustees were regularly in, under the deed, but as trustees appointed by the Court unable to execute the discretionary powers of the deed.

III. As if these trustees were mere volunteers or trustees de son tort, because of the irregular mode of their appointment.

IV. In reference to the question of acquiesence on the part of the life-tenant and the remaindermen.

Propositions under the first aspect:

1. That the trustees in question held the bonds into which the original property had been converted upon the same grants, and with the same powers as affected the original property, and in not complying with the provisions of the deed prescribing the mode by which the character of that property could be legally changed, are responsible for any and all losses which have occurred to it by reason of any such unauthorized change.

Subsidiary propositions and authorities:

1. The word "hereinafter" must be considered a mistake, and the mistake must be rectified by construing it "hereinbefore," or rejecting it as insensible, otherwise the deed is inconsistent, as "same" and "hereinafter" cannot both be retained without repugnancy.—2 Cru. Dig., 241, § 6; 244, § 8; 245, § 12: 247, § 25; 248, § 31.

2. The word "hereinafter" must be reject-

because if allowed its natural import it must defeat the manifest intent of the deed .-- 2 Cru. Dig., 242, § 2, note 1; Hogeson v. Bussy, 2 Atk., 91; Arundel v. Arundel, 1 M. & K.,

The word "hereinafter" being rejected as insensible, or construed "hereinbefore," the deed is consistent with itself, and the trustees hold under the same trusts and affected with the same powers as the original trus-

3. The terms of the deed are that any property substituted for the original property must be held subject "to the same uses, declarations and limitations," and these terms include powers.—1 Sug. on Pow., 4, 118; 2 Fearne, 10, § 26; Ib., § 108 and 109; 1 Fearne, 563, note.

It is unquestioned there was no written request of Mrs. Creighton for change of investment as deed required, and such being the case.

4. The trustees, not complying with the requirements of the deed, are responsible.-Hill on Trust., 369, 3d Amer. Edit.; Cocker v. Quayle, 1 Russ & Mylne, 535; Hopkins v. Myall, 2 Russ & Mylne, 86.

*88

*If contended that the power was exhausted by a single exercise, complainants insist:

5. That power was not so exhausted.—1 Sug. on Pow., 515; Palk v. Lord Clinton, 12 Ves., 48.

6. That, if exhausted, trustees being without special power of any kind under the deed, are responsible for changing of their own will. A good investment, secured by real estate, for a doubtful, uncertain contingent and unlawful investment.-Lewin, 512; Lewin, 523; Howe v. Earl of Dartmouth, 7 Ves., 150; Sitwell v. Bernard, 6 Ves., 544, and Notes; Seidler v. Turner, 8 Ves., 621; Angell v. Dawson, 3 Y. & Coll., 317; Lud v. Godfrey, 4 Mad., 454; Franklin v. Frith, 3 Bro. Ch., 434; Hill on Trustees, 382; Brice v. Stokes, 11 Ves., 324; Quick's Ex. v. Firken, 1 Stock N. P., 802; Adam v. Shaw, 1 Sch. & Lefroy, 272; Goodwyn v. Clewly, 2 Belw., 30; Glover v. Glover, McM. Eq., 153; Ackerman v. Smith, 4 Barb. Sup. Ct. R., N. Y., cited 10 Am.; Dig. No. 49, p. 421; Freeman v. Cook, 6 Ired. Eq., 373.

From the above authorities and positions it is clear that these trustees are liable either because they did not fulfill the requirements presented in the deed, for changing investment, or because they without authority or necessity and voluntarily changed investments, and to the injury of those interested.

Propositions under the second general aspect in which this case may be considered:

Prop. II. That whether trustees appointed by a Court can execute the discretionary powers of the deed or not is practically unimportant in this case, because if they can-

ed as insensible, or construed "hereinbefore," toot, their position is that of trustees without special authority or power changing investments, which has been already considered. And if they can, then, under this deed, the questions would again be, was the power a continuing power? or was it exhausted by a single exercise?

> As to trustees appointed by Court executing discretionary powers.-1 Sug. on Pow., 152, § 73; Att. Gen. v. Doyley, 4 Vin. Abridg., 485, and 2 Eq. Ca. Abridg., 194; Cole v. Wash, 16 Ves., Sr., 46 and 47; Hebbard v. Lamb, Amb., 309; Lewin, 712 and 713; Lewin, 530 to 636; Bartley v. Bartley, 3 Drew., 384; Brum v. Chalmers, 4 De. Gex., M. & G., 528; Byrne v. Byrne, 19 Brad., 66; Vide also the Act 1796, 5 Stat., 277.

> Propositions under the third general aspect in which the case may be considered:

Prop. III. That these trustees were mere *89

volunteers or trustees de *son tort, because of the irregularity of their appointment. The legal title of the trust estate, together with the powers connected with it, being in the heir at law, and executor or administrator (as the case might be) of the last surviving trustee, who have never been legally divested of it; and, as such, are affected with the stringent responsibility belonging to such relations.

1. As to what persons can legally execute a power.—1 Sug. on Pow., 141 to 148; 1 Sug., on Pow., § 66, 147; Hill Trustees, 473; Hawkins v. Kemp, 3 East, 410; Cooks v. Crawford, 13 Simons, 91; Eaton v. Smith, 2 Beav., 239; Sharp v. Sharp, 2 B. & Ald., 405; Lewin, 266; Martin v. Price, 2 Rich. Eq., 412.

2. As to whether the legal estate of the trust passed out of the persons in whom it was vested by law upon an ex parte proceeding to which they were not parties.-Act of 1796, 5 Stat., 277; Ex parte Knust, Bail. Eq., 489, 491; McNish v. Guerard, 4 Strob. Eq., 80; Thomas v. Higham, Bail. Eq., 222; Tilley v. Wostenholm, 7 Beav., 425.

Propositions under the 4th general aspect in which the case may be considered.

Prop. IV. That there is no such acquiescence on the part of the life-tenant as will bar her claim to the relief sought, and if it shall be held that the life-tenant is barred, the remaindermen unquestionably are not.

1. As to acquiescence of the life-tenant. Randall v. Errington, 10 Ves., 427; Walker v. Symonds, 3 Swans., 65; McDonnell v. Harding, 7 Sim., 178; Brice v. Stokes, 11 Ves., 319; Lewin on Trusts, 774-778; Hill on Trust., 382; Cockerel v. Cholmeley, 1 Russ. & Myl., 425; Fish v. Miller, 1 Hoffman's R., 280.

2. As to remaindermen, their rights, and how barred.—Smith v. Poyas, 2 Des., 65; Gardner v. Hardee, 2 McC. Ch., 32; Smith v. Harp., 272; Spear v. Spear, and Simms v. Logan, 9 Rich. Eq., 184; Lewin on Trusts, 723 and 774; Hill on Trust., 382; Bennett v. Cole, 5 Simons, 181, and 2 M. & K., 225.

Case affecting the general liability of trustees, and such liability as affected by questions connected with Confederate currency or securities.-Miller v. Sligh, 10 Rich. Eq., 249; Bryan v. Mulligan, 2 Hill. Ch., 360; Odell v. Young, McM. Eq., 155: Glover v. Glover, McM. Eq., 153; McKnight v. Mc-Knight, 10 Rich. Eq., 157; Hext v. Porcher. 1 Strob. Eq., 171; Boggs v. Adger, 4 Rich. Eq., 410: Townley v. Sherbourne, White & Tudor's Lead. Cas. in Eq., vol. 2, part 2, p. 280.

*Liability as affected by questions connected with Confederate currency or securities.—Manning v. Manning, 13 Rich. Eq., 410; Snelling v. McCreary, 14 Rich. Eq., 291; Wiseman & Finley v. Hunter, 14 Rich. Eq., 167; McPherson v. Lynch, 14 Rich. Eq., 121; McLure v. Steele, 14 Rich. Eq., 105; Thorington v. Smith, Sup. Ct. U. S., MS.

Brief of counsel for appellees:

First. That the consent of the cestui que trust to the marriage settlement was necessary only in the first instance, and only as to the property conveyed in the deed, and that when the consent was once given, it was exhausted, and the trustees held the trust property with such powers as generally belong to trustees, without special directions.-2 Bl. Com., 169; Fearne 1, § 1; 2 Cru. Dig. 261-3; 4 Kent Com., 306; Smith v. Packhurst, 3 Atk., 134; Garth v. Cotton, 3 Atk., 751; Adams' Eq., 302; Tilley v. Wasterholme, 7 Beav., 424.

Second. That after the sale to Mr. Clifford, under the direction of Mrs. Creighton, upon a credit of five years, it was within the duty and authority of the trustees to receive the payment upon the bonds of Mr. Clifford when they became due, and to invest the proceeds.—Hill on Trust, 383, 483, 508; Wood v. Harman, 5 Mad., 368; Wormley v. Wormley, 8 Wheat., 421; Lewin on Trusts, 433; Hill on Trustees, 370.

Third. That the trustees did exercise such discretion, judgment and diligence in the management of the trust fund as the houest and prudent men of the State exercised in the management of their own affairs, and that this is the only rule laid down in this State as the measure of responsibility for a trustee.-Hext v. Porcher, 1 Strob. Eq., 170; Boggs v. Adger, 4 Rich. Eq., 408; Spear v. Spear, 9 Rich. Eq., 184.

Fourth. That the receipt by the trustees of the Heriot and other bonds in the notes of the Confederate States, and their investment of these and other receipts in Confederate securities, were legal and legitimate.-

Deas, 2 McC. Ch., 143; McLean v. Blower, Boggs v. Adger, 4 Rich. Eq., 408; Manning v. Manning, 13 Rich. Eq., 410; Hale v. Shannon, Appeal Court of So. Ca.; McPherson v. Gray, 14 Rich. Eq., 121; Pearce v. Venning, 14 Rich. Eq., 84; A. A. So. Ca., 1861; Thorington v. Smith & Hartley, Am. Law Reg., vol. 8, No. 12, p. 739; Phillips v. Hooker, Am. Law Reg., vol. 7, No. 1, p. 16; Knight v. Plymouth, 1 Dickens, 28; Thompson v. Brown, 4 John. Ch., 629; Ex parte Belsher,

Amb., *218; Snellins v. McCreery, 14 Rich. Eq., 291; McClure v. Steel, 14 Rich. Eq., 105; Rainsford v. Rainsford, Rice's Eq., 69.

Fifth. That it is a mistake in fact that James R. Pringle, the appellee, is not the heir at law and administrator of his father, James R. Pringle, the surviving trustee, because he was both his heir at law and administrator, and there was no issue tendered on that point, there being no allegation to the contrary made in the complainant's bill .-Pringle v. Ravenel, 3 Rich. Eq., 342.

Sixth. That the substitution of trustees by the decree of the Court of Equity, of 25th January, 1850, was according to the course of the Court, and bound all who may claim under the deed .- Cursus Curiæ est lex Curiæ, Broom's Maxims, 98; Omnia præsumuntur solemniter esse acta, Ib. 729; Ex parte Tunno, Bail. Eq., 395; Ex parte Krust, Ib. 489-491; Ex parte Copeland, Rice's Eq., 49; Ex parte Smith, 1 Hill Ch., 140; Ex parte The Greenville Academy, 7 Rich. Eq., 481; Dean v. Sanford, 9 Rich. Eq., 425; McNich v. Guerard, 4 Strob. Eq., 79; A. A. 1796, 5 Stat., 229.

Seventh. That if the cestuis que trust are not bound by the acts of the substituted trustees, the property in the hands of Mr. Clifford, or emancipated by legal authority, and sold to him by trustees who had no right to represent them, is liable to the trust, and that Mr. Clifford is not a party to the proceedings.- 1 Story Eq., Sec. 308; 4 Kent, 308.

Eighth. That if the trustees had no right to receive the payment of the Clifford or Heriot bonds, in Confederate Treasury notes, their receipts and satisfaction for these amounts are void, and the mortgages given to secure these amounts may be set up for the benefit of the remaindermen, and that the mortgagors are not parties to these proceedings.—1 Story Eq., Sec. 308; 4 Kent, 308, and Cases in Note b; Murray v. Ballou, 1 Johns. Ch., 566; Simons v. Bank, 5 Rich. Eq., 270; Lewin on Trusts, 724 et seq.

Brief of Mr. McCrady's argument upon construction of Marriage Settlement:

This deed is only a conveyance to uses, and as such, creates nothing but legal estates in the cestuis que uses. It is in the usual form of such conveyances, namely, lease and release; a form which rests upon the statute of uses. It is described as such, 2 Bl. Com., See also Ib., 327.

The conveyance to the trustees is directly to the uses as follows: (1.) Until the marriage to the use of the grantor, Miss Mc-Pherson, now Mrs. Creighton. (2.) Immedi-*92

ately upon the marriage, to the *use of both Mr. and Mrs. Creighton for their joint lives. (3.) Upon the determination of that estate to the use of the trustees to preserve contingent remainders, and to suffer Mr. and Mrs. Creighton and their assigns to take rents, and so forth, to joint and equal use. (4.) Upon death of Mrs. Creighton, to use of the survivor, Mr. Creighton and his assigns for and during his life, without impeachment of waste. (5.) Upon the death of Mr. Creighton, "to the sole use and behoof of Mrs. Creighton and her assigns for and during the term of her natural life, without impeachment of waste. (6.) Upon determination of the estate of survivor to the use and behoof of the trustees, to preserve the contingent remainders thereinafter limited, but in trust to permit the survivor and his or her assigns during life to receive and take the interest, profit, issues and emoluments of the premises. (7.) And from and immediately after the decease of such survivor, then to and for such child and children of Mrs. Creighton as may be living at the time of the death of such survivor, to be equally divided between them if more than one, and their heirs, free from all trust, limitation, restriction and agreement whatever. And if such child should die, leaving issue, such issue to take what the parent would have taken if such parent had survived such survivor.

We need go no further with the limitations of the deed, but it is proper to say, that should Mrs. Creighton survive all her issue, the reversion would he hers, as the deed makes no provision for the case, as there is no limitation over. At the date of this deed, the operation of the statute of uses was well known and recognized in this State, and deeds to operate under that statute were common.

As to the first, that the operation of the statute of uses was well known and recognized, we have the case of Ramsay v. Marsh, 2 McC., 252, in the year 1822. This deed bears date 1821. In this case it was applied to a devise, and probably the only question in the case was as to the propriety of applying it to a devise, which had another clause supposed to bear upon its interpretation.

The words of the statute are given, 2 Bl. Com., 332, "That when any person shall be seized of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, &c., of

339. "A Fourteenth Species of Conveyance.", and in the like estates as they have in the use, trust or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, *93

in such quality, *manner, form and condition as they had before in the use." Blackstone adds: "The statute thus executes the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession, thereby making cestuis que use complete owner of the lands and tenements, as well at law as in equity."-4 Kent., 292. The case of Ramsay v. Marsh, points out the modes of creating "trusts" as distinguished from "uses executed" in a brief and plain way. The language of the deed shows that it contemplated the statute of uses, and that the omission of the technical words after the words in the habendum, giving the fee, that is the words, "go to the use of the trustees and their heirs, but in trust, and so forth," was designed; for it expressly provides that upon the determination of either of the life estates during the lives of the life tenants, that it shall then be to the use of the trustees for preserving contingent remainders.

There is nothing for a trustee to do. There is no separate estate to the wife free from her husband's control. There is nothing for the grantees to do but in case of destruction of a life estate by the act of life tenants. when a trust is raised by the deed, by adding the technical words "to the use and behoof of the trustees to preserve contingent remainders.

The remainders, then, to the issue are altogether contingent, and contingent upon the uncertainty of the persons who are to take. In this present case, Matthews and his wife are complainants. Since the last argument. Mrs. Matthews has died, and her issue come in her place. No decree in this case can bind the children of Mrs. Matthews who come in (if ever) as purchasers.

And so in case of the death of any of the other complainants in the life time of Mrs. Creighton leaving issue, the issue would not be bound.

Admitting that there was a breach of trust in any sense, Mrs. Creighton, at least to the extent of her interest and estate, is bound, by her consent or acquiescence, which the Chancellor, upon full consideration of the testimony, declares she gave.-Adams Eq., 62; Hill on Trust., 526.

Oct. 16, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. The facts of the case are few, and so fully recited in the decree of the Chancellor, that their repetition here is unnecessary.

In his construction of the powers conferred

on the Trustees, and *the obligation imposed upon them by the marriage settlement, (of which a copy is filed as an exhibit to the bill,) he has regarded them, so far as refers to the relation in which the Trustees stood to the investment of the proceeds of the Clifford bonds, as resulting from the particular words in which they are expressed, irrespective of any control over them by the purpose and intention so plainly appearing throughout the whole instrument. He admits that if "he had authority to sustain him in deciding that in the clause authorizing the sale or exchange 'of the settled property,' the word 'hereinbefore' could be substituted for 'hereinafter,' " (which former word he was strongly disposed to think was intended,) "it would necessarily follow that no change or investment of the Clifford bonds, or any portion of them, could be made by the Trustees without first getting the written request of Mrs. Creighton for that purpose, and that even the payments made by Clifford beyond the interest could not be sustained."

To show mistake in a written instrument, it is not indispensable that it should be by positive proof, through testimony outside of the instrument itself. If the use of a word, insensible in its application to the other parts of the deed, is to control its meaning so as to destroy the obvious intent, and even vitiate the purpose which is apparent from the context with which it is associated, then the rule which requires that such a construction shall be given to a will or deed as shall be consistent with its manifest intent, to be collected from it as a whole, will be entirely defeated. It is impossible, even from the first reading of the settlement, not to perceive that the word "hereinafter," in the clause referred to, is senseless-no "uses, trusts." &c., following it-while great precision has been used in their declaration in the clause which precedes it. The word "same" generally refers "to something which is mentioned before." To retain the word "hereinafter," makes the deed inconsistent with itself, besides requiring the Trustees to hold the proceeds of the property sold, or that for which it might be exchanged, on trust and conditions which could never attach, because not expressed. The plain intent of the deed is that the same uses, conditions, limitations, &c., which are annexed to the land and negroes specifically mentioned, were to attach on the property which was to be derived from their sale or exchange.

In Story's Eq. Juris., Section 168, it is said, "and for the same reason, equity will give effect to the real intent of the parties, as gathered from the objects of the instru-*95

46

though the instrument may be drawn up in a very inartificial and untechnical manner. For, however just in general the rule may be, quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est, yet that rule shall not prevail to defeat the manifest intent and object of the parties, where they are clearly discernible on the face of the instrument, and the ignorance, or blunder, or mistake, of the parties has prevented them from expressing it in the appropriate language." A Court of Equity looks "to the general intent of the deed, and will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it."-Arundel v. Arundel, 1 M. & K., 316; Stapilton v. Stapilton, 1 Atk., 8.

We have no hesitation in holding that the word "hereinafter" must be read "hereinbefore."

There is nothing in the deed to show that the power to the husband and wife, or the survivor, to direct a sale or exchange of the property conveyed, was exhausted by a single exercise of it, and that the same authority which they had in that regard as to the land and negroes specifically conveyed, did not extend to the proceeds of their sale, or the securities in which such proceeds might be invested.

The property all came by the wife, and the right to sell or exchange was a privilege for her benefit, and that of her intended husband. The fund settled was not to remain permanent, but to be of a character and kind preferred by the husband and wife or the survivor. If the sale or exchange of the real and personal estate conveyed by the deed, thus made on the written request of the cestui que trust, subjected the substituted securities to a conversion at the sole discretion of the trustees, the preference of the cestui que trust might be unavailing, to resist the new change proposed by the trustees. Such a result was never contemplated by the deed. It would be a singular perversion of the privileges reserved to the cestui que trust.

The deed, in plain and comprehensive terms, conveyed the right to the wife, as the survivor, by providing that the trustees "shall have and hold the moneys arising, or to arise, from such sale, exchange or substitution, and the property, real and personal, stock, certificates, choses in action, or other evidences of debt acquired by means thereof, to and for, and upon, the same uses, trusts, intents and purposes, and subject to the same declarations and limitations as are hereinafter (hereinbefore) set forth, limited

*96

and declared of and *concerning the hereinbefore granted, released and assigned premises, and to and for no other use, intent or purpose whatsoever." One of the intents ment, and the circumstances *of the case, al- and purposes is that, if the husband and wife, or survivor, should think it fit and beneficial to their interest, or the interest of the survivor of them, to have the aforesaid real and personal property, or any part thereof, so granted, released and transfered to the said trustees, sold and disposed of, or exchanged for other property, and the sale moneys invested in public or private stock, &c., or other property, the said trustees, on being thereunto requested, in writing, by the said husband and wife, or the survivor, shall absolutely sell, dispose of, convert or exchange the same, and so forth.

The plaintiffs do not complain of the investment in the bonds of Mrs. Heriot and others, in 1858 or 1859, of the money received on the Clifford bond. They acquiesced in the investment as judicious and properly secured, but they aver that the acceptance of Confederate Treasury notes on the Clifford and the said Heriot and other bonds, and their investment in stock of the Confederate States, was a breach of trust by the trustees, for which they are responsible. Mr. Hill, in his work on Trustees, 369, says: "If the power authorizing an investment of the trust funds on personal security require the observance of any formality, those formalities must be duly observed. Thus where the consent in writing of the wife is made requisite previous to such an investment, the trustees will be liable for investing with only her verbal consent." We see nothing in the evidence leading to a belief that the investment in Confederate bonds was at the written request of Mrs. Creighton, and we concur with the Chancellor in his conclusion on this question of fact.

Concede, however, as contended for by the defendants, that her written request was not necessary, yet they will be equally liable. The money collected on the Clifford bonds (save as to a portion, to which we shall hereafter advert,) and loaned to Mrs. Heriot and others, was equal to gold and silver coin, and was secured by mortgages of real estate. Was it consistent with the duty required by the trust confided to them, to accept payment in a depreciated currency, and invest the same in Confederate bonds? The trustees in fact paid for the mortgages so much in gold, and acknowledge satisfaction of them, in the receipt of a depreciated currency, for the amount due upon their face. Did they make any attempt even to show that in open mar-

*97

ket, in 1863, a bond secured *by mortgage of real estate would only have brought the sum due upon it, to be paid in the then prevailing currency? We may well infer from their failure to do so, that the value of such a bond would have commanded in such currency far more than the sum which it called for. If the trustees therefore had been invested with a discretionary power as to the investment, their course prevents them from its form rests upon the statute of uses; and

claiming the benefit of the rule which sometimes excuses an error of judgment by a trustee, in doing or omitting to do the same act which prudent and cautious men in like matters do or abstain from doing in their own affairs.-Mayer and Wife v. Mordecai, 1 S. C., 383 [7 Am. Rep. 26].

What we have said as to the payment and investment of the Heriot and other bonds will apply to the \$1,150 received in 1861, on the Clifford bond, for \$30,210, by the said G. M. Coffin, with the consent of the said J. R. Pringle, and to the \$2,970.30, on the same bond, by the said J. R. Pringle, in 1863. The balance due upon the bond was comparatively small, and it was secured by a mortgage of a large number of slaves. The bonds had been due for some years. The trustees having indulged, while the payment in a sound currency could have been compelled, there was neither a legal or a moral obligation on them to favor the debtor at the expense of the trust estate. The payment and investment cannot be approved.

It is objected by the defendants, "that if the trustees had no right to receive the pavment of the Clifford or Heriot bonds, in Confederate Treasury notes, their receipts and satisfaction for these amounts are void, and the mortgages given to secure these amounts may be set up for the benefit of the remaindermen, and that the mortgagors are not parties to these proceedings." The bonds were sacrificed by the parties having the legal title and right to receive, and unless there was fraud or collusion between them and the obligors, they must be held paid. It is sufficient to refer to the ruling of this Court on the like proposition, in the case of Mayer and Wife v. Mordecai.

We see no evidence of any acquiescence on the part of Mrs. Creighton. Her mere acceptance at times of the interest in the only currency then existing, cannot prevail to bind her to the unauthorized acts of the trustees. Her wants may have compelled her to accept the interest in whatever medium which could answer her necessary purposes. Confederate money could procure, though at an exorbitant rate, the means of subsistence, and these she was obliged to have.

*A point made in the argument before us. by one of the counsel for the defendants, remains to be considered. Although it resists the right of the plaintiffs to the relief sought by the bill, on the ground that they have no equitable claim in the premises as against these defendants, yet it was not made in the answers, nor does it appear to have been referred to in the argument before the Chancellor.

It is claimed that the deed is only a conveyance to uses, and as such creates nothing but legal estates in the cestuis que use; that the Court is asked to apply the consequences | 1 McC. Ch., 233; Ex parte Gadsden, 3 Rich., which follow from this relation by holding that the whole estate vested successively in the parties, who, by the death of those who precede them in interest under the deed, are entitled to take. The doctrine contended for is founded on the statute of 27 Hy., 8, generally known as the statute of uses. It transfers the possession to the person entitled to the use, and so unites the possession with the use, that he who had the right to the use was seized of the land to the same extent, and "in quality, form and condition as he before had in the use."

The statute, however, is only applied to simple trusts, whether designated in the instrument as a use or a trust, and operates upon the first use, notwithstanding the intention of the settler.-Lewin, 246. Although its purpose was to vest the legal and equitable estate in the person for whose benefit the use was created, yet very soon after its enactment its whole purpose was defeated, by its being considered by the Court that there were modes of creating a trust by which the legal estate would still remain in the trustee, and the equitable interest be enjoyed by the cestui que trust. Mr. Hill, in his work on Trustees, page 63, says: "It has been laid down that there are three direct modes of creating a trust of lands, notwithstanding the statute: 1st. Where a use is limited upon a use, as in a conveyance or devise to the use of A and his heirs, to the use of B and his heirs; 2nd. Where copyhold or lease-hold estates are limited by deed or will to a person upon any use or trust; and, 3d. Where the donee to uses has certain trusts or duties to perform which require that he shall have the legal estate."

If the trust is supposed to be created under the third mode, "the point to be considered is, whether any legal interest at all, passes to him under the limitation."-Hill, 229. The question has been so fully considered and decided by the cases in our own Courts, that it would be but a loss of time

*99

to collect and compare the English *authorities which have led our Judges to their conclusions. Nor is it necessary to encumber this opinion with the particular words of the instrument to which our Courts in the several cases gave construction. It may, in general, be said, that if any agency in regard to the trust, or its proceeds, is imposed on the trustees—if by the terms of the instrument, an active participation in the management of the trust property is required of him-if a discretion is allowed to the trustees in relation to the trust estate—and, in general, where the object of the trust would be otherwise defeated, a trust will not be held executed.—Posey v. Cook, 1 Hill, 413; Rice v. Burnett, Speers Eq., 579; Jenney et al. v. Laurens, 1 Speers, 356; Wilson v. Cheshire, under this settlement. There was created, in

467; Williman v. Holmes, 4 Rich. Eq., 475.

In Rice v. Burnett, Trustee, Speers Eq., 579 [42 Am. Dec. 336], the marriage settlement conveyed real and personal estate of the intended wife to a trustee, to be held for her until marriage; after that event in trust to permit the husband and wife to use and possess the said property for and during their joint lives, with the same right to the survivor during his or her life, with contingent remainders over, and with a provision that the property might be sold or exchanged with the joint consent, in writing, of trustees and cestui que trust, and the proceeds vested in other property subject to the same trusts.

It was held that the legal title to the real estate remained in the trustee. The provisions of the settlement in that case were not unlike those in the one before us. Here, to say nothing of there being a use to Creighton and wife during their coverture, and that the interposition of the trustees was necessary for the protection of the property against the creditors of the husband, and that, by the terms of the deed, the estate was to vest in the child or children of the wife living at the death of the survivor, "free, clear and absolutely discharged of and from all and every further and other conditions, trust," &c., (which implies the continuance of the trust until such event,) by plain and express words, on the written request of the husband and wife, or either of them as survivor, the trustees are required to sell and dispose of the real and personal estate, or any part of it, or to exchange the same for other property, and the proceeds, or the substituted property, are to be held by them upon the same terms, trusts, &c. For the performance of this duty, it is absolutely necessary that the legal estate should be in the trustees. The sale or exchange and reinvestment are to be made by them, and if the use is to be held execut-

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ed, how could the trustees perform the *duties so imposed by the deed? If the trust is to be regarded as executed in the husband and wife, and the legal estate entirely out of the trustees, what estate did the purchaser take in the land and negroes conveyed by the trustees? In Barker v. Greenwood, 4 M. and W., 429, Parke, B., said: "It is also equally clear and settled that if the testator distinctly expresses his meaning to be, that the trustees are to interfere in the execution of the trusts, and certain duties are cast upon them; if he order, for example, that they shall receive the rents, &c., there they take the legal estate, whatever words may be used; and the case of Gregory v. Henderson, 4 Taunt., 772, shows that very slight circumstances of this nature are sufficient for this purpose." There is something more to be considered as to the execution of the trust favor of the trustees, a trust to preserve con-1 on the 23d May, 1871. This opinion will be tingent remainders. This necessarily vested filed with it. them with a legal title, for how could such interest be secured except through the legal title of the trustees? If the trust was executed, the settlement then conferred a power which, by no possibility, could be executed. In Biscoe v. Perkins, 1 V. and B., 485, "A devise to trustees, their heirs, &c., for the life of the devisor's son, to support contingent remainders, in trust to permit him to receive the rents for life, and after his decease to his first and other sons, in tail: an equitable estate in the son: the legal estate in the trustees, with a legal remainder to the first and other sons." In Jenney et al. v. Laurens, Judge Evans, delivering the opinion of the Court, said: "So also in trusts for the use of a married woman, or to preserve contingent remainders, the very end and design of the trust would be defeated if the statute executed it."

It is not to be forgotten that the settlement here conveyed both real and personal property. All was sold to one purchaser, Clifford, who gave separate bonds for the land and the slaves. The contest between the parties is as to the amount received on the bond for the slaves. "But trusts of chattels are not within the purview of the Act." -Lewin, 7: and language to the same effect will be found in all the elementary treatises on the subject. In Watson v. Pitts, 2 McMul., 298, the Court said: "The statute of uses has no application to trust of personalty." In Rice v. Burnett, the learned Chancellor, delivering the opinion of the Court, said: "Neither the statute of uses, nor the 10th section of the statute of frauds, embrace personal property." See also Youmans v. Buckners, 3 Hill, 222; Ramsay v. Marsh, 2 McC., 255 [13 Am. Dec. 717]; Harley v. Platts, 6

*101

Rich., 315. *Deference to the counsel who pressed his argument on this part of the case with so much earnestness, has induced us to expend more time in the consideration of it than was due to any effect which possibly could be given to it in the cause, for suppose the use was executed, and the statute of Henry VIII applied to deeds or devises of personal property, how could it avail these defendants, who cannot and do not deny the sale of the slaves to Clifford, taking his bond for the purchase money-its collection—the investment of the proceeds in the Heriot and other bonds, and the reinvestment of the proceeds of these in Confederate securities? If they did not act in the premises under the deed, then they are mere volunteers, and having converted a trust fund, to which the plaintiffs are entitled, must be subject to all the liabilities of other constructive trustees.

MOSES, C. J., and WILLARD, A. J., con-

3 S. C. 101

BROWN v. DUNLAP.

(April Term, 1871.)

[Carriers \$\infty\$131.]

The English rule of Court of Hilary Term, 1834, that in an action on the case against a common carrier, the plea of not guilty will not operate as a denial "of the receipt of the goods by the defendant, as a carrier, for hire, or of the purposes for which they were received," was not made of force in this State by the 87th rule of Court of 1837.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 573; Dec. Dig. ⊕ 131.]

Before Thomas, J., at Lancaster, October Term, 1870.

This was an action on the case against the defendant as a common carrier. There was a verdict for defendant, and his Honor granted a new trial, by an order as follows:

"The presiding Judge charged the jury in this case that the defendant having plead the general issue alone, he was precluded from shewing that he was not a common carrier, as alleged in the declaration. This was done under the impression that the rules of Hilary Term were made of force by the rules of Court in 1837. The charge in the declaration was, that the defendant was in charge of a ferry at which the plaintiff lost his team. The defendant wanted to show that the ferry was the property of another person.

*102

*"On hearing the argument of counsel, for and against this motion, it is ordered that a new trial be granted, and that the verdict of the jury and judgment thereon be vacated."

The plaintiff appealed from the order granting a new trial, and now moved this Court to vacate the same, on the grounds:

- 1. Because, by the 87th Rule of Court, as adopted by the late Court of Appeals of this State, in the year 1837, the rules of Westminster, in England, as adopted at Hilary Term, were of force in the State of South Carolina, and binding at the time of the trial of this action; and it is respectfully submitted that the Circuit Judge erred in granting a new trial, "under the impression that the rules of Hilary Term were not made of force by the rules of our Court, passed in 1837."
- 2. Because the defendant, by his plea of the general issue in an action on the case, had precluded himself from denying his responsibility as a common carrier, and the The decretal order of the Court was made Judge's charge to the jury, on the trial to

conveying the opposite idea is erroneous.

3. Because the Judge's charge to the jury, on this point, if erroneous, was an error of law, and could only be properly corrected on appeal to the Supreme Court; and it was not a ground for new trial before the Judge who heard the case on the trial, and who made such a charge to the jury.

Shannon, Brown, Allison, for appellant:

That the said Court of Common Pleas, and the Justices thereof, shall, and lawfully may, have, hold, use and exercise, all and singular the powers, jurisdictions and authorities in all civil causes within this province, in as full and ample manner, to all intents and purposes whatever, as the Court of Common Pleas at Westminster, and the Justices thereof, do, can, or lawfully may there have, hold, use, exercise, and enjoy.—Act of 1737, 7 Stat., 190.

It shall be the duty of the Court of Appeals to make all such further and other rules and regulations as may be necessary to carry this Act, and all parts of all former Acts hereby retained, applicable to the Appeal Courts heretofore existing, into effect .-Act of 1824, 7 Stat., 326.

Court of Errors. And it shall be the duty of the Judges to make all proper rules and regulations for the practice of the said Court of Errors, and for the mode of bringing causes before them.-Act of 1836, 7 Stat., 341.

*103

*The following is one of the recent rules of the Court of Common Pleas, made and adopted in Westminster, England, at Hilary Term, in the year 1834, viz:-Action on the case-"In this form of action against a carrier the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received."

The following is a rule of our own Court, adopted in 1837-(87 Rule, Miller's Compilation, p. 46,) viz: "All cases not provided for in any of the foregoing rules, shall be governed by the practice of the Court of Common Pleas at Westminster, so far as they are consistent with the laws of this State.'

Clark & Connors, contra.

The opinion of the Court was delivered by

WILLARD, A. J. The Circuit Court has granted a new trial for error of law alone, and an appeal is taken from such order. The error which induced the granting of the new trial, was a ruling, excluding the defendants in action upon the case against him as a common carrier, from giving proof,

this effect, was correct, and his recent order, tending to show that he did not occupy the situation of a common carrier to the plaintiff in the transactions out of which the action arose.

> The ruling in question proceeded upon the idea, that under the operation of Rule 87, (Miller's Comp.,) to the effect that "all cases not provided for in any of the foregoing rules, shall be governed by the practice of the Court of Common Pleas at Westminster, so far as they are consistent with the laws of this State," a rule adopted by the Court of Common Pleas at Westminster, in 1834, as follows-"Action on the case": "In this form of action against a common carrier, the plea of not guilty shall operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received," is operative in this State.

> We have been unable to find any evidence that the rule in question has been recognized or applied in the practice of this State. But apart from the proof afforded by so long a course of practice under the 87th rule of its true construction, it is clear that it was not intended to operate so as to unsettle the rules of pleading theretofore of force in this State.

> The Code of Rules, of which the 87th is part, did not assume to make any alteration in the rules of pleading as established. A

> > *104

*regulation of the character involved in the English rule lays entirely outside of the scope of the rules adopted for this State.

In order to render of force, under our 87th Rule, a rule of the English Court, it should appear, first, that it relates to a matter within the scope of the provisions of our own rules, and forming part of the subject treated of by them; second, that it was overlooked in the forming of our rules; and, third, that it is in harmony with our laws, using the term laws in an enlarged sense as embracing the established procedure of this

It is evident that the rule in question is not entitled to be so considered.

The order for a new trial was properly granted, and under Section 1 of the Code of Procedure, the respondent is entitled to judgment absolute in the action.

The appeal must be dismissed, and the cause remanded to the Circuit Court for such proceedings as may be required to render such judgment effectual.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 104

BELL v. WHEELER.

(April Term, 1871.)

[Appeal and Error \$\sim 373.]

An appeal not perfected by the execution of an undertaking, or a deposit of money, as security for the costs of the appeal, as required by Sec. 359 of the Code of Procedure, dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \$ 2001; Dec. Dig. \$ 373.]

This was a preliminary motion to dismiss the appeal, in this case, on the ground stated in the opinion of the Court.

McAliley & Brawley, for the motion. Smith & Wilson, contra.

The opinion of the Court was delivered by

WILLARD, A. J. A motion is made to dismiss this appeal on the ground that it had not been perfected by the execution of an undertaking on the part of the appellant, as required by Sec. 359 of the Code of Procedure.

That Section provides that, "to render an *105

appeal effectual for *any purpose," an undertaking for the payment of the costs on the appeal, to the extent of three hundred dollars, must be executed on the part of the appellant, with sureties, or that sum deposited with the Clerk. It appears that the appellant did not comply with either of these requirements. The effect of that Section, under these circumstances, is to render the appeal void and ineffectual for any purpose. The appeal must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 105

GRIFFIN v. ADDISON.

(April Term, 1871.)

[Partition 5 104.]

A Commissioner in Equity sold land under a decree for partition, and took for the purchase money the bond of the purchaser but no mortgage as directed by the decree. The bond was afterwards paid in money, except a balance of about \$2,300, for which the sealed note of the purchaser, with sureties, was taken, and the bond marked "settled in full." Held. That the bond was satisfied, and that such satisfaction extinguished the lien on the land, created by the Act of 1791, for the purchase money.

[Ed. Note.—Cited in Ex parte Williams, 17 S. C. 405.

For other cases, see Partition, Cent. Dig. § 345: Dec. Dig. \(= 104. \]

Before Johnson, Ch., at Edgefield, August, 1868.

This was a bill in equity, exhibited by Ann Griffin and M. L. Bonham against George A. Addison and Henry W. Addison, to subject land to the lien created by the Act of 1791 in cases of sales for partition. The facts of the case are stated in the Circuit decree, which is as follows:

Johnson, Ch. Nathan L. Griffin, in February, 1853, died intestate, leaving as his heirs at law his widow Ann Griffin and eight children, three of whom are minors. M. L. Bonham, soon after his death, took out letters of administration upon his estate, and was, by the order of the Court, appointed the guardian of the person and estate of Willie J. Griffin, the youngest child of his intestate. During the same year proceedings were instituted in this Court by M. L. Bonham and wife, and others, v. Ann Griffin and others, for the partition of a portion of the real estate of the intestate, and under these proceedings, the greater part of his Ninety-Six plantation was sold by the Commissioner of this Court, on sale day in November, 1853, and was bid off by the defend-

*106

ant, George A. Ad*dison, at and for the sum of fourteen thousand eight hundred and forty-two dollars and thirty cents. By the terms of sale the purchaser was required to give bond with two or more approved sureties, and a mortgage of the premises, to secure the payment of the purchase money. On the 7th day of November, 1853, George A. Addison gave to A. Simkins, the Commissioner in Equity, his bond, without sureties, and without a mortgage, conditioned for the payment of fourteen thousand eight hundred and forty-two 30-100 dollars, payable as follows: One-half, one year after date, and the other half, two years after And the Commissioner gave him a date. deed for the tract of land purchased by him. On this bond G. A. Addison at different times made large payments, and on the 2d day of February, 1858, the whole amount of the principal and interest due on the bond had been paid except two thousand three hundred and thirty-two dollars and sixtyseven cents, which belonged to the minor, Willie J. Griffin, as a part of his distributive share of the real estate of his father. the day last aforesaid the following entry is made on the bond, to wit: "Received on this bond two thousand three hundred and thirty-two 67-100 dollars, which settles it in full. February 2d, 1858. (Signed) A. Simkins, C. E. E. D."

On the same day the receipt, of which the following is a copy, was given by M. L. Bonham to A. Simkins, under a statement of the case, to wit: "Received, February 2d, 1858, of A. Simkins, Commissioner in Equity, twenty-one hundred and eighty-three dollars and fifty cents, the first installment,

with interest, of the share of my ward, Willie J. Griffin, in the first sales of the real estate of N. L. Griffin, deceased, made in this case. And also two thousand one hundred and twenty 70-100 dollars, his share, with interest, in the second installment. (Signed) M. L. Bonham, Guardian."

M. L. Bonham, in his guardian return for the year 1858, charges himself with having received from A. Simkins, on the 2d day of February, 1858, four thousand three hundred and four 21-100 dollars, "in full of both installments of first sale of real estate of the Commissioner, the greater part of which was received on the bond of G. A. Addison." Though the last credit was entered upon the bond, it appears that no money was paid, but M. L. Bonham having a settlement to make with Ann Griffin, who is the half-sister of G. A. Addison, it was understood and agreed between the three that the sealed note of G. A. Addison for the said amount, with interest payable annually, and with S. F. Goode and E. J. Mims, would be received by Ann Griffin as so much money in a settle-

*107

ment with M. *L. Bonham; and upon such sealed notes being given to Ann Griffin, she receipted to M. L. Bonham for so much money. And for the purpose of fully carrying out the arrangement, the receipts, of which the copies appear above, were given. On sales day in February, 1867, the Ninety-Six plantation was sold at Sheriff's sale as the property of G. A. Addison, and was bid off by Henry W. Addison, who is now the legal owner of the same. A portion of the sealed note given by G. A. Addison, S. F. Goode and E. J. Mims, is still unpaid, and the bill in this case is filed for the purpose of subjecting the Ninety-Six plantation to the payment of the balance due on the said sealed note under the provision of the Act of 1791, creating a lien upon such lands for the payment of the purchase money.

The grounds of defence argued are numerous, and raise many nice questions, but the Court is satisfied on the main issue, that is, that the transaction amounted to a payment, and therefore the prayer of the bill cannot be granted. I will not consider the other questions. See Dogan v. Ashby et al., 1 Rich., 37; Watson, Crews & Co., v. Owens, 1 Rich., 112; Townsend v. Stevenson, 4 Rich., 59; Chastain v. Johnson, 2 Ball., 574; [Costelo v. Cave] 2 Hill, 528 [27 Am. Dec. 404].

It is ordered and decreed that the bill be dismissed with costs.

The complainants appealed on the following grounds:

1. Because the Chancellor erred in holding that it was understood and agreed upon between G. A. Addison, M. L. Bonham and Ann Griffin that the sealed note of G. A. Addison would be received by Ann Griffin as so much money in a settlement with M. L. Bonham.

- 2. Because the Chancellor erred in ruling that the acceptance by Ann Griffin of the sealed note of G. A. Addison was payment of the debt due by G. A. Addison for the purchase money of the land bought by him at the Commissioner's sale on sales day in November, 1853.
- 3. Because the Circuit Chancellor refused to allow Ann Griffin the benefit of the statutory lien created by the Act of 1791.
- 4. Because in other respects the decree of the Circuit Chancellor is contrary to equity.

Magrath, Bonham, for appellants:

1. That the provisions of the A. A., 1791, by which lands, sold by the order of the Court for partition, stand pledged for the payment of the purchase money, are not re-

stricted and confined to dis*tributees alone, but create a lien which remains unsatisfied as long as the purchase money is unpaid; and like other liens, is accessory to, and follows the debt due for the purchase money, in the hands of an assignee thereof.—A. A., 1791, Sec. 7, 5 Stat., 164; Wright v. Eaves, 10 Rich. Eq., 582–4–5; 1 Hilliard on Mortgages, 164–7–307–8; Forrest v. Warrington, 2 DeSau., 254; Lagow v. Badollet, 1 Blackf., 416; Elliot v. Connel, 5 Snead & Marshall, 91; Heard v. Evans, 1 Freeman Ch., 79; Burris v. Gooch, 5 Rich., 5; Misservy v. Barrelli, 2 Hill. Ch., 567; Hallock v. Smith, 3 Barb., S. C. Rep., 267; Wardlaw v. Gray, 2 Hill. Ch., 645.

2. That as between debtor and creditor, no agreement can operate as payment of a debt, unless it discharges the debtor from liability to pay it; and where a debt is assigned, though a receipt be given by the assignor to the debtor upon an evidence of debt, yet if it appear that such receipt was only a cancellation of an old security, the substitution of a new security for the original debt, given by the debtor to the assignee by agreement of parties, will carry with it all the liens to which the assignor was entitled.-Wright v. Eaves, 10 Rich. Eq., 582-4-5; Broadwell v. King, 3 B. Monr., 449; Thomas v. Wyatt, 5 B. Monr., 132; Tanner v. Hicks, 4 S. and M., 294; Bailey v. Wright, 3 McC., 485; Briggs v. Planters' Bank, 1 Freeman Ch., 574; Castello v. Cave. 2 Hill., 531; Teed v. Carruthers, 2 Younge & Collyer, 31, 21 Eng. Ch. Rep., 317; Burton v. Pressly, Chev. Eq. 1; Boulware v. Harrison, 2 Rich. Eq., 317-20; Green v. Hart, 1 John Rep., 580; 1 Hilliard on Mortgages, 483-7-(citing Maryland v. Wingart, 8 Gill, 170;) Boyce v. Bowers, 11 Rich. Eq., 41-7.

3. That the agreement of debtor and creditor that the debtor shall pay the debt to a third party, amounts to an assignment of the debt to such party, and it is not satisfaction thereof, and the assignee is entitled to all the securities which were accessory, and attached to the debt in the hands of the as-

signor.—Davies v. Maynard, 9 Mass. Rep., | secured obligation, the mortgage remains val-242; Tripp v. Vincent, 3 Barb. Ch., 614; Hadlock v. Bulfinch, 31 Maine, 246; Edwards v. Bohannan, 2 Dana, 90; Patterson v. Johnston, 7 Ham., 1 Part, 225, found in 2 U.S. E. Dig., 362, No. 1,476; Blair v. Ross, Blackf., 540; and the cases cited in support of the second position.

4. That it is a question of intention whether a new security is given and accepted by the parties as payment of a debt or as substitution of a pre-existing one, and the intention of payment can never arise, as long

*109

as the liability of the debtor remains un*discharged, either to the original owner of the debt or the assignee thereof, and it is incumbent on the party resisting the lien to show it is discharged.—Burton v. Pressly, Chev. Eq., 1; Schwartz v. Stein, 29 Md.; Fletcher v. McQueen, 4 Rich., 154.

Thompson, Addison, contra.

Oct. 29, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The object of the appellants' bill was the foreclosure of a statute lien for the purchase money, upon a sale of land for partition. The respondent, G. A. Addison, became the purchaser on the sale for partition. The respondent, H. W. Addison, has acquired title to the land in question, through a Sheriff's sale under execution against G. A. Addison.

The question in dispute is, whether the purchase money has been paid. A bond was given by G. A. Addison for the purchase money under the sale for partition. Subsequently, payment of this bond was acknowledged in form. It appears that the bond was not wholly discharged by cash payment, but that a sealed note was given by G. A. Addison for a balance due on the bond. The Circuit decree determines, as matter of fact, that the taking of the sealed note was regarded and intended by the parties as payment of the bond. The Chancellor accordingly dismissed the bill.

Unless this determination of the fact of payment is erroneous, the decree must stand.

The statute lien for the purchase money upon a sale for partition, (5 Stat., 164,) is in the nature of a purchase money mortgage, and has been assimilated, as far as possible, to such mortgage.—Allen v. Richardson, 9 Rich. Eq., 53.

The effect of taking a new obligation for one secured by a mortgage, as affecting the lien of the mortgage, was settled in Burton v. Pressly, (Chev. Eq., 1,) where it was held that if a new obligation is taken intended as payment of one secured by mortgage, the security is at an end; but that if the new obligation was intended as a substitute for the

id and effectual.

Applying these principles to the present case, it follows, that if the sealed note was intended as payment of the bond, it extinguished, with the bond, the original indebtedness for the purchase money covered by the bond, and the statute lien is at an end, for *110

*the want of such an obligation to rest upon as the statute contemplated.

We find no sufficient ground for interference with the conclusion of the Chancellor as to the question of fact involved.

The decree must be affirmed, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 110

WELSH v. DAVIS.

(April Term, 1871.)

[Assignments for Benefit of Creditors &= 246.]
An assignment for the benefit of creditors, giving the assignee power to sell the real estate 'at such time, in such manner, and upon such terms as he may deem expedient and prudent," does not give the assignee power to bind the assigned estate by an express covenant of warranty; no plication of law. nor does such power exist by im-

[Ed. Note.—Cited in McKee v. Mobley, 3 S. C. 247.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 787; Dec. Dig. 246.]

[Assignments for Benefit of Creditors 246.] A purchaser of real estate, from an assignee for the benefit of creditors, with covenant of warranty, has no equity to subject the assigned estate to a claim arising from a breach of the covenant.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 782, 787; Dec. Dig. \$\sim 246.1\$

Before Thomas, J., at Lancaster, January Term, 1871.

Cureton and Hasseltine were joint owners of a lot in the town of Lancaster, under a conveyance from Massey.

On March 19, 1860, Cureton made an assignment of his estate for the benefit of his creditors, to Cunningham as trustee, the assignment containing a power authorizing the trustee to sell the real estate "at such time consistent with reasonable despatch, and in such manner and upon such terms as he may deem expedient and prudent.'

On January 8, 1861, Hasseltine, in his own right, and Cunningham, as assignee, joined in a sale of the lot to John R. Welsh, the plaintiff. Their deed of conveyance contained the usual covenant of warranty.

Cunningham died, and in the year 1868 John A. Davis, the defendant, was substituted by the Court of Equity as trustee of the only indemnity is by retaining so much from assigned estate.

Massey also died in the year 1867, and in April of that year his widow filed her bill in equity against Welsh, claiming dower in the lot. The claim was established, and in June, 1868, she obtained a decree against Welsh for \$370.72, inclusive of costs, which he paid. *111

*Hasseltine was adjudged bankrupt, on his own petition, and was afterwards discharged in bankruptey.

On January 17, 1870, Welsh filed this petition against Davis, Hasseltine, and Kibler as administrator of Cunningham, wherein he claimed that the \$370.72, paid by him to the widow of Massey, in lieu of dower, should, with interest thereon, be refunded to him out of the assigned estate, in the hands of Davis.

The case was referred to a referee, who made his report, recommending that the petitioner be paid the amount of his claim, with interest, out of the assigned estate.

Davis filed exceptions to the report, as follows:

- 1. Because Cunningham could not, by his covenant of warranty, bind the assigned estate of Cureton.
- 2. Because the covenant of warranty could not extend to the rents of the lot, and the referee erred in charging the same against the defendant.
- 3. Because the referee erred in charging the defendant with the costs of the dower suit.

His Honor overruled the exceptions, and made a decree confirming the report.

Davis appealed, on the ground that his Honor erred in overruling the exceptions.

[For subsequent opinion, see 3 S. C. 215.]

Moore, for appellant:

The covenant of warranty was the mere personal contract or undertaking of Cunningham, for which he alone became responsible.

"A person who conveys merely as trustee, can be required to enter into no covenants for title beyond the usual covenant that he has done no act to encumber."-Hill on Trust., 281.

Where trustees agreed to exonerate the estate sold, from any incumbrances, the Court refused to enforce a specific performance of the agreement so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages .-Wedgewood v. Adams, 6 Beav., 600; cited in Hill on Trust., 282.

In McBeth v. Smith, 3 Brev., 511, Smith J., in delivering the opinion of the Court, says: "I would not pretend to say that an administrator should in no case be allowed to contract debts that should bind the estate of his intestate; but if he does so, and in many instances it is necessary he should do so, he alone will be liable to the creditor, and his

the profits of the estate," &c.

*112

*In O'Neall v. Abney, 2 Bail., 317, the Appeal Court holds the following language: "It has been held, upon very clear principles, that an executor or administrator, or other person acting in a fiduciary character. cannot, by any contract of his own, create a charge upon the property or estate which he represents, not even in equity, unless the estate or property has been benefited by the contract, and they are in advance;" and in conclusion lays down the rule that, "if a liability on their part does arise, it is personal, and they alone are liable."

In Mayer v. Galluchat, 6 Rich. Eq., 1, the doctrine is laid down in these words: "Parties must look to those with whom they contract. The trustee is the legal owner of the estate. If persons are unwilling to give credit to the cestui que trust, they must contract with the trustee or refuse the credit altogether. If they contract with the trustee, it is still a legal demand, for which they have a legal remedy, and the trustee may reimburse himself from the income, provided the charge be proper."

2. If any benefit inured to the assigned estate from the covenant of warranty, by whom was the benefit conferred? Certainly not by the purchaser, for the covenant was not made by him, but made by Cunningham and Hasseltine, for his protection and benefit.

3. If an incidental benefit to the assigned estate arose out of the covenant, to what extent was it benefitted? No evidence was offered to show that the price at which the lot was sold was enhanced thereby. If it can be assumed that it was enhanced to the value of the widow's dower, then, as only one-half of the property belonged to the assigned estate, it was only benefitted to the extent of one-half of the dower.

4. If the assertion of the right of dower, by the widow, amounted to a breach of the covenant contained in the deed, then the plaintiff Welsh should have brought his action at law against the covenantors, or their representatives, and his petition in Equity should be dismissed as to all of the defendants, but especially as to the defendant Davis, against whom he never had a right of action, even at law.

Allison, contra:

The present case differs from one where a trustee contracts of his own will for the trust estate; for here Cureton in his deed of assignment expressly empowered Cunningham, in the most comprehensive terms, to sell the house and lot, and, as a necessary consequence, clothed them with authority to *113

make the covenant of warranty *which he did make. "A power to sell implies a power to warrant, in the cases, and to the extent,

54

in which a warranty usually accompanies the sale."—Chit. on Con. 200, and the numerous United States cases referred to in a note. "A power without restriction to sell and convey real estate has been held to give authority to the agent to execute deeds with general warranty, binding the principal."—Chit. on Con., same page, and the following and other cases referred to in the note; LeRoy v. Beard, 8 How., U. S., 451; Taggart v. Stanbery, 2 McL., 543.

If the assigned estate of Cureton be responsible to the estate of Cunningham for loss incurred by reason of this covenant of warranty, then, to prevent circuity of action, equity will assume jurisdiction, and allow Welsh to proceed directly against the assigned estate.

The sale of the land was certainly enhanced by the covenant of warranty; and the purchase money so increased, as paid by Welsh, must be considered as having increased the amount of the assigned estate and added value to the same.

"The equity on which a creditor comes into this Court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money, or given credit to effect the objects of the trust, and having accomplished this, at his own expense, he has a right to be put in the place of the cestui que trust, or to be reimbursed out of the trust funds. To expend money for the benefit of a trust estate, would seem to mean adding value to the estate, or the defraying of charges to which the trust estate would be liable."
—Magwood & Patterson v. Johnson, 1 Hill. Ch., 232–4 and 5.

"In the execution of a general power there can be no rule but the discretion of the party to whom it is confided."—Fronty v. Fronty, Bail. Eq., 517.

"Dower claimed and allowed is a breach of a covenant for quiet possession."—Lewis v. Lewis, 5 Rich., 12.

"Verdict rendered against purchaser is conclusive against vendor, who has been vouched to defend his title."—Wilson v. McElwee, 1 Strob., 66.

"Suit must be defended before breach of warranty can be shown."—Buckels v. Mouzon, 1 Strob., 499.

Oct. 27, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The appellant was appointed by the Court of Equity trustee of an estate, assigned for the benefit of creditors.

*114

*upon the death of the assignee. Respondent makes a demand against the assigned estate, on the ground, that under a sale, made by the assignee, of real estate, part of such assigned estate, respondent became a purchaser; that the assignee gave a deed, with a cov-

in which a warranty usually accompanies the enant of warranty, and that respondent has sale."—Chit. on Con., 200, and the numerous usualined damages through a breach of such United States cases referred to in a note.

The case, as presented by respondent's argument, involved two questions: first, had the assignee power to bind the assigned estate by a covenant of warranty? Second, is a covenant of warranty to be implied from the fact of a sale and consideration paid?

It does not appear that the assignment, in express terms, conferred upon the assignee power to bind the estate by a covenant of warranty. If, then, he had such power, it must be made out by implication, based either upon the general terms and expressions of the assignment, or upon the nature of the power of an assignee for the benefit of creditors.

It has been urged that the terms of the assignment embrace such authority. The assignment authorizes the assignee to sell, "in such manner, and upon such terms, as he may deem expedient and prudent." effect of these expressions is to give to the assignee an unrestricted power of sale. It is contended that a collateral warranty is fairly within the sense of the expression "terms of sale." Taken in an enlarged sense, this might be correct, but the nature and object of the instrument operates to limit the expression to a strict sense, which is satisfied by allowing to the assignee control over the consideration and conditions on which the sale is made. Respondent contends that such authority is necessarily involved in the unrestricted power of sale conferred on the assignee. It is said that a power without restriction to sell and convey real estate, gives authority to an agent to execute deeds, with general warranty binding the principal. This proposition is derived from the relation of principal and agent, where that relation exists in its simplest character, namely, where the title, the beneficial interest, and the power of ratification and revocation unite in the principal, and the agent acts solely as the hand of the principal. Such a relation does not exist in the present case. The assignment vested the title in the assignee, and the beneficial interest in the creditors, leaving in the assignor nothing but a resulting trust, should assets remain after the trusts are satisfied. If, then, the proposition advanced is applicable to the case in hand, it must rest on some other ground than that of a similarity between the relations involved in the two cases.

*115

*No such implication arises from the nature of the power of sale, for it is capable of being fully executed without the aid of a covenant of warranty. The covenant of warranty may, by possibility, make the sale more productive, but adds nothing to its completeness.

Neither does the object of the power of

sale, in the case of an assignment for the for the act or contract of the trustee, where benefit of creditors, furnish any ground for such an implication. The object of the assignment is to satisfy the demands of the creditors, by a voluntary surrender of that which, it must be assumed, might by process of law be subjected to such demands. For this purpose power is lodged in the hands of the assignee to convert the assigned assets into a form suitable for distribution, and to make distribution among the beneficiaries. It is obvious that no authority should be implied tending to defeat or embarrass the accomplishment of this object, and it is equally clear that such authority as the respondent contends for, would have that effect. It would, perhaps, enable the assignor to realize a larger sum from the sale of the assigned estate applicable to the discharge of his debts, but at the expense of his creditors, who might thereby be subjected to unreasonable delay, and exposed to litigation and expense. It is said that it would enure to the benefit of creditors, by increasing the distributable fund; but the same end may be obtained under orders in equity, (Rogers v. Horn, 6 Rich. 361,) without resort to an implication that would place in the hands of the assignee authority limited only by his discretion and prudence.

The state of relations, as created by the assignment, between the assignor, the assignee, and the creditors, precludes the application to the case of the principle contended for. In the case of principal and agent, the effect of its application is that a covenant is created in the name of, and for the benefit of, the principal, but no lien or charge arises affecting the proceeds of sale in the hands of the agent in order specifically to subject them to any claim for damages for a breach of the warranty. Yet this is the effect claimed as the result of applying that principle to the case in hand. It is not enough for the respondent to show that the assignee had power to bind the assignor by a covenant of warranty, for such an obligation could not be satisfied out of the assets. It is not disputed that the assignee may bind himself personally, but that gives no claim upon the assets. It will not be contended that the assignee had any authority to bind the beneficiaries under the assignment by a personal covenant.

*116

*It follows that, to reach the present case, it must appear that the assignee had authority to create either a legal or equitable lien or charge on the assets. In no way of viewing the proposition, as to the powers of an agent to bind his principal, can such operation be ascribed to it as that claimed in the present case.

An argument has been pressed, based upon the general powers of fiduciary agents. It is contended that the estate is chargeable it has received benefit through such act or contract. It is claimed that the covenant of warranty enhanced the product of the sale of the land, and thus conferred a benefit on the estate, which is ground in equity for holding the estate liable to answer for the performance of the trustees' contract. It will be found that the rule on this subject, as practically applied by the Courts, is restricted within limits that would exclude the respondent's demand. It will be also found that the act or contract of the trustee, in order to bind the estate through the benefit derived, must be within his proper powers, as trustee, and that the benefit must be substantial and actual, and not merely speculative.

In Magwood v. Johnston, (1 Hill Eq., 228,) an attempt was unsuccessfully made to charge an estate, in trust for a wife's separate use, with advances made for the domestic use of husband and wife. Ch. Harper, whose decree was adopted by the Appellate Court, says: "The equity on which a creditor comes into this Court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money or given credit to effect the objects of the trust, and having accomplished the object of the trust at his own expense, he has a right to be put in the place of the cestui que trust, or to be reimbursed out of the trust funds." Again he says: "To expend money for the benefit of the trust estate, would seem to mean either adding value to the estate, or defraying charges to which the trust estate would be liable.'

In Carter v. Eveleigh, (4 Desaus. 19 [6 Am. Dec. 596]) the purchase of a gin, for the use of a trust estate, was sanctioned, it being requisite and proper, in order to render the trust estate, consisting of a plantation, productive.

In Frazer v. McPherson, (3 Desaus. 393,) slaves were purchased by a trustee, and a mortgage given for the purchase money. While no question was made in that case, as to the propriety of the investment, still the mortgage was held invalid for want of power in the trustee to create a lien or

*117

charge on the trust estate. That *case went to the length of holding that such lien or charge could not be created, even as to additions to the estate, accruing in the hands of the trustee.

In Montgomery v. Eveleigh, (1 McC. Eq. 267,) advances made for the maintenance of slaves, part of a trust estate, were held to be chargeable to the estate.

The general rule that persons acting in a fiduciary capacity cannot, by any contract, create a charge upon the trust estate, even in equity, is recognized in O'Neall v. Abney,

(2 Bail., 317.) although exceptions of the class already alluded to are noticed.

We have already seen that, by the terms of the assignment, no power to warrant passed to the assignee, allowing its expressions in the sense demanded by the object of the assignment. Nor can such power be implied from the relative rights and obligations of the several parties affected by the assignment, unless it appears that some duty, incident to the obligation assumed by the assignee in respect to the assigned estate, demands the exercise of such power.

It is not enough that the trustee sees an opportunity of benefiting the trust estate, to warrant an enlargement of his powers, so as to secure such benefit. Such a principle would open to trustees a career of speculation quite inconsistent with the character of trusts. The true rule is that stated by Ch. Harper in Magwood v. Patterson, which is, in effect, that the act or contract, in order to fall within the proper powers of the trustee, must be in the line of the discharge of his duties under the trust.

In the present case, the benefit claimed to have been realized by the estate is matter of speculative opinion alone. It is not in proof that the land sold for a larger price on account of the covenant of warranty; but we are called on to assume that fact as probable on the ground of argument alone. The respondent's case cannot, therefore, be brought within the principle of Magwood and Patterson; but, independent of this fact, it was no part of the assignee's duty, under the assignment, to warrant the title to the land, and no power is to be implied to do that which he was not called upon by his duty to do.

It only remains to consider the proposition advanced by the respondent, that a warranty of title is to be implied from the sale and consideration paid. It is well settled in this State that upon a sale of real estate no warranty is to be implied. In the early cases, where relief was granted to defendants sued at law for the purchase money of land, on the ground of a failure in the

*118

quality or quantity *of the subject of sale, such relief was, in some instances, said to result from an implied warranty, based upon a full consideration paid, but later cases place the nature of this relief in a true light. In Evans v. Dendy, 2 Speers, 9 [42 Am. Dec. 356], the purchaser of land at an Ordinary's sale, after payment of the purchase money into the Ordinary's hand, and while the sum remained undistributed, sought to recover back the amount paid on the ground that the land had been recovered under title paramount. The Court refused to imply a warranty in favor of the purchaser, or to grant him relief. In the opinion of Judge Evans, is made; no coupons on said bonds to be

the relief which had, since Gray v. Hankinson, 1 Bay, 278, been frequently allowed to purchasers of land upon the authority of that case, was ascribed to the powers of the Courts of law in this State to allow, by way of defense to an action for the purchase money, the equitable defense of failure of consideration by reason of fraud, misrepresentation or mistake affecting the contract.

The authority of Evans v. Dendy was recognized in Rogers v. Horn, 6 Rich., 361. It was fully sustained by Prescott v. Holmes, 7 Rich. Eq., 9, and in Com. v. Smith, 9 Rich., 515, where, though a different doctrine as to implying warranty was applied to sales of personalty, still it was recognized that no such implication arose in the case of sales of realty.

The petitioner has established no right to be paid out of the assets, and the decree of the Circuit Court must be set aside and the petition dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 118

FLEMING v. ROBERTSON.

(April Term, 1871.)

[Damages \Leftrightarrow 126.] By contract under seal dated September 14, 1864, C promised to pay to F \$12,000 "in Confederate money," "by the 28th instant;" "and upon failure to pay by that time," to pay to F \$12,on failure to pay by that time, to pay to F \$12,000 in six per cent, bonds of the five hundred millions loan, within twelve months from that date." In an action of covenant on the contract. Held, That the measure of damages was the value of the bonds at the time the contract was made.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 348; Dec. Dig. ← 126.]

Before Glover, J., at Columbia, April Term, 1871.

This was an action of covenant by C. E. Fleming against Thomas J. Robertson, executor of John Caldwell, deceased, on a contract as follows:

*119

*"By the 28th instant, we, or either of us, promise to pay Dr. C. E. Fleming, or order, twelve thousand dollars in Confederate money; and upon failure to pay by that time, we, in like manner, promise to pay said C. E. Fleming, or order, twelve thousand dollars in six per cent. bonds of the five hundred millions loan, nontaxable, within twelve months from that date, with coupons bearing interest from the 28th instant; or should the coupons be off, then to pay in Confederate money in lieu of the coupons, at their value in gold or cotton when the payment taken off before they become due. These bonds to be estimated at one hundred and thirty-five dollars for each one hundred dollars on their face, to make up the twelve thousand dollars. Witness our hands and seals, this 14th day of September, 1864.

"W. Shiver. [Seal.]
"John Caldwell. [Seal.]

Witness: H. H. Thomson."

The other facts of the case bearing upon the only point of law made by the appeal are stated in the opinion of the Court.

The verdict was for the plaintiff for \$1,627, and the defendant appealed.

C. D. Melton, for appellant:

- I. What is the measure of damages recoverable in actions ex contractu is, in general, a question of law.—Sedg. on Dam., *30, *201, *472.
- II. The legal measure of damages recoverable for breaches of contract is regulated by these principles, viz:
- 1. That damages are to be awarded only for the actual injury sustained by the default.—Sedg., *200, *210, *229; Garrett v. Stuart, 1 McC., *516.
- 2. That the contract itself furnishes the measure of the damages.—Sedg., *202, Tayloe v. Riggs, 1 Pet., 598.
- 3. That the damages recoverable must be the result, and the natural and proximate result, of the breach complained of.—2 Green. Ev., §§ 254, 256; Sedg., *57, *204.
- III. Where the contract is one by which the payee is to receive, not money, but specific property, the value of the property, at the time fixed for the delivery, is the true measure of damages.
- In such a contract "the value of the original consideration is not to be enquired into, but the value of the property is the *120

mea*sure; because this is the remuneration fixed by the agreement."—Sedg., *203, and cases there cited.

- 2. The value of the specific articles, on the day on which they should have been delivered, is the true measure.—Price v. Justrobe, Harp., 111; Sedg., *239-41, and cases there cited.
- 3. So held in this State in reference to contracts made during the Revolution, which were payable in a class of securities known as "Indents."—Davis v. Ex'rs of Richardson, 1 Bay, 105; Wigg v. Ex'rs of Garden, 1 Bay, 357.
- 4. Exceptions to this rule are only found in cases where special damages are proved resulting from the breach, and in cases where there have been changes in value between the time fixed for delivery and the time of trial.
- 5. The Confederate bonds which were in this case to be paid were "specific articles" within the meaning of the rule. Any thing that is not money falls properly in this class.

 —Robinson v. Noble, 8 Pet, 198.

- IV. This rule as to the measure of damages recoverable on breach of contract, is not affected by the Act of 1869, nor by the Ordinance of the Convention of 1865.
- 1. The A. A. 1869 (14 Stat., 277,) is expressly limited to determining the value of contracts made with reference to Confederate States notes as a basis of value.
- 2. The Ordinance of September, 1865, (Journal of Convention, 111,) furnishes merely a rule of evidence for determining what the contract was.—Copes v. Rutland, 15 Rich., 84.
- 3. Neither the A. A. 1869, nor the Ordinance of 1865, can operate to change a contract for the payment of specific articles into a contract for the payment of money; nor can either operate to change the measure of liability for a breach of a contract.
- 4. "Any legislation which would increase or lessen the measure of the recovery for the breach of a contract impairs its obligation and must be void."—Kirtland v. Molton, 41 Ala., 560; McCracken v. Hayward, 2 How. U. S., 608.

See cases: On Ordinance of North Carolina—Woodfin v. Sluder, Phillips' Law, 200; on Ordinance of Georgia—Slaughter v. Culpepper, 35 Geo., 25; Evans v. Walker, 35 Geo., 117; Taylor v. Flint, 35 Geo., 124; Cherry v. Walker, 36 Geo., 327; Field v. Leak, 36 Geo., 362; High v. McHugh, 38 Geo., 284; on Ordinance of Alabama—Kirtland v. Molton, 41 Ala., 548; Herbert v. Easton, 43 Ala., 547.

*121

- *V. The obligor, John Caldwell, being a naked surety, is liable alone on the letter of his contract. He cannot be affected unfavorably by any rights or equities which may exist between the parties to the consideration of the contract.
- 1. A surety has a right to stand upon the very terms of his contract; and if a variation be made, and he does not assent to it, the variation is fatal—Miller v. Stewart, 9 Wheat., 680; 2 Bouv. Institutes, § 1422; Smith v. United States, 2 Wallace, 233; U. S. v. Boyd, 15 Peters, 187.
- 2. A surety who has not received or shared the consideration cannot be held liable on an implied promise.—Wells v. Girling, 8 Taunt., 737 (4 E. C. L., 264); Barlow v. Bishop, 1 East., 432; Page's Adm'rs v. Bank of Alexander, 7 Wheat., 37; Butler v. Rawson, 1 Denio, 106.
- 3. The fact that the principal obligor placed funds in the hands of his surety to meet the obligation, does not enlarge the plaintiff's remedy against the surety.

McMaster & Leconte, contra:

- 1. The obligor, John Caldwell, is bound as principal debtor.—Berry v. Radcliffe, 6 John. Ch., 621; Bouv., L. D., Title Surety, 1 Bur., 373.
 - 2. The obligors having received valuable

consideration, did not fulfill their part of the rights of this plaintiff might have been contract by attempting to tender what purported to be Confederate bonds, after they had lost all value.-Williamson v. Bacot, 1 Bay, 62; Chitty on Contracts, 7th Ed., 751, note.

3. The measure of damages in such a contract is not governed by the rule with regard to "specific articles," but must be the value of Confederate bonds at the time and place of contract.-Thorington v. Smith, Am. Law Times, 2, 169; Witsell v. Riggs, 14 Rich., 186; Hudspetter v. Johnson, 34 Ga., 403; Oliver v. Coleman, 36 Ga., 857; Ex'ors of Fowl v. Todd, 1 Bay, 176.

4. This contract, coming properly under the Ordinance of the Convention of 1865, p. 111, the jury should be allowed a "liberal discretion," and the verdict being less than it would be by a strict application of the Ordinance or Corbin's Bill, it must stand unless objected to by the plaintiff.-Evans v. Walker, 35 Ga., 117; Taylor v. Flint, 35 Ga., 124; High v. McHugh, 38 Ga., 285; Peay v. Briggs, 2 N. & McC., 186.

5. Any other construction would be unjust,

*122

and violate the spirit *of the contract.-Hum v. McLaws, 1 Bay, 96-98; Herbert & Gesler v. Eason, 43 Ala., 552.

Nov. 20, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. The late Mr. John Caldwell, with Wm. Shiver, on the 14th of September, 1864, executed a sealed instrument, by which they jointly and severally promised to pay to the plaintiff, C. E. Fleming, or his order, by the 28th September of the same month, twelve thousand dollars in Confederate money, and on failure to do so, promised to pay him within twelve months from the date, \$12,000 in 6 per cent. bonds of the five hundred million loan, the bonds to be estimated at \$135 for each one hundred dollars (\$100) on their face, to make up the \$12,000.

The pleas were, first, a tender on 28th September, 1865, of the specific bonds agreed to be paid at that date; and, secondly, nondamnificatus. The error assigned, to be determined by us, is the refusal of the Circuit Judge, at the instance of defendant's counsel, to charge the jury that, "if they shall find that a tender was not made, the measure of damages is the value of the bond at the time they should have been delivered," and his instructions, "that if they should find that a tender was not made, the defendant was liable for damages for the breach of the covenant, to be measured by the value of the bonds at the time the contract was made," to which the defendant excepted. The verdict was for the plaintiff in the sum of \$1,-627. It is not necessary to consider how the changed, if the tender, in the very securities which he had agreed to accept, had been within the period fixed by the instrument.

The jury have decided the fact of tender adversely to the defendant, and the effect of this proposition is to claim all the benefit to which he may have been entitled by the agreement, in the same manner as if he had fulfilled, to the very letter, all the obligations which it imposed on him. The consideration of the contract is expressed, and the intention of the parties is clearly apparent on its face. Within fourteen days of the date the defendant was to pay the plaintiff \$12,000 in Confederate money. A fixed and definite amount was agreed upon, which had a value that might be ascertained when compared with that of specie or the national currency. If the defendant neglected to perform a condition, which was to attach as his failure to comply with the primary obligation he assumed, the damages to be awarded should

*123

be sufficient "to repair *the actual injury sustained by the default." We do not propose to question the general principle which applies to the measure of damages, where the party is to receive not money, but property. Confederate bonds cannot more properly be termed money than Confederate notes, but yet it is plain that, by this contract, they were treated as money; the true intention was that the plaintiff should have the benefit of the consideration for which he parted with his property, and this was the \$12,000 to be paid at the time stipulated in the notes described, or their value, and this has been fixed and ascertained by the verdict of the jury. The argument of the appellant proceeds upon the ground that, on the failure of payment by the 28th of September, 1864, he had the right to discharge the contract by the delivery of Confederate bonds, viewed in the light of property, without regard to their utter want of value at the time they should have been delivered. This position is not maintainable, for in the event of a noncompliance with his primary obligation, "he was to pay \$12,000 in 6 per cent. bonds within twelve months from the 14th September, 1864."

The sum still remaining due was expressed, and that he engaged to pay. His laches in the payment within the period fixed by the contract cannot operate to the prejudice of the plaintiff by destroying his right to the value of the twelve thousand dollars Confederate money, which was to be substituted by the \$12,000 in bonds, and which were not substituted by the defendant within the time allowed him by agreement. There is nothing in the contract to show that any risk was to be assumed by the plaintiff in the provision made in the event of non-payment by the 28th of September, 1864, by any change in the value of the securities which he was to accept ed, in June, 1838, an Act for that purpose, and for the debt, beyond that which might arise from the rate at which they were to be estimated. When the defendant failed to comply even with the condition which extended the time of payment, and allowed him within the period to make satisfaction in a security of a different character, the plaintiff had a right to insist on his primary contract, which remained unfilled by the defendant. To hold that he was to accept worthless paper in satisfaction of his debt, which was to be paid at a rate of value then agreed upon, would not only be inconsistent with every principle of justice, but would give an intent to the contract entirely at variance with its plain design and purpose. The intention of the parties is so apparent in this contract, that to avoid the gross wrong to the plaintiff which would follow the adoption of the prop-

*124

osition contended for *on the part of the appellant, it is not necessary to call to our aid the ruling of the Court in Williamson v. Bacot, 1 Bay, 62.

There, an offer of payment was made in 1781, by paper currency, which, by the Act of 1778, was a legal tender in all cases whatsoever. But the Court said: "This tender, made after this species of money had gone out of circulation, is certainly no bar to the plaintiff's recovery. Under the peculiar circumstances and situation of the State at that period, no Court of justice could uphold a plea of that kind. The depreciation Act fixed the lowest period of its legal existence down to the 10th of May, 1770, and no further. To give, therefore, any efficiency to a tender made after that time would in fact be to receive and give it circulation, after it was sunk and good for nothing." The depreciation Act was not passed until March, 1783, 4 Stat., 563. Confederate notes, bonds or securities of any kind, were entirely worthless after the 1st day of May, 1865, and were not therefore included in the Act of March 26, 1869, entitled "An Act to determine the value of contracts made in Confederate States notes, or their equivalent."-14 Stat., 277.

The motion to set aside the verdict, and for a new trial, is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

3 S. C. 124

DABNEY, MORGAN & CO., v. BANK OF THE STATE OF SOUTH CAROLINA.

(April Term, 1871.)

[Banks and Banking \$\sim 80.]

The State being the owner and sole stock-holder of the Bank of the State of South Caro-

thereby directed the money when borrowed to be deposited in the bank, as so much additional capital thereof, and directed the bank to keep a sepital thereof, and directed the bank to keep a separate account of the annual profits of such additional capital, to constitute a fund "solemnly pledged and set apart" for the payment of the interest on the loan and the final redemption of the principal. The other profits of the bank were also pledged for the same purpose, after contain specifical chains thereon gives made certain specified claims thereon, since paid, should be satisfied. A portion of the money was borrowed on bonds of the State, guarantied by the bank, and known as the Fire Loan Bonds, and the residue on stock of the State, known as the Fire Loan Stock. The bank neglected to keep a separate account of the profits, and afterwards became insolvent, its assets being insufficient to pay its debts, evidenced principally by its guaranty of the Fire Loan Bonds, the bills of the bank, and its deposits: *Held*, That the assets on hand were not subject to the lien created by the Act in favor of the holders of the Fire Loan Bonds and Fire Loan Stock, but were subject to distribution among all the creditors of the bank, pari passu.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. 80.] *125

[Assignments 579.]

*Though a pledge, or assignment, of profits in general carries the corpus, or capital, which produces the profits, yet, such is not the case where the intention is clear that such corpus, or capital, shall not be affected by the pledge, or assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 146; Dec. Dig. 79.]

[Banks and Banking \$\sim 80.]

A bank incorporated for the benefit of the State, of which the State is the sole stockholder, and for whose debts the State is liable, has the same rights, and is subject to the same obliga-tions, so far as creditors are concerned, as a bank whose stockholders are private individuals.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. © 80.]

[Banks and Banking \$\sim 77.]

Where the assets of an insolvent bank are insufficient to pay its debts, such assets represent neither the capital nor the profits of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. @== 77.1

[Banks and Banking \$\sim 99.]

The guaranty of the Fire Loan Bonds, though not directed by the State, was nevertheless within the scope of the powers of the bank as a banking corporation, and was a valid and binding contract.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 236; Dec. Dig. ⊗ →99.]

[Constitutional Law \$\sim 93.]

In 1865, the State passed an Act authorizing and requiring the bank, then known to be insolvent, to collect its assets and property, and hold the same "specifically appropriated," to the payment, (1) of the Fire Loan Bonds, (2) of the Fire Loan Stock, and (3) of the bills of the bank. In 1868, and before any appropriation of the assets and property was made by the bank, the State passed another Act repealing the Act of 1865: Held, That the Act of 1865 amounted, lina, a moneyed corporation with the usual bank-ing powers, and wishing to borrow money, pass-assets and property of the bank, nor created a lien thereon for the benefit of the classes of [Banks and Banking 5.7]. creditors named, but merely authorized the bank, as agent of the State, to make the appropriation, and that such agency was revocable, and been revoked by the Repealing Act of 1868.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 176, 177, 181–185, 190–192, 194–200, 208, 213–224, 236; Dec. Dig. 🖘

[Banks and Banking \$\sim 80.]

The bank being insolvent, and its assets insufficient to pay its debts, the State had no power to appropriate the assets to the payment of the Fire Loan Stock, that being a debt for which the Bank was not liable-semble.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184–196; Dec. Dig. 😂 80.]

[Banks and Banking \$\sim 80.]

The assets of an insolvent bank are a trust fund for the payment of its creditors, whether as guarantees, bill holders, depositors, or otherwise, and if there is no lien on the fund, the distribution among the creditors must be passu, and until the creditors are fully satisfied there is nothing which the stockholder, whether a private individual or a sovereign State, has the right to dispose of or appropriate to his own 1180

[Ed. Note.—Cited in Ex parte Savings Bank of Rock Hill v. Commercial & Farmers' Bank of Rock Hill, 73 S. C. 397, 53 S. E. 614, 5 L. R. A. (N. S.) 520.

For other cases, see Banks and Banking, Cent. Dig. § 193; Dec. Dig. \$\sim 80.]

[Banks and Banking \$\sim 208.

Bona fide holders of the bills of an insolvent bank, hold them as against the bank, at their face value, no matter at what price they were purchased.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 780; Dec. Dig. &== 208.]

[Banks and Banking \$\sim 119.]

In the absence of a special contract to the contrary, a deposit of money in a bank vests the title in the bank, and the depositor becomes a creditor of the bank to the amount of the de-

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 289; Dec. Dig. 5 2119.]

[Banks and Banking \$\sim 133.]

In the absence of a special contract varying the rights of the parties, depositors of Confederate currency in a bank, are entitled to be paid in lawful money only so much as the currency was worth at the time of the deposit in such money.

[Ed. Note.-For other cases, see Banks and Banking, Cent. Dig. § 349; Dec. Dig. \$\sim 133.]

[Banks and Banking \$\sim 47.]

The capital of an incorporated bank being a trust fund for the payment of its debts, if it be withdrawn by the stockholder, even though a sovereign State, is held after such withdrawal, subject to the trust.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 68; Dec. Dig. \$247.]

[States \$\infty\$213.]

When a sovereign State becomes a voluntary party to a suit in its own Court, it may be informed and advised by the judgment of the Court, as to its rights and obligations, though such judgment cannot be enforced against it, by the process of the Court.

[Ed. Note.—For other cases, see States, Cent. Dig. § 201; Dec. Dig. \$⇒213.]

Under a bill to wind up the affairs of the Bank of the State of South Carolina, the billholders have no equity to compel the holders of the Fire Loan Bonds, guaranteed by the bank, to show that their claims against the State on the bonds, will be delayed or denied, nor have they any equity to be subrogated to the rights of such bondholders against the State-the latter being liable, by the terms of the bank charter, for all the debts of the bank, no matter how contracted.

[Ed. Note.-For other cases, see Banks and Banking, Cert. Dig. § 198; Dec. Dig. 579.]

[Corporations \$\sim 550.]

[Cited in Parker v. Carolina Savings Bank, 53 S. C. 595, 31 S. E. 673, 69 Am. St. Rep. 888, to the point that an insolvent corporation may make an assignment for the benefit of creditors, as a natural person may do, by virtue of its general power to contract, acquire, and transfer property.1

[Ed. Note.-For other cases, see Corporations, Cent. Dig. §§ 2190-2200; Dec. Dig. 550.]

Before Carpenter, J., at Charleston, May Term, 1870.

This was a creditor's bill filed for the purpose of having the affairs of the defendant, an insolvent bank, wound up under the decree and orders of the Court. A Receiver was appointed, and creditors called in to prove their claims. The case was heard in *126

the Circuit *Court, upon the report of a Referee, setting forth, at length, what orders and other proceedings had been had in the case, what amount of assets were in the hands of the Receiver, and what claims against the bank had been proved. The case will be understood from the judgment of this Court, and the decree of the Circuit Judge, which is as follows:

Carpenter, J. The bill in this case was filed by Messrs. Magrath & Lowndes, Solicitors for Dabney, Morgan & Co., on the 30th day of October, 1867, in the Court of Equity of this State under the laws then existing.

The bill sets forth in substance the charter of the Bank of the State of South Carolina, adopted by the Legislature of South Carolina, in the year 1812; the election by the Legislature of the President and Directors of the bank so created, and the acceptance by them of the charter; the supply of capital by the State, and the fact of the issuance, from time to time, of notes or bills of the bank, redeemable in specie. It sets forth that the bank is insolvent, and claims in the alternative, first, that the capital and all the assets and property of the bank are primarily liable to the holders of the bills issued, and that these billholders are entitled to payment in full before the claims of other creditors can be considered; or, failing in this, secondly, that billholders are entitled to share the assets or property of the bank, pari passu, with other creditors. It refers to the Act of 1838, for rebuilding the city of

Charleston, and recites the 10th, 11th and postponed to the two first named classes of 12th Sections of said Act. The bill further charges, that the two millions of dollars added to the capital of the bank by the loan effected under the Act of 1838, are subject to the same conditions with the original capital. It denies that the holders of the fire loan bonds and stock are properly creditors of the bank at all under the Act of 1838, or, if they be creditors, that they are entitled to any preference over other creditors, and, least of all, to any preference over billholders. It further charges that the 11th Section of the Act of 1865, directing that the assets of the bank be held "especially appropriated, first, to the principal and interest of the bonds known as the fire loan bonds payable in Europe; second, to the payment of the principal and interest of the fire loan bonds payable in the United States; and, third, to the redemption of the outstanding notes hitherto issued by said bank," is unconstitutional and void; first, as impairing the obligation of the contract raised by the charter of 1812; second, as violating the Bankrupt Act passed by Congress in 1867.

*127

The bill then prays that the *"President and Directors of the Bank," as a corporation, and Charles M. Furman and Thomas R. Waring, as individuals, answer the premises, and that they account for the capital, assets and property in their possession; and it further prays that the Court take possession of said capital, assets and property, and distribute the same among the creditors, but claiming priority in such distribution for the billholders.

On the 3d day of February, 1868, the President and Directors of the Bank of the State of South Carolina, by their solicitors, Hayne & Son, filed their answer to the bill.

The answer admits the adoption of the charter of 1812, its acceptance, the receipt of the original capital from the State by the bank, and the issuance by it, from time to time, of bills or notes, made payable in gold or silver coin, and that the holders of the bills are creditors. The answer denies that the billholders are preferred creditors, or that the present holders of the bills issued received such bills "as money," or "in the expectation or hope that they would be paid in coin;" but it alleges that these bills or notes were bought on speculation, and after the insolvency of the bank, and with a full knowledge of this insolvency. The answer further alleges that, (if the bank be insolvent, as alleged by complainants, and the assets insufficient to pay all indebtedness,) when said assets are to be distributed by the Court of well as other general creditors, are, in fact, bondholders, and A. V. Dawson, and others,

creditors, to whom preference was given by the Act of 1865. It claims that a lien was created by the Act of 1838 in favor of these classes; but that, even if the "pledges" contained in the Act of 1838 do not constitute a "lien," giving them a priority to the exclusion of other creditors, that Act certainly constitutes these classes, to wit: the fire loan bondholders in Europe, and the fire loan stockholders in America, "creditors" of the bank. The answer refers to the endorsement on the bonds by the President of the bank, guaranteeing, in the name of the bank, the payment of principal and interest, in proof that these preferred classes were creditors, and creditors having peculiarly strong claims both on the State and on the bank. The answer further alleges, that the bondholders and stockholders being bona fide creditors, the bank was, under the then existing laws, authorized, at its discretion, to assign its ef-

fects for the benefit of creditors, giv*ing a preference to these creditors over others, and that the Act of 1865, adopted by the bank and accepted by the preferred creditors, constituted an assignment by the bank; that such preferences impair no contract, and being consummated before the passage of the Bankrupt Act by Congress, could not be affected thereby; and it claims that the President and Directors of the bank should be allowed to proceed with the execution of the statutory assignment thus adopted by them.

The answer further suggests that the State should be made a party through the Attorney General, and that the preferred creditors should likewise be brought in to defend their interests.

On the 3d day of February, 1868, C. M. Furman and Thomas R. Waring, by their solicitors, Hayne & Son, filed their respective answers, which deny any interest, except as President and Cashier of the bank, respectively, and adopt, as their own, the answer of the President and Directors of the bank.

On the 25th day of February, 1868, a petition was filed by Hayne & Son, solicitors in behalf of Baring Brothers & Co., of London, England, praying that they be admitted as parties defendant, and it was so ordered.

On the 3d day of March, 1868, at the February Term of the Court of Equity, certain decretal orders were adopted by consent of all the parties then before the Court, as well as by consent of the solicitors for the fire loan bondholders, the solicitors for the fire loan stockholders, and the Attorney General of the State. By these orders, the bill was amended, so as to make the Attorney Gen-Equity, the billholders, as creditors, can eral a party defendant for the purpose of rightfully claim only in proportion to the sustaining the validity of the Act of 1865, amount actually paid for the bills. The an- and to make Baring Brothers & Company deswer further alleges, that the billholders, as fendants in behalf of the fire loan sterling

defendants, representing the six per cent. fire | leading representative of South Carolina in loan stock in America. It also required the the American Congress, was appointed and Master of the Court of Equity to call in, by advertisement, all persons claiming to be creditors by reason of holding bills or notes of the bank, on or before the first day of June, 1868; also to notify all persons claiming to be creditors of the bank by reason of holding fire loan stock, to make proof of the same within the same period—that is, before the 1st of June, 1868. An injunction was granted by these orders restraining creditors of all classes from suing the corporation, except as parties to these proceedings, and restraining the bank, and its President and Cashier, from paying over assets to pre-

*129

ferred creditors, without *prejudice however, to the right of the corporation to collect debts, and to change the form of the assets in possession.

On the 3d of April, 1868, the Attorney General filed his answer, which vindicated the Act of 1865, preferring certain creditors, and claimed that the Act of 1865 was confirmatory of the Act of 1838, known as the Fire Loan Act.

On the 15th of April, 1868, Maria Simons and another, in behalf of themselves and all others holding fire loan stock, and on the 20th of May, 1868, A. V. Dawson, filed their respective answers, both of which claimed under the Acts of 1838 and 1865.

On the 26th of May, 1868, the answer of Baring Brothers & Company was filed. From their answer, I copy the following statements, which seem to me necessary to a full understanding of the case .:

"In the month of April, of the year 1838, the larger part of the business portion of the city of Charleston was destroyed by fire. Trade was prostrate, and thousands of the inhabitants were without shelter. Such was the extent of the calamity that the General Assembly of South Carolina had been called together by the Governor, and had duly created and ratified, on the 1st day of June, 1838, an Act entitled 'An Act for rebuilding the city of Charleston.' This Act authorized the issue of the bonds referred to, for the sum of two millions of dollars, thereafter known as the 'fire loan bonds,' and hereinafter more particularly described. The funds thereby to be raised, were, by the scheme of the Act, to be placed in charge of 'the President and Directors of the Bank of the State of South Carolina,' to be used by them for the purpose of rebuilding the city of Charleston. The Act also provided for the appointment by the said 'the President and Directors of the Bank of the State of South Carolina,' of an agent to be 'commissioned by the Governor to proceed to Europe to negotiate said loan.' Under this provision, Mr. McDuffie, a distinguished and favorite citizen of the State, lately Governor, and for many years a three millions one hundred and fifty thou-

accredited."

"These bonds, known as 'fire loan bonds,' were of the form following, signed by the Governor of the State, to wit:

*130

*"'United States of America, "'State of South Carolina.

"£1,000) Loan under an Act for £1,000) Stg. "or Stg. re-building the City or "£500 of Charleston, Five £500 per cent. stock.

"No.

"By his Excellency, Pierce M. Butler, Governor of and Commander-in-Chief in and over said State: Be it known that there is due from the State of South Carolina to the President and Directors of the Bank of the State of South Carolina, one thousand pounds (or five hundred pounds) sterling, lawful money of Great Britain, which sum of money the said State promises to pay the said President and Directors of the Bank of the State of South Carolina, or their assigns in London, on the surrender of this certificate, on the 1st day of July, in the year of our Lord, one thousand eight hundred and sixty-eight, (or one thousand eight hundred and fifty-eight,) with interest thereon, at the rate of five per cent. per annum, payable semi-annually from the date hereof, as it becomes due, on presenting the several warrants herewith annexed, at the Banking House of Baring Brothers & Company in London."

(Signed) "Pierce M. Butler, Governor. "Countersigned by

"Wm, Edw. Hayne,

"[Seal.] Comptroller General. "To the bonds were attached the following coupons, signed by the Cashier of the bank, to wit:

"'South Carolina State Stock, "'Under an Act ratified 1st June, 1838. "'Baring Brothers & Co., London:

"'Pay to bearer, on 1st July, 1839, twentyfive pounds (or twelve pounds ten shillings) sterling, being a half year's interest on bond for £1.000 (or £500) sterling.

"(Signed) C. M. Furman, Cashier of Bank of State of South Carolina.'

"'£25 or] Sterling. " '£12.10

"On the bonds was the following endorsement, signed by the President of the bank, to wit:

"'In pursuance of and by authority of an Act of the Legislature of the State of South Carolina, ratified on the 1st day of June, one thousand eight hundred and thirty-eight, the

*131

President and Direct*ors of the Bank of the State of South Carolina, with a capital of

within bond to hereby guarantee the punctual payment of the principal and interest of the said bond as it becomes due at place specified within.

"'C. J. Colcock. (Signed) "'Pres. of the Bank of the State of So. Ca.

"Mr. McDuffie exhibited in England double credentials; the first executed by the Governor of South Carolina, constituting him agent of the State, and the record by the President of the Bank, constituting him agent of the bank. In Mr. McDuffie's address to the public, he makes the following statement:

"The Legislature, in order to make assurance doubly sure, has provided that in addition to the general pledge of the faith and resources of the State, particular funds shall be specially appropriated and solemnly pledged and set apart to secure the punctual payment of the interest and principal of this loan. As this fund will partly consist of the profits which shall accrue from the two millions now to be borrowed, the mode in which it is to be used will be stated. It is to be deposited in the Bank of the State of South Carolina, as so much capital to be employed by that bank, acting as the fiscal agent of that State, in accomplishing the object of the loan."

"In the same address, he publishes two Sections of the Act of 1838, which were as follows:

"'Section XI. It shall be the duty of the President and Directors of the Bank of the State of South Carolina, to cause to be opened in the books of the said bank, an account, in which they shall debit themselves with the profits arising out of the additional capital created out of the two million loan, aforesaid. for the year ending on the first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and with all the future profits of the said loan, as the same shall be hereafter annually declared, which said fund, with all its accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof, and it shall be the duty of the President and Directors of the said bank, annually to report to both branches of the Legislature the exact state of that fund.

*" 'Section XII. When the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks, for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart, for the payment of the interest on the said loan and final redemption thereof."

"Upon the faith of these representations

sand dollars (including the present loan) (& Company themselves became purchasers of for value received, assign and transfer the these bonds to a large amount, and were acor bearer, and tive in inducing others to become purchasers. They believed that the bondholders became creditors of the bank (whose capital they furnished) as well as of the State. They relied on both. They relied on the honor and good faith of a State which had hitherto proved true to its engagements, but were all pleased that the bank, a moneyed institution. whose life was credit, and a corporation amenable to the laws of the country, was interposed between the State and trustee for the creditors."

As a part of the history of these proceedings, it is proper to notice the fact that the public advertisements, calling in billholders and fire loan stockholders in America, continued to be published from March 3, 1868, to May 20th, of the same year, in one or more of the leading newspapers in the cities of Charleston, Cincinnati, New Orleans, New York and Augusta, and that after May 20th, until July 1st, 1868, the following amended order was published in the same papers:

"Office of Master in Equity, "Charleston, May 20th, 1868.

"I. All presenting claims in the above case, including holders of bills or bank notes, are required, in addition to the proof of the claims, to render into this, the Master's office a statement, verified by affidavit, of the time when the same came into the possession of the holder, and the consideration paid there-

"II. It is further ordered, That all parties who have presented, or shall present their claims before Master Tupper, before the 1st day of June, shall be allowed until the 1st day of July next, within which to supply the statements as to the time the claims were required, and the consideration paid for them. But nothing in the order contained shall be construed as extending the period for presenting claims beyond the 1st day of June.

"III. It is further ordered, That neither *133

the amended order nor *the orders hitherto made, are intended to conclude or to in any way prejudice the right or equities of the parties to this suit.

> "James Tupper, (Signed) "Master in Equity."

The exhibits filed with the report of the special referee, James W. Gray, Esq., show the extent to which proof has been made up to this time.

I may add that certain general creditors, such as persons claiming for work and labor, have, by consent of parties already in, been allowed at a late day to come in, representing themselves and others having like interests. These are entitled to an adjudication of and assurances, the house of Baring Brothers | their claims upon the assets in controversy,

which have been a "fund in equity" since the decretal orders of March 2d, 1868. In April, 1869, the fund was transferred from the custody of the bank officers into the hands of a receiver, appointed by the Court, in whose hands they still remain, subject to the order of the Court.

4 Kent, 138; 2 Spence's Equity, 777, and Kelly's Reports, 435. As to the extent of this lien, I am of the opinion that it covers everything which the bank now has in its possession, or rather the entire "fund in equity" in the hands of the receiver. Mr. Waring testifies that nothing contributed by

The first inquiry presenting itself is directed to the equities of the complainants' bill. These seem all to be based on the effect of the original charter of the bank; and it is assumed that the charter pledges to billholders through all time a lien on the bank, its capital and assets, in preference to all other creditors. I cannot perceive in the charter relied on, any provision which makes the bank in this respect, differ from other banks. It is well settled that stockholders, or a sole stockholder, though that stockholder be a State, cannot withdraw from a bank its capital or assets to the injury of creditors-that the assets of a bank unable to pay "belong solely to the creditors." It has been decided that an Act of a State Legislature intended to effect such a result-that is, to withdraw the assets from the reach of creditors-is unconstitutional and void.

But these cases, although in some of them billholders were the creditors moving, make no distinction in favor of this class of claimants over others. It is simply as creditors that their rights are defined. Their rights are sustained as against stockholders setting up ownership, but the respective claims of creditors among themselves are not discussed. "A corporation," it is said, "unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made bona fide for the payment of its debts." See Abbott's Digest, Law of Corporations, 44, and cases there cited. An ordinary charter, then, cannot be construed as pledg-*134

ing capital or assets so as *to constitute a lien. Otherwise, it would be too late to make preferences. Billholders, then, in my judgment, have not, as such, any priority by virtue of the charter of the bank over other creditors, and it is so adjudged.

The question that then presents itself is, whether the fire loan bondholders have any claim to preference, and, if so, to what extent? That they are creditors, I consider too plain for argument. In my judgment, Sections 11 and 12 give them, most clearly, a lien on the thing pledged. On this head, the authorities cited by counsel are to my mind conclusive. In the language of Judge Story, I consider it "a contract for an hypothecation" of future profits, and that when the profits once came into existence, "the right of the pledgee immediately attached."—Story on Bailments, 294; Coote on Mortgages, 233;

Kelly's Reports, 435. As to the extent of this lien, I am of the opinion that it covers everything which the bank now has in its possession, or rather the entire "fund in equity" in the hands of the receiver. Mr. Waring testifies that nothing contributed by the State as capital now remains in the form in which it was placed there. He says that it appears that the bank has accounted to the State for all capital advanced from all sources, with interest in full thereon; that, in fact, the State has withdrawn from the bank over and above the amount of capital advanced a large sum, and is now heavily indebted to the bank. He represents that the present assets of the bank have been considered as the result of past profits; that the sinking fund made of profits was appropriated to the purchase of those assets. He states that since the year 1838, the profits of the bank have exceeded the value of the property and assets now held, and declares that, "if set apart and applied as directed by the Act of 1838, the fund accumulated would have greatly exceeded the present fire loan debt." All other debts for which profits were pledged, he says, have been paid. Mr. Furman entirely confirms this testimony.

It would appear, from this evidence, that as a matter of fact, the present property and assets of the bank are covered by a pledge of "profits." In the case of Curran v. The State of Arkansas, 15 Howard [304, 14 L. Ed. 705], Judge Curtis expresses himself as follows: "Whatever losses a bank sustains are losses of the capital paid in by its stockholders. That is the only fund it has to lose. When it has become insolvent it has lost all that fund, and has nothing belonging to its stockholders. In some sense a *135

bank may be said to owe its stock*holders for the capital they have paid in. With the leave of the State they have a right to withdraw it, after all debts are paid; and if the State is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of its capital remaining."

The Chief Justice of this State, in regard to this very bank and these assets, uses the following language:

"While it continued solvent, it was matter of little consequence to a creditor, how far, or to what extent the Legislature interfered by its control. When, however, the fact of its insolvency is apparent, whether the State is the sole stockholder or a costockholder with individuals, the fund which it supplied as capital no longer remains."—The State ex rel. the Attorney General v. The President and Directors of the Bank of the State.

The counsel for defendants have, in fur-1 created that the Bank of the State was to ther confirmation of this view, cited the case of Garnet v. Stewart, 3 Sim., 308, in which Vice-Chancellor Shadwell decided that "a devise of rents and profits of the estate is the same as a devise of the estate itself." Again. they cite Legard v. Hodges, 3 Brown Ch. Rep., 531. This case was twice argued, and on re-argument, Lord Loughborough confirmed the previous decision, that "to set apart and appropriate a third part of rents, etc., (to secure the payment of a debt,) was an equitable lien on the estate, the rents of which were so appropriated.

From the authorities above cited, it would seem that the pledge of the profits in the 12th Section of the Act of 1838 is equivalent to a pledge of the whole capital of the bank for the payment of the fire loan bonds, and the redemption of stocks provided for in that Section: and those stocks having long since been redeemed, the lien of that Section extends to all the present property and assets of the bank. According to the view I take of the 11th Section, it makes little difference whether the foregoing conclusions are or are not correct. It is provided in that Section that, "all the future profits of the said loan, as the same shall hereafter be annually declared, which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof." Here is a pledge of the two millions capital and its future profits. It is in proof that the State has long since withdrawn all the capital placed in the bank by it, except this fire loan, therefore the loan *136

is *the only capital left in the bank, and this being solemnly pledged for the final redemption of the fire loan bonds, the present assets must be applied to their payment.

Having thus determined that the holders of the fire loan bonds are entitled, by virtue of the Act of 1838, to priority over the billholders in payment from the assets of the bank, the next question to be considered is as to the status of the holders of the fire loan stock. It is contended, on the part of both bond and billholders, that the fire loan stock is not entitled to the lien created by the Act of 1838. Both bonds and stock are equally a part of the fire loan. The authority of the Act of 1838, was to procure the loan on the best terms, either in Europe or America, by the issue of bonds or other contracts. Whether the whole of the loan, or any part of it, was made in Europe or America, and whether the form of the loan thus effected should be by bonds or other contracts, as, for instance, stock, was entirely a matter of discretion. When thus created, in whatever form of contract, the loan, to the extent of two millions of dollars, was equally protected. It was for the whole loan thus

provide for the payment of the interest and principal, and to which the pledges of the Act of 1838 were to apply. The Act makes no distinction in reference to any portion of the loan. It places the whole upon the same footing.

It was urged, in argument, that the 1st Section of the Act of 1838 authorized and directed the Governor of the State to issue the bonds or other contracts, countersigned by the Comptroller General; whereas, the certificates of the fire loan stock exhibited in the case show that they are signed by the State Treasurer, and countersigned by the President of the bank, and because they are countersigned neither by the Governor nor the Comptroller General, the holders of the certificates cannot claim the benefits of the Act. It appears that in 1839, with the consent of the Governor, it was determined to issue, as a part of the loan, a six per cent. stock, of which three hundred thousand dollars was raised in that year. The Act of 1840 made further provisions in relation to the fire loan. In that Act it was declared that transfers of the stock issued by virtue of the Act of 1838, and the new certificates requisite upon such transfers, should be made by the same officers, and in the same manner as for other State stocks; and, as if to leave no doubt that the stock when thus issued was to be entitled to all the benefits of the Act of 1838, it added, "but the certificate shall upon its face exhibit that such stock has been issued under the provisions of the said Act."

*137

*It was further urged in argument that while the certificates of the fire loan stock are headed "Loan under an Act for rebuilding the City of Charleston," yet the stocks exhibited allege that they are created by virtue of Section 1 of an Act for rebuilding the City of Charleston, ratified 1st June, 1838, and therefore that the stock has reference simply to the 1st Section, and is not entitled to the guarantees of the other Sections.

In the view thus urged I cannot concur. It is the 1st Section only which creates the loan, whether in the shape of bonds or stocks. Without the 1st Section there would be no authority for the issue of the bonds, or of any contract for a loan. Both the bonds and stocks are created by the 1st Section. other Sections provide the security for their redemption. It was upon the faith of the guarantees of the Act of 1838 that the bonds and stocks were taken, whether in Europe or America. Until the Act of 1865, the Legislature, by the reports of their investigating committees and their whole course of action, recognized that the pledges of the Act of 1838 applied without discrimination to the whole loan of two millions.

It is urged that by the 11th Section of the

Act of December 21st, 1865, entitled "An Act the fire loan stockholders, it is further orto raise supplies for the year commencing in October, 1865," a statutory assignment of the assets of the bank was made; first, for the benefit of the bondholders; second, for the benefit of the stockholders; and, third, for the redemption of the outstanding bills issued by the bank. Conceding that the State had a right to assign assets belonging to it for the benefit of creditors, and that it had a right to make preferences, the proof in this showing, as we have seen, that it had already withdrawn more than it had put into the bank, I cannot conceive how the assignment of funds belonging to the creditors, and not to the State, could affect the rights of the parties. If I am right in my conclusions, the State had, long before the passage of the Act of 1865, solemnly pledged every dollar that remained in the bank in 1865 for the redemption of the fire loan bonds and stock, and therefore had no right to make any other or different disposition of that fund. In the one view, it was disposing of property that the State did not own; and in the other, it was a violation of solemn contract, upon the faith of which the loan was taken. But if I should be in error in this view, there is another, which, to my mind, is conclusive as to the invalidity of that Section of the Act of 1865. Section 22 of Article I of the Constitution of the State of *138

South Carolina, adopted September 27, *1865, declares that "every Act or Resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." On the 21st day of December, 1865, while that Constitution was in full force, the Legislature passed an Act entitled "An Act to raise supplies for the year commencing in October, 1865;" and the 11th Section of that Act directs how the assets and property of the bank shall be distributed. I am of the opinion that every provision of the Constitution of a State is mandatory, and the Legislature is bound thereby; hence I cannot resist the conviction that the 11th Section of the Act of 1865 is unconstitutional and void, because it is a subject entirely distinct from the subject of the Act, and is not expressed in the title.-Baldwin v. The Mayor of New York, 42 Barbour, 549.

It is, therefore, ordered and decreed, That from the assets of the bank in the hands of the receiver, the fire loan bondholders and the fire loan stockholders be first paid, principal and interest, accrued and accruing, up to the date of their payment, upon the surrender by them of their bonds and certificates of stock respectively; but should the assets be insufficient to pay the whole amount due the bondholders and stockholders, then they shall be divided ratably between them.

But, if the assets should be more than sufficient to pay the fire loan bondholders, and dered and decreed. That the remaining assets in the hands of the receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other creditors of the bank, subject, however, to the modification hereinafter made.

The next question which presents itself for my consideration is as to the right of the holders of bills issued by the bank.

The State has become a party to these proceedings. It cannot be sued; but it may consent to be a party. No process of the Court, proprio vigore, can affect it. No order or decree can act upon it in invitum. When it does become a party, it is to the end that through its courts it may be advised of its rights or its obligations; and when these are ascertained, the highest sanction has been secured to enforce the one or discharge the other. In this case the State has, of its own will, submitted to its Courts the decision of the issues involved. At the hearing, it was so announced by the Attorney General then representing the State.

In considering the relation of the State to the holders of the bills of the bank, it is not necessary to give critical interpretation to so

*139

*much of the Act of 1812 as declares that "the faith of the State is pledged for the support of the bank, and to supply any deficiency in the funds specially pledged, and to make good all losses arising from such deficiency." When a State becomes a corporator, in that capacity, it retains no attribute of its sovereignty. It is regarded as an individual, so far as any exercise of control is concerned, in relation to the corporation. What an individual corporator may do, the State, as a corporator, may do, and no more. And where, as in some states, the Constitution provides that the State may be made a party to a suit, and, therefore, in such suit, a decree in invitum be made against it, there is no difference between the condition of a natural person and that of the State as a party to that suit. In this case, the assent of the State to become a party does not carry with it the assent that the order or decree should reach its property. The object, therefore, of the State connecting itself with this suit is that the nature and extent of its rights and obligations may be ascertained by the Court.

It has been shown, in this case, that the State contributed to the bank the whole of its capital. Its rights were those of a stockholder, and so were its obligations. capital of the bank is pledged for the payment of its bills. It is held, or it is intended to be held, by the proper officers of the bank, as a trust fund, of which they are the trustees. The right of the stockholders to a return to them of what they contribute, can been paid. According to the testimony adduced, the State has drawn from the bank not only the whole amount arising from all sources which it ever contributed to its capital, with interest thereon, but it is largely indebted to the bank besides; and while this fact appears, the billholders, depositors, and other creditors are left unpaid.

If an individual held the relation to the bank which the State holds, he would be required to pay back to the bank at least as much as would satisfy its creditors. The right of the creditor against the State is as clear as it would be against the individual stockholder. The obligation of the stockholder is as clear in the one case as in the Nor is it lessened because in the case of the individual the order or decree could enforce his duty, while in the case of the State its Courts have no such process. But it cannot be supposed that a State will need any process, when it has the sense of duty in regard to its obligations announced in its own Courts. If the State had not with-

*140

drawn from the bank the whole *of its capital, the creditors of the bank would be paid. To those who would become creditors of the bank, the State had pledged that capital. At various times the Courts of the State have declared that the capital of the bank was pledged to its creditors. The pledge of the State, and the judicial declaration of it in the case of this bank, was that which had been everywhere declared to be the law governing such corporations. The principle that the capital belonged in the first place to the creditors of the corporation, and not until they were satisfied, to the stockholders, is settled beyond dispute. And equally well settled is it, that stockholders who have withdrawn capital before the claims of creditors are satisfied will be forced to bring it back.

The statement that the whole of the capital has been withdrawn by the State, has been made very positively by Mr. Furman and Mr. Waring, and no denial has been made of its correctness.

In giving force to the Act of 1838, and recognizing the prior equity of the creditors under that Act, I could not fail to observe the pledge of the faith of the State which it gave to those who, in that matter, became its creditors. Unquestionably the creditors of the bank have a right to ask of the State that its pledge, in relation to that bank, be redeemed. They only ask the State to give back to the bank that which belonged to it-which was its property, and which belonged to its creditors, and is their property.

In the discussion of the case something was said concerning the inhibition of the State to provide for the billholders, because of the amendment to the Constitution for-

only arise when the debts of the bank have | bidding the payment by the seceding States of debts contracted in aid of the war. point thus raised cannot be sustained. the first place, the claims are against the bank, and the State is involved because it has taken the assets of the bank. The bank can have no more reason to question its liability in regard to its bills than would any other party to a contract who had entered into a lawful engagement during the war. But another reason is all-sufficient. It is proved that the bills now in question were not issued in aid of the war, but to relieve the necessities of the people, arising from the loan of bills of an older issue to the Confederate States. If any bills came within the terms of the amendment referred to, it is the bills which have been redeemed by the State by the issue of its bonds.

> It was also said that the bills proved, in this case, had been purchased at a low rate, and that the claim for their face was unjust and extortionate. It would not be easy for

*141

one who had sold these *bills in open market, at less than their face, to a purchaser, bona fide, to come into Court and claim that he who had purchased should not receive from the bank more than he had paid for them; and it would be equally difficult to understand how the bank could claim that it was only liable for the amount paid by each purchaser for its bills. Within a comparatively recent period, the public securities of the State were sold at very reduced prices. If the objection now made as to these bills be well taken, it would seem to be equally applicable to all public securities. And yet few things would more affect the value of the public securities of the State than such an objection seriously pressed by those having control of its affairs.

But this objection, considered in connection with the bank, ceases to have any claim to consideration. When the bank issued its bill, it promised to pay the holder the amount specified on its face. That promise was made either to create a valid legal obligation, or to work a fraud. As it is not conceivable that it was made for the latter purpose, it must have been for the former. For every bill that it issued, the bank received consideration. For that it made the promise that is contained in the bill. And there is nothing afterwards and between other parties that can diminish its obligation to pay that bill, according to its face, to a bona fide holder.

In the case of Furman Green & Co. v. Michel, Collector of Taxes, recently heard and decided in the Supreme Court of the United States, the question was considered how far the guarantee of the State of Tennessee extended. In the judgment of the Court this language is used:

"An attempt is made to restrict the oper-

the course of dealing with the bank, receives the notes, and not to extend further. * * * The guarantee is, in no sense, a personal one. It attaches to the note; is part of it: as much so as if written on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it."

It would seem, from the last mentioned authority, that the State of South Carolina was bound to redeem these bills to the extent of the original pledge made in the Act of incorporation, and that, certainly, was to the amount of the capital stock furnished by the State. But I prefer to rest my judgment of the liability of the State, in this case, upon what I regard as the true and unquestionable grounds. The bank is insolvent. The State is its debtor. It owes, first, the amount of capital stock furnished by the State; and

*142

*it owes, second, large amounts borrowed by the State in addition thereto. The creditors of the bank, therefore, have the right to payment of the amount of the indebtedness of the State into the bank for the purpose of being applied to their debts respectively. So far as the bills are concerned, this claim should be for the full amount of the face of said bills, while such bills were issued upon a specie basis, and until they were practically Confederate transactions, from which time, taking the date of the bill as the data, they should be scaled like other transactions made with reference to Confederate money.

What I have said in reference to the bills of the bank applies, in my judgment, with equal force to the depositors and other creditors of the bank whose claims are unsecured under the Act of 1838; it is therefore

Ordered, That this case be referred to the Hon. B. F. Dunkin, as special referee, and that he call in the two classes of depositors represented in this case by those who deposited before the war, and those who deposited during the war, by advertisement, published in the Charleston Courier, Charleston News, and Columbia Phenix, for six weeks, on or before the 15th day of August, 1870, to prove their claims; and if such claims are not so proved, they will be barred from all participation in the assets of said bank, or claims upon the State; and it is further

Ordered, That the said special referee take proof as to the character of the indebtedness to said two classes of depositors, as to whether the transactions were with reference to lawful money of the United States or Confederate currency; and as to such of them as he finds to have been in Confederate currency, he will ascertain the value of each claim in the lawful currency of the United States; and it is further

Ordered, That the said special referee also ferred to the charter.

ation of the guarantee to the person who, in ascertain what portion of the bills already proved were issued with reference to Confederate currency; and as to such bills, he will ascertain their value in lawful money of the United States. And he will also ascertain what portion of the other debts already proved were contracted in Confederate currency; and, as to such debts, he will ascertain their value in lawful money of the United States at the date of the contract; it is further

> Ordered, That the said special referee ascertain the amount of the indebtedness of the bank upon the principles of this decree, giving to the State credit for the amount of

*143

stocks and other securities *left with the bank as collaterals, and giving to the State also credit for the amount of the bills redeemed by the issue of bonds; and it is fur-

Ordered, That the said special referee tax the costs of this suit, and report to this Court on the first day of its next November Term.

The holders of the bills of the bank appealed, on the following grounds:

- 1. Because, by the charter of the bank, in 1812, and the several renewals of that charter, and the rule of law applicable in such cases, the assets of the bank must be applied to the payment of the creditors of the bank; and among such creditors are the holders of the bills of the bank.
- 2. That over so much of the assets of the bank as are or may be necessary for the payment of the billholders and creditors of the bank, the State as sole stockholder has no lawful right or power to make any appropriation or disposition of them by which the creditors of the bank would be delayed or defeated in the recovery of their claims.
- 3. That the pledge of the profits of the bank, as it appears in the Act of 1838, is only the pledge of what the State, being entitled to take after the debts of the bank were paid, had a right to pledge. That profits are only ascertained after debts are paid; and no profit exists when the assets are not sufficient to pay the debts.
- 4. That the Act of 1838 was not a modification of the charter of the bank; it was not so intended, and cannot be so construed. That when the Act of 1838 was passed, the charter of the bank, by the Act of 1812, was of full force, and so continued in all respects and without modification, so far as creditors of the bank are concerned, in its renewal by the Act of 1833, and subsequently by the Act of 1852.

5. That the lawful issue of the bills of the bank, of whatsoever dates of issue they may be, unless otherwise plainly designated, are of the like and equal legal obligation. That the obligation they impose arises from the charter, and the liability they create is re1838 was a notification to the holders of bills of the bank, subsequently issued, of a modification of the charter of the bank, or that their rights as creditors of the bank under its charter, were intended to be, or were, in

fact, *modified or impaired by the Act of 1838; is not the true interpretation of the Act of 1838, and is inconsistent with the terms of the Act of 1812, and the subsequent Acts renewing the said charter; and with the purposes of those Acts in the establishment of a bank, and the pledge of the State, as it is made in the Act of 1812, and in the other Acts of 1833 and 1852.

7. That whatever may have been the claims of the holders of the fire loan bonds, if the addition to the capital of the bank arising from those bonds had been left with the bank when the State withdrew from the bank the whole amount that had been so deposited with the bank, as between the State and the bank, the primary liability for these bonds was with the State, and should have been so decreed.

8. That with such primary liability on the State, the State could not have any right to appropriate or apply the assets of the bank to the payment of these bonds, and leave the proper creditors of the bank unpaid.

9. That, where the holders of the fire loan bonds had an admitted liability of the State for their claims, and the creditors of the bank had no other admitted claim than against the assets of the bank, the holders of the fire loan bonds should be confined to their remedy against the State.

10. That the holders of the fire loan stock are not creditors of the bank. The stock they have is a part of the public debt of the State, so recognized by the State, and the holders thereof have no more right to claim the assets of the bank, to the exclusion of the proper creditors of the bank, than have the holders of any portion of the public debt of the State.

11. That the holders of fire loan bonds and stocks, who advanced moneys to the State under the Act of 1838, with notice under that Act, that such moneys were to become a part of the capital of a bank, have no equity against creditors of the bank who deal with the bank on the faith of its capital being liable to its creditors.

12. That no part of the stocks and securities set forth and considered as belonging to the sinking fund, was proved to belong to that fund. The Act of 1852 expressly provided the manner in which the profits of the bank should be disposed of, and the manner in which securities belong to the sinking fund should be designated. None of the stocks and securities were so designated. They could not be identified by Mr. Waring, the Cashier, as belonging to that fund; no being no condition broken. The bonds are

6. That the proposition that the Act of account was kept of investment for that *145

> fund; and *the decree in this case establishes, as a fact, which no witness undertook to prove.

> 13. That in relation to the choses in action left in the hands of lawyers for collection -the real estate of the bank-the State bonds lodged with the bank by the State as collateral security for the repayment of moneys advanced for the New State House; and the shares of the Charlotte and South Carolina Railroad lodged also as security for the advances made by the bank to pay the subscription of the State to that railroad; these nowhere appear as the property of the bank, otherwise than as collaterals to secure the repayment of loans made by the bank in the course of business; are not regarded by the bank as profits; constitute no part of what is regarded as the sinking fund; and do, in fact, represent so much of the capital of the bank, as not withdrawn, still remained in its possession, and is now in the hands of the Receiver.

> The President and Directors of the bank and the State of South Carolina, appealed also from so much of the decree as is embraced by the following words, to wit:

> "But if the assets should be more than sufficient to pay the fire loan bondholders and the fire loan stockholders, it is further ordered and decreed that the remaining assets in the hands of the Receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other creditors of the bank, subject, however, to the modifications hereinafter named."

> The solicitors for Baring Brothers & Co., also appealed, on the grounds:

> 1. The decree errs in deciding that the Act of 1838, for rebuilding the city of Charleston, created a lien on the assets of the bank in favor of the fire loan stockholders, equal in all respects with the lien given by that Act to the fire loan bondholders.

> 2. It is submitted that if any lien was given by said Act securing that portion of the debt incurred by the State in issuing State stock, the lien was intended for the protection of the State, and not for the holders of the stock. Neither the circumstances of the issue, nor the language of the scrip, imply any direct contract with the holders of the stock; and it was competent for the State, at any time before condition broken, to waive or postpone the lien intended for its own protection. According to the testimony there has been no failure to pay the holders of this stock up to this day. The

princi*pal is not due, and the interest has been paid, latterly, in gold. The stockholder cannot therefore claim by subrogation, there

past due, and no interest has been paid since the Act of June 5th, 1838, for rebuilding the January, 1868.

- 3. The decree errs in setting aside the 11th Section of the Act of 1865, entitled "An Act to raise supplies." This Section, it is submitted, is germane to the subject-matter of the Act expressed in the title, as it was in effect a provision to raise supplies for meeting a debt. And if not germane it is not on that account void.
- 4. Defendants, representing fire loan bondholders, submit, further, that the 11th Section of the Act of 1865 does not contravene the Act of 1838. On the contrary, in apportioning the assets, first, to payment of the fire loan bondholders, it confirms the contract made with them in pursuance of said Act; and in postponing fire loan stockholders the State simply waived its own security and violated no contract.
- 5. The Act of 1865 was the action of the sole stockholder, and being ratified and acted upon by the President and Directors of the bank and accepted by the preferred creditors, it became an assignment by the corporation.
- 6. If this assignment, made before the rassage of the Bankrupt Act, violated no previous contract, it is a valid assignment, and gives priority to fire loan bondholders.
- 7. If the Circuit decree should be so modified as to place billholders upon the same footing with fire loan bondholders and stockholders, then defendants submit that the holders of such bills who came into possession of the same after the insolvency of the corporation, cannot claim to share the fund in equity as creditors according to the face value of such bills, but they must share said fund, if insufficient to pay debts in full, according to the price paid for said bills.
- 8. Should the Circuit decree be so modified as to place all creditors of the corporation upon the same footing, defendants submit that persons who deposited Confederate money in said Bank have no claim upon the fund in equity.

Dec. 2, 1871. The opinion of the Court was delivered by

MOSES, C. J. The decree of the Circuit Judge presents the issues on which his judgment was rendered, and the notices furnish the grounds of appeal on which its reversal or modification is asked. The question submitted for our consideration involves the

*147

mode in *which the assets held by the Receiver appointed by the Court, for and on account of the corporation lately existing as the Bank of the State of South Carolina, admitted to be insolvent, are to be distributed among its creditors, and these may be divided into four classes:

First, the holders of the bonds issued under

the Act of June 5th, 1838, for rebuilding the City of Charleston; second, the holders of the 6 per cent. stock, claiming by virtue of the same Act; third, the billholders of the said corporation; and, fourth, the depositors and general creditors.

The case has been ably and elaborately argued, and has received all the consideration which was demanded, more from a deference to the zeal with which the various claims have been pressed, than from any serious difficulty on the part of the Court in arriving at what it regards a just conclusion. It will be necessary, before proceeding further, to refer to so much of the history of the institution as relates to its establishment, and to the character of the claims which are before us for adjudication.

By the Act of 1812, 8 Stat., 24, a bank was established "on behalf of and for the benefit of the State." All the stocks then owned by the State, of any description whatsoever, and enumerated in the Act, the unexpended money in the Treasury, and all the taxes to be thereafter collected on account of the State-the last subject to the drafts on the part of the State, authorized by legal appropriationwere to constitute and form its capital, and was vested in the President and Directors to be elected by joint ballot of the Legislature. It was made a corporation and body politic. "and the faith of the State was pledged for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency." The corporation had the right to hold property, and the same to convey at pleasure; to sue and be sued. the powers usually enjoyed by banking corporations were vested in the President and Directors. The whole capital having been contributed by the State, it was the sole owner and stockholder. By the charter, the income of the bank was to be a part of the revenue of the State, and the bills or notes of the corporation originally made payable, or which shall have become payable on demand in gold or silver coin, were to be receivable at the Treasury either at Charleston or Columbia, and by all the tax collectors and public officers, in all payments for taxes or other moneys due. It is not necessary for the

*148

solution of the several questions *before us, to refer to the subsequent Acts of the Legislature, which, from time to time, increased the capital of the bank, by requiring all public officers to deposit their receipts therein, or created loans upon which the corporation was to bank, except the Act of June, 1838, 7 Stat., 156, on which the fire loan bond and stockholders found their claim to a specific lien on the assets of the bank, which now alone consist of real estate, bonds, stocks and outstanding personal debts. The charter was to continue until May 1st, 1835. In Decem-

1, 1856, and in December, 1852, again extended to January 1, 1871, 12 Stat., 151.

By the Act of June, 1838, (7 Stat., 156.) entitled "An Act for rebuilding the City of Charleston," the Governor was directed, "in the name of the State, to issue bonds or other contracts, to be countersigned by the Comptroller General, not to exceed two millions of dollars-one million to be payable at the expiration of twenty years, and the other million at the expiration of thirty years-at a rate of interest not exceeding six per cent., for the purpose of procuring a loan, on the credit of the State, to re-build that portion of the city of Charleston then lying in ruins, and it was enacted by the first Section thereof, "that the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of the said bonds or contracts, with the interest thereon."

By the second Section, the Governor was authorized and directed to commission such agent or agents as the President and Directors of the Bank of South Carolina should appoint, which agent or agents were empowered to receive the said bonds and contracts, and to make all such arrangements as in his or their judgment may be deemed expedient for procuring the said money, and placing it to the credit of the State, subject to the draft or order of the President of the bank.

By the third Section, it was enacted that "the money, when realized in Charleston, shall be deposited in the Bank of the State of South Carolina, and shall become a part of the capital thereof."

The tenth, eleventh and twelfth Sections are quoted in full, as the Fire Loan bond and stockholders rely on them as creating a trust on their behalf, attaching on the assets now held for appropriation and distribution.

"Sec. X. It shall be the duty of the President and Directors of the Bank of the State of South Carolina to make proper provisions or the punctual payment of the interest of

*149

such loan as may be *effected upon the credit of the State under the provisions of this Act, and also for the ultimate payment of the principal thereof.

"Sec. XI. It shall be the duty of the President and Directors of the Bank of the State of South Carolina to cause to be opened on the books of the said bank an account in which they shall debit themselves with the profits arising out of the additional capital created out of the two millions loan aforesaid, for the year ending on the first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and with all the future profits of the said loan, as the same shall hereafter be annually declared, which said fund, with its annual accumulation, shall be considered solemnly pledged of the said two millions loan for the year

ber, 1833, 8 Stat., 67, it was extended to May | and set apart for the payment of the interest on the said loan, and the final redemption thereof; and it shall be the duty of the President and Directors of the said bank annually to report to both branches of the Legislature the exact state of that fund.

> "Sec. XII. When the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thercof."

> Though the bank was established "on behalf of and for the benefit of the State, which held the relation to it as a sole stockholder, its obligations and responsibilities to its creditors are to be measured by the same standard which would be applied if it constituted a company representing the interests of individual stockholders. It can demand no privilege, immunity, or exemption by reason of its connection with the State, nor is it subject to a higher responsibility because it represents a State as its only stockholder. In regard to its creditors, it can occupy no other position than a corporation composed of private citizens.

> It is claimed for the Fire Loan bond and stockholders that the 11th and 12th Sections of the Act of 1838, create a prospective lien upon the "fund" pledged in Section 11, and upon the profits in Section 12, to wit: the profits arising from the original capital of the bank after payment of certain debts for which said profits had been previously pledged, and which have been fully satisfied. It is not to be denied that a pledge may be created by written directions to hold property to meet a specified demand, or to devote to a special and stated purpose the rents and issues of a particular estate. In fact, any contract, in writing, by which one engages, for a

> > *150

con*sideration, that another may have the income or yield of either real or personal property, (in proper form to affect such property) or the profits of his stock, or other moneyed investment, will amount to such a devotion of that so set apart as the principal from which the rents, income, or profits were to accrue, as in equity will constitute a charge upon it. The principle, as in the case of a technical pledge, is not restricted to such property as may be in existence, but will extend to future earnings and income. The authorities referred to in the argument, leave no doubt of the position. It is necessary, therefore, to inquire, assuming that some pledge was thus made by the said Act, what was its character and extent? The word "fund" is used only in the 11th Section. The bank was required to debit itself with the profits arising out of the additional capital ending on the first of October, 1839, and with all the future profits of the said loan, as the same should thereafter be annually declared, which said fund and its accumulations were solemnly set apart for the payment of the interest on the said loan, and the final redemption thereof.

The additional capital was not to remain in the bank, but was to be engaged in its usual business, the bank, however, being required to loan the applicants, for the purpose of rebuilding in the city of Charleston, the same amount of money, if so much was required. It was the profits arising out of the additional capital for the year ending October 1st, 1839, with all the future profits of the said loan, as the same shall be annually declared, which were to constitute the "fund." These were not known, and could not be anticipated, and the bank was, therefore, properly directed to keep them in a distinct form, that their amount might at once be capable of ascertainment. The 12th Section gives the same direction as to the general profits of the bank, after the redemption of certain stocks for the payment of which they had been previously set apart. The fire loan bond and stockholders, however, contend, that even if the two million additional capital, under the construction to be given by the Court to the said Sections, cannot be included in the fund pledged for their debts, then, that the remaining assets of the bank represent its profits during its existence, and are covered by the lien of the fire loan debt, which must be wholly satisfied before any other creditor can have any share of them. The argument proceeds upon the ground that a pledge of the profits is a pledge of that out of which the profits are to arise: authorities are referred to for the purpose of showing that a devise

*151

of rents and profits is *a devise of the land itself, and will carry the legal as well as the beneficial interest therein.

The application of the principle to devises, proceeded from the disposition of the Courts not only to effect, if possible, the purpose of the testator, but to give the devisee the bounty intended for him in a shape in which he could enjoy it, and to place at his command the direction and control of the very fund to the profits of which he was entitled. When the rents and issues are only given for a limited time, the rule does not seem to apply, for the reason of it ceases.-Earl v. Grim, 1 John. Ch., 499. The doctrine has been extended to legacies and dividends, and interests in stock and funds. It was held in Philips v. Chamberlain, 4 Ves., 51, that where trustees were directed by a will, to pay the dividends and interests of certain stock and funds to the legatees, share and share alike, and the survivors of them, as they attained the age of twenty-one, &c., the whole interest passed to them. The rule has also been mitting that such payment had been made.

applied to deeds, as in Legrand v. Hodges, 3 Brown C. R., 531, where it was held that "a covenant to appropriate one-third of the produce of a real estate to raise a sum of money, is not a mere personal covenant, suable at law, but creates a lien upon the land, and the covenantees are entitled to have it specifically performed." In all the cases where the principle is enforced, it is with the view of giving effect to the intention of the instrument, by requiring that the right and use under it may be co-extensive with the design implied from its terms. It would, however, be difficult here to infer, that in an Act when the Legislature employed both the words "capital" and "profits," apparently having in mind the well-established difference in their import, the use of the latter word in the said Sections was intended to convey, by way of pledge, not only the profits, but the capital itself. The rule is never so enlarged as to include that which is not covered by the immediate grant. If "an agreement, as to the produce of land, affects the land itself," can it be so amplified as to include land of which the produce is not conveyed or pledged? So if the pledge insisted on under the Act of 1838, of the two million capital, or the profits which it has yielded, cannot be redeemed for want of a fund which can properly represent either, can the holders of the fire loan bonds and stock claim, by virtue of their lien, the assets now held for the bank, unless it can be shown that they are of the profits so pledged to them?

By the 11th Section of the Act a distinct account of the profits of the additional capital was directed to be kept, which said fund, *152

and *its annual accumulations, were to be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof. far from this having been done, according to the testimony of Mr. Waring, the Cashier, although the requirement was brought to the notice of the President, it was purposely avoided. Though the net profits of the bank were annually ascertained, the practical sources from which they arose could not be distinguished. Before, therefore, these holders of bonds and stock under the fire loan could enforce their claim against the existing assets, it would be incumbent on them to shew, that they in some way represent the profits pledged to them by the said 11th Section. If they cannot be distinguished, it is beyond their ability to do so. What practical advantage can they derive from the 12th Section, which they aver gives them a lien on all the profits of the bank, "when they shall have paid the interest of certain stocks and redeemed the stocks for which they have heretofore been pledged and set apart," ad-

The bank is insolvent. Its capital is gone, temployed, though there may be assets left and all that the corporation holds are the assets already referred to. In what view can they be considered as the representative of profits? Were they so regarded by the bank? In 1821, Stat. 6, 665, the Legislature provided "a sinking fund for the redemption of the 6 per cent, stock of the State," and the bank was required to open an account in which it should debit itself annually with the profits, and the fund and its accumulations were set apart for its redemption. In 1852, 12 Stat., 150, the profits of the bank were directed "to be carried to the credit of the sinking fund," and the account of the fund was to "be kept in such a manner as to shew, at all times, what particular bonds, notes, stocks and other securities, belong to the said fund." Not only did the bank fail to keep such an account, but the sinking fund has never been distinguished from the capital, and was banked on in common with it.-Report of Comp. Gen. Harrison, Bk. Comp., 692; Report of President Elmore, Ib., 533; Report of Invest. Com. of Legislature, 1841, Ib., 225; Report of President Furman, Reports and Resolutions of Session of 1863, 72, 73.

Notwithstanding the insolvency of the bank, it is yet claimed that all which remains in the shape of property to this once great moneyed institution, whose capital is not only gone, but whose assets are inconsiderable, when compared with the extent of its indebtedness, represent its profits.

There would, as it appears to us, be some-*153

thing anomalous, if not *contradictory, in holding what may be left of value to an insolvent corporation as the representative of profits. If there were profits, no matter how small, how could there be insolvency?

"The word insolvent, unless controlled by the context, means unable to pay debts, in the ordinary acceptation of the phrase." Lindley on Partnership, 695. Le Blanc, J., in Bayley v. Schofield, 1 M. & S., 353, says: "I take it, insolvency, as it respects a trader, to mean that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs." Here, unfortunately, this long continued litigation in regard to all that is left of this corporation, plainly concedes the sense in which the term is to be applied. Its liabilities are largely in excess of its means to meet them.

The word profit presupposes an excess of the value of returns over the value of advances.—1 Lindl., 11. If the amount of the capital invested in a particular business is returned to its owners, while there is no gain, there is no loss. If it is returned increased, there is profit; but if it is swallowed up in the speculation in which it has been which were held while the capital was in active employment, still, if they are not sufficient to meet the engagements contracted in the enterprise to which the capital was employed, they can, in no sense, be taken as standing in the place of profits, which could never result from a profitless employ-

"In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital, with interest, (if necessary,) is to be deducted: the residue will represent the profits."-Dunham v. Bradford, 5 L. R. Ch. Appl. Cases, 519.

What are the remaining assets of the bank to be considered? When a corporation is insolvent, as we have said in the State v. Bank of the State of South Carolina, 1 S. C., 76, the fund supplied as capital no longer remains, that is to say, the amount which the stockholders advanced as capital is not in a shape or form to which the term, in its proper significance, can apply.

If A invests his whole estate of \$10,000 in trade, and on winding up his affairs, finds that he owes \$15,000, and has assets in value equal only to \$5,000, the fund which constituted the capital of the business is exhausted, although the assets on hand were derived from the operations in which it was employed. We should, however, be rather inclined to the conclusion, that they repre-

*154 sented the *money of his creditors which had been used for their acquisition. If it is asked, how can this apply to the State bonds lodged with the bank, as collateral security for the repayment of money advanced by the bank for the new State House, and the shares of the Charlotte & South Carolina Railroad, lodged also as security for advances made by the bank to pay the subscription of the State to that Railroad, the answer is, that the money used by the bank for such advances was of the funds for which it now stands liable to its creditors. In no case can they be considered the profits of the bank.

If a pledge was given by the Act of 1838, amounting to a specific lien, the subsequent legislation of the State, in 1839 and 1852, by appropriating the subject-matter already pledged to the fire loan, could not affect its validity. If the pledge amounted to a contract, it would be no sufficient answer, when its bond or stockholders sought to enforce it. that the debtor had pledged the same security to another creditor. Nor can the failure of the holders to take action be construed as an acquiescence on their part with the new direction of the fund already pledged to them.

The conceded solvency of the bank, with its prospect of so continuing, made it an object of little moment to the creditor how

the Legislature interfered in the disposition of its funds, and no want of good faith can be attributed to the State, in attempting to divest securities already appropriated, for, by the charter, "the faith of the State was pledged to the support of the bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency."

It is intimated, however, that the bondholders, under the fire loan, are not creditors of the bank. That its guaranty of the bonds, by the statement which appears upon them, must be referred to the power conferred on the bank by the Act, and whoever accepted them, did so with the limitation imposed on the extent to which the bank could guarantee them. We say intimated, because the objection was not pressed with an apparent confidence in its soundness.

It was competent for the bank to incur an obligation in the legitimate course of its business. It was incident to its powers, as a body politic, to enter into contracts not inconsistent with the purposes for which it was organized, unless forbidden by the charter. To say that it was restricted to those created by the issue of notes, would have so cramped and encumbered its administra*155

tion that the *end for which such corporations are generally organized, would, to a large extent, have been defeated. No one would doubt the right of the bank to transfer a note made payable to its order, and yet such an act would create a liability on its part. Here the loan to be raised was to be added to its capital, and it was to its interest to lend its name, as a guarantor, to effect a purpose which promised profits in its employment. But even if the guaranty was originally without authority, its recognition by the State, at various times, and on various occasions, has placed its validity beyond dispute.

Before we consider the effect of the Act of 1865, on the claims of the several classes of the creditors of the bank to the assets now held on its account, it is proper that we dispose of so much of the appeal on the part of the fire loan bondholders as submits error in the decree, in deciding "that the Act of 1838 created a lien on the assets of the bank in favor of the fire loan stockholders, equal in all respects with the lien given by the Act to them." While we hold that by the terms of that Act neither the said bond or stockholders are entitled to the said assets under any appropriation or contract which confers a lien, we can distinguish no difference in their rights growing directly out of the Act itself.

The character of the fire loan stock is not to be determined by the fact that the money raised through it was never appropriated to the purpose which the Legislature contemplated. It constituted a part of the two millions directed to be borrowed, and if there were any assets which could be held subject to a lien, by the force of the Act, in favor of the bondholders, we do not see how the holders of the stock could be placed on any different footing in regard to them. The difficulty with those who hold that portion of the loan, which was issued in the form of stock, is, that they have no contract with the bank. It never guaranteed the payment of the stock, which, though "a contract" under the Act, entered into by the Governor on behalf of the State, imposed no liability on the bank. In all the legislation of the State, in the reports of the President and Directors and of the investigating committee appointed by the General Assembly, it has been recognized as issued under the fire loan Act, and therefore protected by its provisions. Act of 1840, 11 Stat., 130, refers to the stock "as issued in virtue of the said Act of 1838," and the certificate of it is required, upon its face, to exhibit that such stock has been issued under the provisions of said Act. Although not a debt against the bank, it would have been entitled equally with the bondhold-*156

ers to the benefit *of any assets which could be referred to the pledge under which both classes now prefer a claim.

If the Act of 1838 can not be held to establish a lien on the assets in the hands of the Court for distribution, then the bondholders claim that the 11th Section of the Act of 1865, 13 Stat., 267, is in itself a valid assignment of the effects of an insolvent debtor, and that by its terms they have a preference to the said assets. This is resisted by the fire loan stockholders, the bill owners and depositors. The said Section, after directing that the branches and agencies shall be closed, and that the principal bank at Charleston shall cease to be a bank of issue, authorizes and requires the President and Directors "to collect the assets and property of the bank, and hold the same specially appropriated: first, to the payment of the principal and interest of the bonds, known as the fire loan, payable in Europe; second, to the payment of the principal and interest of the fire loan bonds, payable in the United States; and, third, to the redemption of outstanding notes hitherto issued by said bank."

The legal title to the property of the bank was in the corporate body, the President and Directors. The sole stockholder is the State itself. The property, if not bound by a valid lien, may be disposed of by the bank in its corporate capacity. It is, however, but the agent of the stockholder, bound to execute his directions in the disposition of the fund which it holds, by and under his appointment.

A corporation has the same right to deal with its property through a conveyance, whether by actual sale or assignment for the benefit of the creditors, as an individual has. [It is a right incident to ownership, and its exercise is not trammelled with any other conditions or restrictions than those which the law imposes. A preference, if fair and honest, may be given by an insolvent person to one creditor, to the exclusion of all others, and this right is not denied to a corporation, though without means to meet all its liabilities. "A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made bona fide for the payment of its debts."-Abbot's Digest Law of Corp., cases there cited; Angell and Ames on Corporations, 155 and 156.

Is the Act of 1865 such an assignment as conferred a vested right on the creditors which it proposed to prefer, and, therefore, irrevocable on the part of the State, the sole *157

stockholder of the corpora*tion? If it amounts, as is contended, to a statutory assignment which transferred the assets from the State to the creditors in the order prescribed, then the creditors took a vested interest beyond the power of a subsequent Legislature, either as to repeal or modification. If the fund has been transferred by the agent to the hands or dominion of the creditor, such transfer would have operated to change the ownership, and the power over it would have passed from the principal. Before, however, any express act of transfer or change of control, the mere expression of willingness, on the part of the creditor, to accept the disposition intended by the principal, would not so affect the relation of the principal to the fund as to deprive him of all power over it. While in the hands of the agent, unless affected by words sufficient to create a vested right, it is within the discretion of the principal to revoke the order for its disposition, or entirely to recall it. In Story on Agency, Section 465, where the author treats of the revocation of authority to an agent, it is said: "So if it has been in part put in the course of execution, but not to such an extent as to become obligatory between the parties, as if preliminary proceedings only have been instituted." From the passage of the Act of March 3d, 1868, the date of the injunction granted in this case, no action was taken by the President and Directors which changed the legal or beneficial interest in the fund, nor, up to that time, was there such an acceptance of its provisions on the part of the creditors proposed to be preferred by it which amounted to a contract that would preclude the State from further intervention between them and the bank in the administration of the said assets. The Act of September, 1868, 14 Stat., 22, by its 11th Section, in express terms, repealed the said Section of the Act of 1865,

and unless it can be held to have vested a right, or constituted a contract, on the part of the State, with the creditors named in it, it was within the power of the Legislature not representing the sovereignty of the State, but in its capacity as sole stockholder, to revoke the authority to its agent to perform an act, which, while it remained unexecuted, did not change its control over the property to which it referred.

The statute cannot have the force and effect which is claimed for it as an assignment. The title to the assets was not in the State but in the bank. The direction was not to the President and Directors to execute an assignment by which the legal title was to be transferred, but was "to hold the assets especially appropriated to the payment of" certain classes of the creditors in a named order.

*158

The *State may, by Act of the Legislature, divest itself of property and vest it in another. There are here, however, no words which shew an intent to deprive itself of all control of the fund. Mr. Justice Story, in Tierman et al. v. Jackson, 5 Peters, 594 [8 L. Ed. 234], says: "Whatever may be the inaccuracy of expression, or the inaptness of the words used, in a legal view, if the intention to pass the legal title can be clearly discerned, the Court will give effect to it, and construe the words accordingly." Is there anything in the language employed in the statute which denotes an intention to change the legal ownership, and if this is not accomplished by the terms of it, how can it be said to amount to an assignment? The Act of 1865, until executed, was but the assertion by the State "of its proprietory rights over the assets," but was neither in design or effect a contract with the fire loan bond or stockholders.

Even if the preference sought to be derived from the Act could be ascertained as applying to the classes of claimants who are in fact creditors of the bank, what can be said of so much of it as undertakes to "appropriate" the property of the bank to persons who do not stand in the attitude of creditors to it?

We have already said that, in our judgment, the holders of the fire loan stock were in no way creditors of the bank while they are creditors of the State. The assets of the corporation must be held, first, applicable to the payment of its own creditors. therefore, the State undertook to appropriate the property of the bank to the payment of debts for which the bank was not liable, but which the State contracted, and in which it alone was the debtor, it brought itself within the principle announced in Curran's case, 15 How., 304 [14 L. Ed. 705], and which was adopted by this Court in the State v. The Bank of the State of South Carolina, before referred to. It was an attempt to divest the

creditors, and to devote it to the payment of a debt contracted alone on the faith and credit of the State-to abstract it from the debts of the bank, and dedicate it to a debt of the stockholder for which the bank was not bound. It is not of consequence to consider how far this attempt to invade the rights of the creditors of the bank, by applying its property to the payment of creditors alone of the State, might tend to invalidate so much of the said Section as was intended for the benefit of the bank creditors, for, according to our view, no rights vested under it, and the enquiry is therefore immaterial.

The conclusion at which we have arrived, as to the claim of the bond and stockholders of the fire loan, under the Act of 1838, and *159

*of their several preferences under that of 1865, renders unnecessary a consideration of the grounds of appeal submitted on behalf of the billholders and depositors, save the seventh, which is in the following words: "That whatever may have been the claims of the holders of the fire loan bonds, if the addition to the capital of the bank arising from those bonds had been left with the bank, when the State withdrew from the bank the whole amount that had been so deposited with the bank, as between the State and the bank, the primary liability for these bonds was with the State, and should have been so decreed." The claim of the holders of the fire loan bonds to a share of the assets does not arise, as we have said, by virtue of any lien or pledge made by the Act of 1838. The liability of the bank rests on the express contract it made with the bondholders, by which it guaranteed the payment of the principal and interest. The withdrawal by the State of the whole amount raised by the loan, and which had been added to the capital of the bank, cannot change the character of the guaranty, or release the bank from the obligation which it imposed. The State was the primary debtor, the bank the guarantor, and it is not easy to conceive of any proceeding or even contract between the original debtor and the guarantor, which, without the express or implied assent of the creditor, could discharge the guarantor from the liability which he has assumed.

The Attorney General, as "attorney for the President and Directors of the Bank of the State of South Carolina," and "as Attorney General of the State of South Carolina," appeals from so much of the Circuit decree as is embraced in the following words, to wit: "But if the assets shall be more than sufficient to pay the fire bondholders and the fire loan stockholders, it is further ordered and decreed that the remaining assets in the hands of the Receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other

property of the bank from the reach of its | creditors of the bank, subject, however, to the modification hereafter made." We have not had the benefit of any argument in support of the said ground, and cannot well conceive how it can be taken on behalf of the President and Directors, who, in their answer, "admit their liability at law for genuine unpaid bills, and if in funds to pay all indebtedness, would not hesitate to pay them when presented."

In the order of the Court in this cause, of the 3d of March, 1868, the former Attorney General was made a party defendant "in behalf of the State, he being in Court and con-

senting, for the purpose *of sustaining the validity of the Act of 1865," and, in the answer which he filed, says that "the general obligation of the bank to redeem its bills is admitted," while he claims that the bank is bound to carry out the provisions of the Acts of 1838 and 1865. Nay, the very Act of 1865, to sustain the validity of which the Attorney General was made a party, recognizes the billholders as creditors of the bank, by applying the assets of the bank to their payment, but postponing them to the bond and stockholders of the fire loan. If we properly appreciate the point raised by this ground of appeal, it denies the right of payment from these assets to all creditors of the bank save and except those under the fire loan. then, the assets shall be more than sufficient for their satisfaction, what is to become of the surplus? Is it to be enjoyed by the stockholder of the bank? He can have no right but to what may remain after all the debts of the bank are paid. What then is to become of it? "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation." * * * "Stockholders are not entitled to any share of the capital stock, nor to any dividends of the profits until all the debts are paid."-R. R. Co. v. Howard, 7 Wall., 409 [19 L. Ed. 117].

It is not perceived upon what possible ground it can be pretended that the property of a corporation having a right by charter to issue bills, and the property not bound by any lien, can be exempt from liability to meet them. The charter, as if to give additional strength to the obligation on the part of the bank, incurred by its issue, declared, in the 6th Section, that "bills or notes which may be issued by order of the said corporation, signed, &c., promising the payment of money to any person or persons, his, or her, or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same, in like manner, and with the like force and effect. as upon any private person or persons, if issued by him, her or them, in his, her, or their private or natural capacity or capacities, and shall be assignable and negotiable in like manperson or persons."

Throughout the whole argument on the part of the holders of the fire loan, although they set up priority in the fund held for distribution, it was not pretended that the bill holders, depositors and other creditors did not have a right to any of the portion which might remain, after first satisfying the claims in favor of which a preference was averred.

*161

We fail to discover a single argument *upon which such a proposition as is submitted by the said ground, can be maintained.

For the reasons given in the decree, we concur with the Circuit Judge in holding that the claimants of bills are entitled to the full amount of the face of said bills, without any regard to the price at which they may have purchased them. As to such as may have been issued by the bank under circumstances which show that they were not issued on a specie basis, they must be subjected to the same rules which apply to contracts which practically amount to Confederate transactions.

Depositors are creditors of the bank. They part with the title to their money, and loan it to the bank.-Thompson v. Riggs, 5 Wall., 678 [18 L. Ed. 704]. There may be an express contract, or one may be inferred from the attendant facts, that the title to the money deposited remained with the depositor; but if nothing is said, or done, which may vary the general rule, a mere naked deposit changes the title to the money, and at once establishes the relation of debtor and creditor. Having in view the periods at which it appears some of the deposits were made, a qualification must however be attached, that if the money deposited was not accepted by the bank, with reference to a specie basis, the depositor will be entitled, in National currency, to only so much as his deposit in such currency was worth at the time it was made.

On the part of the billholders and depositors, it is claimed, that the right of the bondholder, as creditor of the bank by reason of its guaranty, should be qualified: "1st. By compelling him to show that his claim against the State will be either delayed or denied; and, 2d. That whatever sum he takes from the assets of the bank, the other creditors will be subrogated for that sum, to the claim of the bondholder against the State."

It does not appear to us that the principles which, either at law or in equity, govern the relation between the guarantor and guarantee, can be exacted or enforced when the original debtor is a State, and beyond the reach of the process of the Courts. If the guarantor can set up a defense by reason of some failure on the part of the guarantee to pursue his rights against the principal debtor, through which has ensued a loss of some security which the guarantee held for his

ner as if they were so issued by such private, debt, it is on the assumption that the law has afforded adequate means to avert or prevent such loss. The process of the law, however, is powerless against the State. If it is the debtor, the arm of the Court cannot reach it.

The creditor *has no security but in its faith and pledge in its sense of moral obligation and of honor.

We do not say this because we perceive that the holders of the fire loan bonds have done anything in regard to their debt against the bank, which, in anywise, deprives them of the full benefit of their guaranty, but simply for the purpose of indicating their position as to the principal creditor against whom they are without remedy through the Courts. And the inquiry is rendered entirely unnecessary, when it is remembered that the principal is the sole stockholder of the very corporation which has guaranteed the bonds.

The second ground, on which the proposition is rested, would seem to imply that the billholders and depositors have no claim against the State for what may remain unpaid to them out of the assets of the bank, a position entirely inconsistent with that assumed both in the bill and throughout the argument. If they and the bondholders have valid and subsisting demands against the State, for the amounts unpaid, by reason of the insufficiency of the bank assets to meet the whole, what additional security would the billholders and other creditors have by being subrogated to the claim of the bondholders for the sums which they may receive of the said assets?

In marshalling securities, "the general principle is, that if one party has a lien on, or interest in, two funds, for a debt, and another party has a lien on an interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties wherever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."-1 Story Eq., § 633; Walker v. Covar, 2 S. C., 16.

The reason of the rule ceases where both the parties have a like and equal claim to both the funds, and such we regard the condition of all the creditors of the bank.

By the charter of 1812, "the faith of the State was pledged for the support of the bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency." The pledge for the support of the bank involves an obligation on the State, which had the supervision and control of its management to hold its capital and profits always ready to meet the liabilities, which, by virtue of its establishment, it had a right to incur; the

engagement "to supply any deficiency in the | tablished "on behalf of and for the benefit of *163

funds *specifically pledged," was an undertaking that, in the event of a failure of the capital furnished (and referred to by the designation of "the funds specifically pledged.") to respond to the debts incurred by its own corporation, the State would make good "the losses" which might ensue. As if to leave no room to doubt the real purpose and intent of the pledges so made, the sixth Section of the charter, wherein the State limits the debts which the bank shall at any time owe, and makes the Directors, in whose term an excess may happen, liable in their private capacities, nevertheless provides that such liability of the President and Directors shall not be construed to exempt the bank, or its property, from liability for such excess, nor their insufficiency to exempt "the State of South Carolina from being also liable for, and being chargeable with, the said excess," the State here actually announcing its liability for debts of the bank, contracted in express disregard and violation of the charter.

In the opinion of the Constitutional Court, delivered in 1822, in the case of The State v. Billis, 2 McC., 20, it is conceded that the faith of the State is pledged by the charter, in case of the insolvency of the bank, for the redemption of its notes. From the day of its establishment to the present moment, there has never been evinced a disposition on the part of the State, even by intimation, to repudiate its liability for the debts of the The whole course of its legislation exhibits a contrary intent.

The moneyed relations between the bank and the State might well be said to have identified them. In fact, the treasury played but a secondary part in the financial affairs of the State. The bank was its cashier. By the Act of 1819, 6 Stat., 136, all payments by the Treasurers of the Upper and Lower Divisions were to be by drafts or checks upon the bank, while, on the other hand, by the same Act, no payment of money was to be made by any public officer in any other manner than by check or draft on the bank, "so as to make it indispensably necessary for such public officer to deposit his money in such bank, or its branches, previous to his making such payment."

The State, from time to time, raised loans. by the issue of stock and otherwise, and pledged not only its own faith but the capital of the bank and its annual profits for the payment of the interest, and the final redemption of such debts.

To refer to the many reports of the President and Directors, and of the Committees of the Legislature appointed to examine into

*164

and *report on the condition of the bank, which directly admit the liability of the State for the debts of this corporation, es- against "debts contracted in behalf of the

the State," would only encumber this opinion with a repetition of the acknowledgment, never questioned, denied, or even qualified by a single Act or Resolution of the General Assembly.

A reference to one or two will suffice, for as was said in the argument, "the language of one report is the language of all." In the report of the Committee made to the Legislature in December, 1841, (Bk. Comp., 221,) it is said, "and the extraordinary security for the management of the bank is contained in these words, 'the faith of the State is hereby pledged for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency. Thus this institution has in reality the whole resources of the State as its stay and support. It cannot fail in any event, though the State may suffer." In the report of the Committee made in 1847, (Bk. Comp., 311,) it is said, "There are some very peculiar features in the constitution of this Bank of the State, which it seems to your Committee not amiss at this time to bring more particularly to the view of your honorable body. This bank is in many respects an independent treasury. The funds of the State are in effect kept by herself, or by a corporation entirely under her control; * * * her assets are in her own vaults, and only to be used, so far as the theory of the establishment is concerned, for the benefit and at the will of the State." In the examination of the President of the bank, which accompanies the report, he says: "Beyond those resources which the bank has within itself to convert its notes into coin, the State has added its pledge, in case of its failing, that it will pay off all its liabilities." The Legislature, by a Joint Resolution, approved September 25th, 1868, raised a Committee of three "to enquire into the assets and liabilities of the bank," with instructions "to enquire into and report for what debts of said bank the State is liable."—14 Stat., 158-9. On December 18, 1868, the report was made, in which it says that "it (the bank) really and in fact had no independent existence from the State, but was really subject to and controlled by it. Truly it had a legal entity for business purposes, but was really nothing more nor less than the State engaged in banking business. The debts, therefore, of the bank, created during as well as prior to the existence

*165

of the rebel*lion, were liabilities incurred in the name and on behalf of the State."-Rep. and Res. of 1868, 14 Stat., 221.

The report proceeds to discriminate between the bills issued prior to and during the war, and as to the latter, holds them subject to the prohibition of the Constitution

rebellion," to which objection (passed upon) referred to in the argument, directly applies by the Circuit decree) we shall hereafter re- to the aspect of the case now under considfer. The General Assembly, by Act approved September 15, 1868, 14 Stat., 22, provided for the funding of the bills issued prior to December 20, 1860, in bonds of the State, with interest at 6 per cent., the interest payable semi-annually, and the principal to be redeemed within twenty years after the date of the bonds, provided they were presented to the Treasurer before January 1, 1869. The decree pronounced in the case before us puts all the bills on the same footing, without regard to the date of their issue, holding that they are not affected by the amendment to the Constitution of the United States forbidding the payment by the seceding States of the debts contracted in aid of the war. If they are not subject in this regard to the prohibition in the amendment of the Constitution of the United States, they are free from the objection to the same effect in the Constitution of the State, and there being no appeal from so much of the said decree as holds them exempt from such inhibition it stands as the judgment of the Court.

The liability of the State for all the debts of the bank does not rest alone on its charter and the legislation which has so identified the State with the institution as to make it not only its monetary agent, with power to contract debts on its account, but

its creature.

The Circuit decree rules as a question of fact, (and one which has not been disputed in the whole course of the long litigation,) "that the State has drawn from the bank not only the whole amount arising from all sources which it ever contributed to its capital, with interest thereon, but is largely indebted to the bank besides."

If the bank had been a corporation representing private stockholders, and on the dissolution, its stock, or the money arising from the sale and transfer of it, had been distributed among them, "the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a Court of equity will enforce, and compel the application of the same to the satisfaction of their debts."-Railroad v. Howard, 7 Wal., 410 [19 L. Ed. 117], and the cases referred to. It is because the capital *166

stock of a corpora*tion constitutes a trust fund for the payment of its debts. If, then, the whole capital of this bank, with the interest on it, has not only been withdrawn from the corporation by the single stockholder, but he is found to be largely indebted to it, and the assets which remain are not sufficient to satisfy its outstanding liabilities, he must restore a sufficient amount to meet them. The property of the corporation must first respond to its debts.

eration. The other points made involved the question of preference among the creditors of the bank. This affects the relation of ali of them to the stockholder, who has absorbed the whole capital, leaving them unpaid, and as was held in Curran v. Arkansas, if the charter of a bank set apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that such fund shall not be diverted to other purposes.

That the State was the sole owner of the capital stock does not at all vary the relation of the bank to its creditors.

The State, as a stockholder, carried no attribute of its sovereignty to this corporation, for whose engagements it became responsible.—The State v. President and Directors of Bank of South Carolina, 1 S. C. R., 77. It is true that it is beyond the reach of any remedy that can be enforced by the process of the Courts, but this only adds additional weight to the moral obligation. In this case, it is not at least weakened by the fact that its own legal officer, with his consent, was made a party on behalf of the State, for the purpose of sustaining an Act by which the State undertook to dispose of the assets of the bank, its outstanding notes being specifically included among them, or that it afterwards admitted its liability for all the bills issued prior to December 20, 1860, in providing for their payment by its own assumption. The Circuit Judge, in his decree, says: "In this case, the State has of its own will submitted to its Courts the decision of the issues involved. At the hearing, it was so announced by the Attorney General then representing the State."

Not only has the present Attorney General directly, on the part of the State, submitted to this Court, by his appeal, errors in so much of the decree as directs the application of any of the assets of the bank, after paying the fire loan bond and stock-

*167

holders, to the *payment of the bills, but "an argument on behalf of the State" was heard from assistant counsel employed.

As was said by the Senior Associate, Mr. Justice Willard, in the case of The State v. The President and Directors of the Bank of the State of South Carolina, to which we have referred, "the State can neither be sued nor compelled to appear in its own Courts. When it enters the Court it does so voluntarily, and it is to be presumed, for the reason that some important object cannot be obtained except through the judicial arm of the Government." The judgment of the Court cannot bind the State. It may be the medium, however, when the State is in the position of a party before it, of informing it of the The case of Curran v. Arkansas, so often rights which its own acts confer on others,

and the obligations which, by reason thereof, [rest upon it.

It is ordered and decreed, that so much of the Circuit decree as gives a preference to the fire loan bondholders and fire loan stockholders, in the payment to be made out of the assets of the bank, be set aside.

That the said assets be held for distribution among all the creditors of the bank in rateable proportion to the amount of their respective debts; any collaterals or securities held by any of such creditors, for or on behalf of the bank, to be accounted for by them.

That the claims by holders of bills of the bank, issued since Dec. 20, 1860, be subject to the conditions in this opinion expressed in relation to them.

That in taking the account of claims by depositors, the value in national currency to which they may be severally entitled, shall be assessed by the Circuit Court, not only with regard to the time at which the respective deposits were made, but to the facts and circumstances, (if any,) through which any contract, express or implied, may have been created between the bank and the depositors as to the money value for which the bank was to be liable on account of such deposits.

That such parts of the Circuit decree as may not be inconsistent with the judgment of the Court, as expressed in this opinion, are confirmed.

That the case be remanded to the Circuit Court, for such orders as may be necessary to give effect to the judgment of this Court; the question of costs reserved for future decision by the Circuit Court.

WILLARD, A. J., and WRIGHT, A. J.,

[Affirmed, Baring v. Dabney, 19 Wall. 1, 22 L. Ed. 90.1

3 S. C. *168

*MASSOT v. MOSES.

(April Term, 1871.)

[Mines and Minerals 56.]

A, being seized in fee of a tract of land, in A, being seized in fee of a tract of faint, in consideration of \$2,000, granted to B "the right and privilege of entering in or upon, by himself or his agents, all or any part" of said tract, "for the purpose of searching for minerals and feed! substances, conducting mining operations. fossil substances, conducting mining operations to any extent" he "may deem advisable, and for working, removing, selling and appropriating" to, his own use, "for the term of ten years from" &c., "all * * * phosphates that may be found on, by any person or persons, or contained in, any part" of said tract; provided that "shall not, at any one time during" said m, "engage in working over one-third part" said of said tract; such one-third part to be selected by him as often as he may desire. The deed al-so contained grants to B of the right to cut and remove trees and wood—such trees and wood to remain the property of A-and of a

general right of way, with the privilege of constructing railroads and other roads and machinery, to be used in the transportation, manufacture, &c., of said substances, with the right to remove the same at the expiration of the term: Held. That this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of, and manufacturing all phosphates found during the term, and that B had the right to divide his in-Held, terest and convey part of it to others.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. 🚐 56.]

[Mines and Minerals 56.]
The expression "that may be found by any person or persons, or contained in any part the land, distinguishes this case from Lord Mountjoy's, Co. Litt., 165, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this con-struction is aided by the fact that the consideration was an entire sum demandable at the de-livery of the deed, and intended as compensation for the right granted.

[Ed. Note.-For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. 56.]

The principal cases on the subject reviewed, and the principles deducible from them stated.

[Mines and Minerals 55.]

Unopened veins or beds of minerals contained in and below the surface of the soil may be demised as if they were separate pieces of

[Ed. Note.—Cited in Pearson v. Matheson, 86 S. E. 1065.

For other cases, see Mines and Minerals, Cent. Dig. §§ 153–165; Dec. Dig. €=55.]

[Mines and Minerals \$\sim 56.]

A grant, for a term of years, of the exclusive right to search for, take, sell and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of the beds or veins of phosphates contained in the land.

[Ed. Note.-For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. 56.]

Before Graham, J., at Charleston, April, 1871.

This was a bill in equity exhibited in January, 1870, by Horace Massot, plaintiff, against O. A. Moses, W. L. Bradley and C. C. Coe, defendants.

The bill alleged that on the 24th April, 1868, the plaintiff was seized in fee of a plantation in Charleston County containing one hundred and thirteen acres of land, in, upon, or under which, there were certain veins or beds of phosphate rock of great value; that on the day and year mentioned, the plaintiff entered into an agreement with the defendant, Moses, whereby, in consideration of the sum of \$2,000, he granted, sold and conveyed unto the said Moses, "his heirs, executors and assigns, the right and privilege of entering, by himself and his agents, in and upon all or any part of the said tract of land, for the purpose of searching for minerals and fossil substances and conducting mining operations, to any extent the said Moses might deem advisable, and for working, removing,

*169

selling, *using and appropriating, as the property of the said Moses, for the term of ten years, all organic or unorganic minerals, rocks, fossils, marls or so-called phosphates that might be found on, by any person or persons, or contained in, any part of the said plantation," which said privilege was, however, subject to the proviso, "that the said O. A. Moses should not, at any one time, during the aforesaid term of ten years, engage in working over one-third part of the said tract. The third to be so worked to be selected by the said O. A. Moses, and such selection to be made as often as the said O. A. Moses might desire."

That immediately after the execution of the said agreement, the defendant, Moses, entered upon the said land, and commenced mining for phosphates thereon, and has continued to do so to the present time, and has erected offices, houses and other buildings on said land; that, in November or December, 1869, he, the said Moses, granted to the defendants, Bradley and Coe, the right to dig and mine, for a long term of years, upon so much of the said plantation as lies to the west of the North Eastern Railroad track, and bound them to pay him one dollar per ton for all phosphates dug by them, and to dig not less than 5,000 tons per annum; that the said Bradley and Coe have entered upon said plantation under their said agreement with Moses, and are prosecuting mining operations thereon, and have dug therefrom large quantities of phosphates, and sold the same: that the said Moses is about to open fresh mines upon that part of the said tract lying to the east of the North Eastern Railroad track, and work the same for his own

The bill charged that the assignment by Moses to Bradley and Coe was illegal, and a fraud upon the plaintiff, and extinguished all his right and interest in said tract of land, and that the plaintiff was entitled to an account of all the phosphates dug by the defendants on said tract, and the profits and produce thereof; and it prayed that an account be taken of all such phosphates, and of the proceeds of the sales thereof, and that the defendants be enjoined from working the mines in said land.

The defendant, Moses, filed an answer and demurrer, and the defendants, Bradley and Coe, an answer and plea to the bill.

On July 1st, 1870, an order, by consent, was made, appointing I. W. Hayne, Esq., referee in the cause, and referring it to him to hear and determine all the issues therein; and on the 26th day of the same month and year, he made his report, as follows:

*170

*A bill of complaint was filed in this case on the 25th January, 1870, under the old system of pleading, in the Court of Common

Pleas for Charleston County, on the equity side. On the 23d February, an answer and demurrer were filed by Ottolengui A. Moses, and an answer and plea by W. L. Bradley and C. C. Coe. A question was raised at the hearing as to the extent and effect of the demurrer—the plea seemed to have been lost sight of. Ultimately, however, it was expressed as the desire of all parties, that the case should be decided on its merits, without regard merely to technical points of pleading. I proceed, therefore, at once to the case as presented by the evidence and the admissions of the parties. Horace Massot is now and on the 24th April, 1868, and long anterior thereto, was seized and possessed of a tract of land in Charleston County, containing about one hundred and thirteen acres, and more particularly described in an instrument to which I shall presently refer. On the day and date above specified, the said Horace Massot joined with Ottolengui A. Moses in a deed of indenture, wherein the said Horace Massot "of the first part," in consideration of \$2,000 cash, "granted, sold and conveyed," to A. O. Moses, "of the second part," to him, "his heirs, executors, administrators and assigns the right and privilege of entering in and upon, by himself and his agents, all and every part of said lands," for the purpose of "searching for mineral and fossil substances, conducting mining operations to any extent," and "for working, removing, selling," and, as his property, "to use and appropriate for the term of ten (10) years," all the minerals, phosphates, &c., "that may be found or contained in any part" of said land. It was contended, on the part of the plaintiff, that the instrument admitted to be a deed of grant was, in effect, a license merely, and "granted, sold and conveyed" not a tangible estate, either real or chattel, but simply an interest in the nature of an "incorporeal hereditament." It was admitted that the license was irrevocable, and that such an interest was assignable, but it was insisted that it was a necessary incident to such an interest that the assignment should be entire, and that an attempt to divide the interest was in derogation of the rights of the original grantor, and worked a forfeiture or extinguishment of the "right and privilege" of the party attempting the division. On the other hand, it was contended, on the part of defendant, that the indenture of the 24th April, 1868, "granted, sold and conveyed" the phosphates themselves, and that the thing conveyed was tangible and corporeal, and the indenture gave an interest *171

*which, during the term of ten (10) years, could be disposed of in all respects as property, and might be divided to any extent the owner pleased. The result of the case turns upon the construction of the deed. The gravamen of the complaint, and the only

fer by O. A. Moses of a part of his interest (whatever the nature of that interest might be) to Bradley, whose agent C. C. Coe is, as well as one Gildersleeve, and the fact that Bradley, through these and other agents, has, under an agreement with Moses, set up on complainant's premises, phosphate works separate and distinct from those worked by Moses.

In terms the deed conveys only a "right and privilege of entering" the premises of complainant for certain specified purposes. Among these "purposes" are the "working removing, selling," and, as his "property, to use and appropriate," "for the term of ten years," the phosphates, &c., "which may be found," or are "contained in any part of all that plantation." There is, it is plain, no direct conveyance of a mine or mineral, or phosphates, or of anything corporeal. The conveyance is, as I have said, of a "right and privilege." But in analogy to the familiar doctrine cited from Coke by the counsel for defendants, that a grant of the profits of land carries the land itself, I was at first inclined to hold that the grant of "the right" to take as his property the phosphates "contained in any part of all that plantation," carried the phosphates themselves. In the case of Stewart v. Garnett, 3 Sim., 398, it was decided that a devise of the rents and profits of a plantation in Jamaica gave an absolute property, in not only the land, but the slaves, stock, planting implements, &c. The Vice Chancellor says "the devise of the rents, issues and profits of the estate is the same as a devise of the estate itself." The counsel for complainant seemed to think that the grant being but for a term of years would make a difference. But the case of Legard v. Hodges, 3 Brown Ch. Rep., 531, was a pledge of profits not perpetually, but until £10,000 should be paid.

After a thorough examination, however, of the authorities cited by counsel for complainant, I have been constrained to yield this prepossession, and, in view of the consequences which follow, I add that I yield most reluctantly.

The case of Lord Mountjoy, as reported by Lord Coke, near three hundred years ago, reads as follows:

"The Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and enrolled, bargain and sell the same to *172

*Browne in fee, in which identure this clause was contained: Provided, always, and the said Browne did covenant and grant to and with the said Lord Mountjoy, that he, his heires and assignes, might dig for ore in the lands (which were great wasts) parcell of the said manor, and to dig turfe, also for the making of allome. And in this case three poynts were resolved by all the Judges.

matter insisted on in argument, is the trans-, First-that this did amount to a grant of an interest and inheritance to the Lord Mountjoy to digge, &c. Secondly-that notwithstanding this grant, Browne, his heires and assignes might dig also, and like to the case of common sauns nombre. Thirdlythat Lord Mountjoy might assigne his whole interest to one, two or more, but then if there be two or more, they could make no division of it, but worke together with one stocke: neither could the Lord Mountjoy, &c., assigne his interest in any part of the wast to one or more, for that might work a prejudice and a surcharge to the tenant of the land."

The terms of the deed in that case, as given by Anderson, J., who presided at the trial, are as follows:

Lord Mountjoy "did license and authorize Richard Leycole, for and during the term of 31 years next, to search, open, dig, cast up and work for all manner of mines, minerals, mettals, liquors and commodities whatsoever, in any of the mines, minerals and possession whatsoever, of the said manor, and the same to convert to his use during the said term, yielding therefor yearly to the Lord Mountjoy the full moiety or onehalf," &c.

Doe v. Wood, Barn. & A., 2, 724, decided in King's Bench, in 1819, is equally explicit. This was a grant to A. and his "partners, fellow adventurers, executors, administrators, and assigns, of free liberty, license, power and authority to dig, work, mine, and search for tin, tin ore, &c., and all other metals and minerals whatsoever," and the same "there found" to "dispose of to their own use," for the term of twenty-one years. Chief Justice Abbott held that this deed operated "as a license merely." He says, "the purport of the granting part of this indenture, is to grant, for the term therein mentioned, a liberty, license, power, and authority to dig," &c., "throughout the lands therein described, and to dispose of the ore to the use of the grantee, his partners," &c. "That is," he continues, "no more than a mere right to a personal chattel when obtained, in pursuance of incorporeal privileges, granted for the purpose of obtaining it." This case cites and confirms Lord Mountjoy's case, decided 200 years before. The case of Cheatham *173

*v. Williamson, 4 East, 469, decided in 1804, is likewise cited and approved. It is in the latter case that Lord Ellenborough says that no case can be found where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to bring trover against the owner of the estate for coals raised by him, and Lord Ellenborough recognizes Lord Mountjoy's case as authority, and declares it decisive of this point. He adds that "those who compared it to a grant of common sauns

number used that as the strongest instance; that is exclusive of the owner of the soil? to show that it could not be an exclusive right. In the case of Grubb v. Bayard, 2 Wallace, Jr. [81, Fed. Cas. No. 5.849], Reports of cases in Circuit Court of the United States, in Pennsylvania, Justices Grier and Kane presiding, the effect of the following deed was considered: "And the aforesaid David, for himself, his heirs, executors, and administrators, doth covenant, promise, grant and agree to and with the aforesaid William, his heirs and assigns, that he, the said William, his heirs and assigns, shall and may, from time to time, and all times hereafter, dig, take and carry away all iron ore to be found within the bounds of the said David's tract of land, containing 282 acres, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of sixpence (Pennsylvania currency,) per ton, for every ton taken from the premises of 282 acres aforesaid."

Of this deed in a former case before the Supreme Court of Pennsylvania, Judge Roberts had said, "it is a grant of twenty acres of land in fee simple, and also a grant of an incorporeal hereditament, for a distinct and different consideration, in the remaining part of the tract of two hundred and eighty-two acres. The right to raise ore is an incorporeal hereditament, granted for a valuable consideration, and is not, as has been contended, a license revocable at the will of the parties." The point was distinctly made in argument, that "the words were essentially different from those in Lord Mountjoy's case." "How," counsel asked, can one man dig, take and carry away, all iron to be found," within a certain tract, "consistently with the same right in another man?" The grant, it was claimed, on this difference, excluded any concurrent right to dig on the part of the owner of the soil. It was decided otherwise, and decided, further, that it could not be divided or apportioned. Judge Grier, in his separate opinion, expresses himself as follows:

"A right of privilege to dig and carry ore from the land of another is an incorporeal hereditament—a right to be exercised on the land of another. It is a license, irrevocable,

*174 when granted *on sufficient consideration. It may be demised for years or granted in fee; it is assignable. The grantee or assignee of such a license, right or privilege, to be exercised in the land of another, has no such title to the ore that he can support trover against the owner of the land, for ore or coal raised by him. On this subject, 1 may adopt the words of Lord Tenterden in one of the cases relating to mines quoted at the bar. This indenture, in its granting part, does not purport to demise the land or the metals, or the minerals therein comprised." Again, he says, "is the right granted, one

Much stress has been laid upon the word all in this grant, as having the effect of making it exclusive. But so important a restriction cannot be deduced from so equivocal an expression. The deed has been drawn up by a very able conveyancer. He seems to have had Lord Mountjoy's case in his mind at the time. He employs none of the apt and well known terms or phraseology to indicate an intention of giving an exclusive right as against the grantor himself. The grant of a right to dig, take and carry away 'all' iron ore to be found within the bounds, &c., shows the extent of the license but not its exclusiveness. The grantee may dig, take, &c., of any or all the ore he can find on the land, but he has no exclusive right in any of it till he finds it and digs it. It is a right without stint as to quantity, and Lord Mountjoy's case likens it to the grant of a right of common sans nombre which does not exclude the This is a point decided in Lord owner. Mountjoy's case as reported by Coke, Leonard and Godbolt."

On a subsequent day, Judge Grier, speaking for the Court (himself and Judge Kane) says: "We decide that the thing granted is not the iron ore contained in the land of defendant; but an incorporeal hereditament, a right, or license or liberty, well described in the plaintiff's declaration as a 'right and privilege to dig, take and carry away' all or any iron ore to be found in the land of defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee. * * * That the effect of the word 'all' in this grant is not to give an exclusive right as against the grantor. It describes the extent to which the license may be exercised, not its exclusiveness. It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross sans nombre, which does not exclude the lord or owner of the land out of which it is granted. That such a right is indivisible, and unless the plaintiff, as assignee, is *175

clothed with the *whole, he has nothing, and cannot support this suit as against the owner of the land."

"And, lastly, that the case of the Lord Mountjoy as reported by several authoritative reporters, and among them by Lord Coke in his Commentary, is directly in point on both parts of the case, and rules it. Its authority has never been questioned; and the application of its doctrines to this case results in a conclusion which accords with our reason and our sense of justice."

I cannot, in the same cordial terms with Judge Grier, express the "accord" of my own mind with the conclusions arrived at.

To my mind there is a clear distinction between common of pasture, and of estovers and piscary, and a right to mine. The pasture is to be used by the commoner's cattle, and the wood to be burned by the commoner or his household; even the fish were expected to be consumed; but ores, minerals and phosphates are essentially articles of sale, and the supply may be indefinitely extended. The capital invested in the enterprise, much more than the number of assignees, regulates and controls the amount of the minerals removed. The "surcharge," it seems to me, in case of a mine, is very much of a fiction. I go further; this very case shows that all considerations of expediency and public policy are with the defendants.

Mr. Massot, it appears, has had, according to the argument of his counsel, (sustained I think, by the authorities adduced) a concurrent right to dig and sell phosphates with Mr. Moses, even on the one-third to which the license of Moses extends. There is, it will be remembered, a proviso in the deed that Moses should not work more of the land than one-third, at any time. And the counsel of the defendant seemed to concede that as to the other two-thirds of the tract the complainant had, and still has, such right. Why has the right never been exercised by complainant? Mr. Moses, on the contrary, has pursued his own mining, we presume, with profit, and has made an arrangement with Mr. Bradley, sublicensee, by which he, Moses, is to receive \$5,000 a year, and leave, I presume, a large margin of profit for Mr. Bradley, in addition. These contracts and subcontracts, it strikes me, benefit the community by stimulating enterprise. As to the original grantor, if his whole grant, which is admitted to be assignable, had been assigned absolutely, as he had a conceded right to do, to some one great capitalist or some one rich corporation, in what respect would Massot's condition be bettered thereby?

But, sitting in the exercise of judicial

*176

functions, I must adminis*ter the law as I find it, and the cases, in my judgment, are conclusive as to the points stated below; and the inconveniences and hardship arising from this construction, if it does not in fact express what was the intention of the parties at the time of the deed, may, at all times, be obviated by the insertion of a few additional words in the granting part of the deed. Let the grant be of the minerals and phosphates themselves, followed by the right to dig. &c.

- 1. That the indenture of the day of entered into by Ottolengui A. Moses and Horace Massot, conveys no property in the phosphates contained in the land, but merely a "right and privilege," to dig, use and sell them.
- 2. That this right and privilege is not exclusive in Moses, but to be enjoyed by him concurrently with the same "right and privi-

ture is to be used by the commoner's cattle, | lege" belonging to Massot as the owner of the

- 3. That even if the "right and privilege" were exclusive, they are in their nature incorporeal.
- 4. That though it may not be true, universally, that all incorporeal hereditaments are incapable of division or apportionment, yet it is true that a right to dig, use and sell minerals, unaccompanied by a grant of the minerals themselves, cannot be divided or apportioned; and that though assignable, the assignment must be entire, and of a single interest.
- 5. That an attempt to assign in part, or to assign several separate interests, is illegal, and the contract void.
- 6. If necessary, I should be compelled to hold, further, that, at law, the attempted assignment of a divided interest by Moses extinguished his right.

It is quite a relief, however, that I am not called on to decree under the principle last announced. The principle of extinguishment, as applied to mining licenses, does not enlist the sanction of my judgment and is utterly opposed, I think, to the equities of this case. I do not consider the principles of equity as abolished by the New Code of Procedure. There may arise cases when it will be difficult to say whether a suitor seeks redress in equity or at common law. But this, beyond all question, is an equity case, and equity will not decree a forfeiture. The complainant will have had all the redress which, in my opinion, he could in equity demand of Moses, when his licensee, the said Moses, turns over to him the amounts received by him under the void assignment to, or contract with, the sub-licensee Bradley. To that ex-

*177

tent I feel constrained *to go, as to defendant Moses. The contract with Bradley being illegal and void, he, of course, must cease to work under it. Such must be my decree as to him. I should be pleased to stop with an order enjoined and restraining the defendant, Bradley, and his agents, from further operations. But Massot was no party to the contract between Moses and Bradley, and he has, I think, a right to an account from Bradley of his profits, with a view to fix a proper compensation for the use of the phosphates. since he, Bradley, has been at work. It may be that the amount of reasonable compensation would exceed the sum agreed to be paid to Moses. If so, complainant is entitled to the excess.

It is ordered, adjudged and decreed, that the defendant, Ottolengui A. Moses, do account before

hereby appointed referee for the purpose, for all amounts of money or other thing of value received by him, his agents or assigns, for or on account of any agreement with W. L. Bradley, C. C. Coe, or any other agent or phosphates on the lands of Horace Massot, said Ottolengui A. Moses, and that said amounts being ascertained, the said O. A. Moses pay the same to the complainant.

It is further ordered, adjudged and decreed, that W. L. Bradley and C. C. Coe, defendants, appear before said referee and give full information as to the extent of their operations under the agreement with the said O. A. Moses, of the value of services rendered and labor bestowed, and of their net profits, for the purpose of enabling the referee to determine whether any additional compensation, and if any, how much, is due to complainant for and on account of their operations under the void license aforesaid.

It is further ordered, adjudged and decreed, that the said W. L. Bradley, C. C. Coe, and all other persons acting under their authority, be, and they are hereby, restrained and enjoined from all further mining or phosphate operations on the premises of the complainant, or from otherwise trespassing thereon.

It is ordered, that defendants pay the costs of this suit.

It is ordered, that the parties have leave, either in Term time or at Chambers, to apply at the foot of this decree for such further orders as may be necessary to carry said decree into effect.

The plaintiff excepted to the report, on the grounds:

1. That the right granted to Moses, being

*178

essentially integral *and indivisible, was entirely extinguished by his grant to his codefendants of a license to mine a part of the plaintiff's land.

- 2. That the right of the defendant, Moses, having thus been extinguished, he was, from the time of such extinguishment, a mere trespasser, and the plaintiff was entitled to an injunction against him, upon the ground that his further mining would be an irreparable damage to the plaintiff's property; especially as it is alleged in the bill and admitted by the demurrer, that he "is a man of small means," and "that a judgment recovered against him would be of little or no value."
- 3. That the principle, that equity will not enforce a forfeiture, is applicable only to forfeitures created by agreement of parties, and not to forfeitures created by law.
- 4. That the Court having jurisdiction for the purpose of restraining Coe and Bradley from mining the complainant's land under the license granted to them by the defendant, Moses, will, to avoid multiplicity of suits, go on and do complete justice between all parties to the proceedings.
- 5. That the Code now of force in this State abolishes all distinctions between law and against all the said defendants.

employé of the said Bradley, for digging | equity, and the referee, selected by consent, instead of a jury to try this case, was as by the authority, license or permission of the strictly bound to decide it according to the rights of the parties, as a jury would have been.

- 6. That even admitting that this Court would not enforce the strict right of complainant, without trial by jury, still complainant was entitled, pending such trial, to an injunction against O. A. Moses, who, according to the facts found by the referee, is a mere trespasser, taking away the very substance of the complainant's property.
- 7. That the said referee should have ordered the said O. A. Moses to account for the value of all the phosphates dug by him since the extinguishment of his right to mine upon the land of the complainant.

The defendants also excepted to the report, on the grounds:

1. Because, under the provisions of the deed, executed on the twenty-fourth day of April, eighteen hundred and sixty-eight, the plaintiff, by his conveyance to the defendant, O. A. Moses, his heirs, executors, administrators and assigns, of the right and privilege of entering in and upon, by himself or his agents, all or any part of the tract of land therein described, for the purpose of searching for mineral and fossil substances,

*179

conducting mining *operations to any extent he might deem advisable, and for working, removing, selling, and, as his property, to use and appropriate, for the term of ten years, all organic or inorganic minerals, rocks, fossils, marls, or so-called phosphates that might be found on, by any person or persons, or contained in any part of the said tract of land, conveyed the title to the organic or inorganic minerals, rocks, fossils, marls, or so-called phosphates, in the said tract of land, and not a mere license or incorporeal right or hereditament, and by terms of the said deed the said O. A. Moses is entitled to the exclusion of the plaintiff to mine on the said tract of land during the period of ten

- 2. Because, under the said deed, any assignment by the said O. A. Moses of the right to mine any portion of the said tract of land is not invalid or illegal, but such assignment is in accordance with the rights and powers vested in the said O. A. Moses under the
- 3. Because the plaintiff is not entitled to any account from the said defendant, O. A. Moses, for any part or portion of the minerals dug on the said tract of land, and the judgment of the said referee, whereby the said account against the said defendant, O. A. Moses, and an injunction against the defendants, W. L. Bradley and C. C. Coe, is ordered, is erroneous, and should be set aside, and the bill should have been dismissed

heard the case on the pleadings, report and exceptions, ordered that the exceptions be overruled, and that the report be confirmed as the judgment of the Court.

Both sides appealed to this Court, the grounds of appeal being the same as the exceptions to the report.

Dingle, Pressley, Lord and Inglesby, for plaintiff, contended:

I. That the deed of 24th April, 1868, granted to Moses the right to dig on the premises described therein for phosphates, but conferred no property or estate in the phosphates themselves until severed from the soil. was a sale, therefore, of such phosphates only as were raised during the term, and conveyed to Moses an incorporeal and not a corporeal hereditament.—Collier on Mines, 4 Law Lib., 6th Series, 1, 15, 111; Bainbridge on Mines, 156, 710, 733, 300; Bac. Abr. Leases, K; Doe v. Wood, 2 Barn. & Ald., 731; Cheatham v. Williamson, 4 East., 469; Nor-

*180

way v. Roe, 19 Ves., 158; *Grubb v. Bayard, 2 Wal., Jr., 81; Funk v. Haldeman, 53 Penn., 229. The deed, therefore, was not a lease but a license.

II. That the license conferred upon Moses was not exclusive of the plaintiff's right to dig for and take phosphates from the prem-Collier, 9; Bainbridge, 308; Lord Mountjoy's case; Johnston Iron Company v. Cambrice Iron Company, 32 Penn., 241; Glowinger v. Franklin Coal Company, 55 Penn., 1; Clark v. Way, 11 Rich., 624; 2 Bl. Com., 20; Smith on Real Prop., 4; Caldwell v. Fulton, 31 Penn., 475; Clement v. Youngman, 40 Penn., 341, and cases cited on first point.

III. It is contended that the grant to Moses, though a license, was irrevocable and assignable, but we insist that the contract between Moses and Bradley and Coe, was not an assignment of an existing interest, but the creation of a new interest-a license from Moses to Bradley and Coe.-Tayl. L. and T., §§ 426, 429, 431.

incorporeal hereditament IV. That the granted to Moses, though assignable, was indivisible, and by attempting to sever it Moses has destroyed it. See cases cited above, and Leymen v. Abeel, 16 Johns. R., 30; Van Russelear v. Radcliffe, 10 Wend., 639.

Cases were also cited upon the plaintiff's second and third grounds of appeal, which are not given, as those grounds were not considered by the Court.

Buist, for defendant Moses: The deed of 24th April, 1868, is substantially a lease for ten years of the minerals in the land. It is a grant of a corporeal right, and cannot be properly construed to be the grant of a mere license or incorporeal hereditament.—Crabbe Dig. Real Property, § 1,281; Jackson v. Har-

His Honor the presiding Judge having | son, 7 Cowan, 326; Jackson v. Kessewank, 10 Johns. R., 336; Shep. Touchstone, 86; 3 Bac. Abr., 393; Moore v. Fletcher, 16 Maine, 63; Crosby v. Bradley, 20 Maine, 61; Bac. Abr. Leases, K; 2 Washb, on Real P., 345; 1 Washb. on Real P., 12, 270; Stewart v. Garnett, 3 Sim., 398; Legard v. Hodges, 3 Bro. Ch., 441; Co. Litt., 46; Parker v. Plummer, Cro. Eliz., 190; Queen v. Winter, 2 Salk., 588; Paramour v. Yardley, Plow., 539; Throgmorton v. Tracy, Plow., 145; Col. on Mines, 5; Stoughton v. Lehigh, 1 Taunt., 403; Adams v. Briggs Iron Co., 7 Cush., 361; Yale on Cal. Min. Claims and Wat. Rights, 215; Cary v. Daniels, 5 Metc., 236; Seaman v. Vaudrey, 16 Ves., 389; 1 W. Bl., 482; Muskett v. Hill, 5 Bing. N. C., 694; New Jersey Zinc Co. v. New Jersey Frank. Co., 13 N. J. Eq., 322; United States v. Gratiot, 14 Pet., 526. He also cited the Pennsylvania cases cited on the other side at great length.

*181

*Moses had the right to divide his interest and assign part of it to others.-2 Story Eq., §§ 1,039, 1,040; 12 Petersd. Lit. Leases, 2 Story Eq., §§ 1,050, 1,051.

He also cited Ricketts v. Bennett, 50 Eng. C. L. R. 695; Dickenson v. Valpy, 10 Barn. & C., 41; Hautayne v. Bourne, 7 M. & W., 595.

Memminger, Corbin, for defendants.

Dec. 7, 1871. The opinion of the Court was delivered by

WILLARD, A. J. In the decision below, and in the argument at the bar, an important feature of this case has not received the attention due to the importance of its bearing. The line of argument pursued assumes that the question, whether the defendant, Moses, acquired under the grant of Massot an exclusive right as against the grantor, to the minerals contained within the premises described, for the period of ten years, is to be decided by first determining whether the thing granted was in its nature corporeal or incorporeal. It is contended that the grant created, at most, either a mere license, or an incorporeal hereditament, and authorities are cited to show that in such cases the grant does not include the right of the grantor to exercise, concurrently, a similar right to that conferred by his grant or license. The objection to this line of argument is, that it lays too great stress on the technical import of the words of conveyance, and gives too little attention to the actual intent of the parties, as evidenced by the entire instrument. The true inquiry is, what, from the construction of the whole instrument, was the nature of the right, power or property intended by the parties to be vested in the grantee? Having ascertained, from this source, the nature of the thing granted, it will not be difficult to ascertain whether it is corporeal or incorporeal, nor to scribe such interest.

The instrument in question is, in form, a deed, signed, sealed and witnessed as such. Massot, in consideration of \$2,000, grants, sells and conveys to Moses, his heirs, executors, administrators and assigns, "the right and privilege of entering in and upon, by himself or his agents, all or any part of the land hereinafter described, for the purpose of searching for mineral and fossil substances, conducting mining operations to any extent the said party of the second part may deem advisable, and for working, removing, selling, and, as the property of the party of the second part, to use and appropriate, for the term of ten years from the date of these

*182

presnts, all * organic or "inorganic minerals, rocks, fossils, marl, or so-called phosphates, that may be found on, by any person or persons, or contained in, any part of all that plantation or tract of land," &c. Moses is further to have the right to cut and remove trees, wood and timber, when he shall deem it advisable and advantageous, such trees, wood and timber to remain the property of Massot, who is to have the disposal and profit thereof.

The deed contains the following proviso: "Provided, further, That the party of the second part (Moses) shall not, at any one time during the aforesaid term of ten years, engage in working over one-third part of the said tract, the third to be worked to be selected by the party of the second part, and said selection to be made as often as the party of the second part may desire." The deed further conveys, for the like period, a general right of way, with the privilege of constructing railroads and other roads, and machinery, to be used in the extraction, preparation, manufacture and transportation of the organic and inorganic substances in question, with the right to remove the same at the expiration of the term aforesaid.

What distinguishes this grant from that in Lord Mountjoy's case, (Co. Litt., 165,) and in all the other cases relied on as decisive against the exclusive nature of the grant, is contained in the expression "that may be found on, by any person or persons, or contained in, any part," &c. The term, "any person," must be regarded as including the grantor, so that if the grantor, in an attempt to exercise the same right as that conferred, should find any such substances upon the premises described, such act of finding would complete the title of the grantee or his assigns to the substances so found under the express terms of the grant. It might, perhaps, be said that this applies only to substances "found on," but not those "contained in" the premises. This construction cannot prevail, for it would contravene the general intent of the instrument. It is clear that, as

find the technical terms appropriate to de- to some part of the minerals, the right of the grantor is excluded, and to that extent something more than a right in the nature of common is conveyed.

> How far, then, does this exclusion extend? It is evident that the parties did not intend to make a distinction, as to the character of the grantee's title, between the minerals lying on the surface of the ground and those contained within it. Such a distinction would be inconvenient and senseless. then, it was intended that the grantee should have the same right in respect to the one class as to the other, the particular expres-

*183

sion under consideration must be re*garded as characterizing the grantee's right, as to the whole, as exclusive of the grantor and all other persons.

This view is aided by the fact that the consideration of the deed was an entire sum of money demandable absolutely under the deed, and which may be assumed to include a valuation, fixed by the parties, on all minerals that the grantee was authorized to remove from the premises, and might, by possibility, remove therefrom during the term of ten years, and by the further fact that the deed, by its terms, professed to sell and convey the material itself, as well as the right to search for and take it.

It is not necessary to rest this case upon the whole ground taken in Caldwell v. Fulton, 31 Penn., 475. In that case the grant was held to exclude the grantor on the ground that the consideration, being an entire sum paid for the right conferred, evidenced an intent to sell the whole mineral content as Independent of the character of the consideration, the language of the grant, in Caldwell v. Fulton, was substantially the same as that in Lord Mountjoy's case. The opinion in Caldwell v. Fulton does not seek to unsettle the authority of Lord Mountjoy's case, but finds grounds of distinguishing the cases, in the fact that different inferences are to be drawn, as to the intended exclusiveness of the grant, from the respective considerations in the two grants.

In the case before this Court, the construction of the grant does not depend wholly on the character of the consideration, as we have already seen. It is, however, a circumstance in the case, and, therefore, it is in place to enquire, whether the fact that the consideration is an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted, tends to show an intent to convey an exclusive inter-

Apart from the limitation of ten years, if the subject-matter of the grant had been personal property, instead of land, it would have passed an exclusive right of property to the grantee.

A bill of sale for a valuable consideration,

certain warehouse, or all the quarried stone or mined ores, in a certain field, would show an intent to transfer a perfect title. Should the vendor, at the same time, confer a license upon the purchaser to enter upon his premises, and to search for, and remove the property, its effect would be to enlarge still further the right of the purchaser.

Although the subject-matter of the contract be land, still, if capable of severance, so as to become personal property, the parties

*184

are *not precluded, by any rule of law, from treating it, in its unsevered condition, as personalty, and transferring title accordingly.-Clark v. Way, 11 Rich., 624.

These propositions are not disputed by Lord Mountjoy's case, nor by any of the English or American cases following its authority; but, on the other hand, are supported by many cases of undoubted authority.

To all such contracts and grants, whether relating to realty or personalty, the test that has been applied, is the intent of the parties. The difference between the two cases is this: that certain words sufficient to manifest such intent, in the case of personalty, are not deemed sufficient for that purpose in the case of realty.

The proper conclusion from these cases would seem to be, that grants of a right to enter the lands of the grantor and sever therefrom and appropriate its products or mineral contents, are subject to a presumption not applicable to the case of a sale of personalty, that the grantor did not intend to exclude his own proprietary right to a concurrent enjoyment with the licensee of the power granted. If this view is correct, any words evidencing an intent on the part of the grantor to part with his proprietary rights over the subject-matter to which the grant relates, would rebut such presumption. What force, then, should be given to words tending to evidence an intent on the part of the grantor to exclude himself from the enjoyment concurrently with the grantee of the right conferred? So far as the existence of such a presumption bears on the question, the obvious answer is, that the same force should be given to the expressions employed that would be given had the subjectmatter been other than realty. The presumption, indeed, demands some positive evidence of an exclusive intent, but does not influence the force of the evidence of such intent.

If the foregoing propositions flow from the principles of law, and are compatible with the adjudicated cases, then we have a clear rule to govern us in seeking the construction of the grant in question.

We have only to ask what the parties had in contemplation as the right intended to be created, giving to the terms, or expressions employed by them in a technical sense, that to exclude the grantor has been expressed:

paid of all the goods of a certain kind in a technical force and effect conferred upon them by the adjudicated cases entitled to have weight as authority. We have now to look into the current of decisions to verify the grounds of our conclusions; but that we may the better understand their bearing and

force, it is proper to observe some of *the features in the various instruments which have received judicial construction as bearing on the question of intent.

In all the grants of mining rights, from the earliest reported cases down to the present time, there is a striking similarity in the terms used to describe the character of the It is derights intended to be conferred. scribed, substantially, as a right to enter certain designated premises, and to search for minerals, to mine or work them, appropriate and sell them. In some cases the premises may be used for manufacture only to the extent of preparing the raw material for use or sale; in other cases, like the case in hand, the right to use the premises for the purpose of manufacture is unlimited, as to the nature and extent of the manufacturing powers. The right uniformly embraces authority to go upon the land of another, and perform there certain acts which could only be justified under authority, derived from the owner, of severing from the land certain portions of the body of the land, so as to become personal property, and appropriating the same as against the right of the owner and all other persons.

Such a right may exist perfect in the hands of a grantee, and yet not exclude the right of the grantor or owner to take from the land like substances, for his own use, so that he does not obstruct or impede such operations as the grantee may have set on foot, in virtue of his grant.

Although the right to mine in the lands of the grantor, may extend to all minerals, or to all of a given class, yet that does not exclude the grantor from appropriating minerals of that description, provided he does not obstruct the operations of the grantee. In a word, the possession of a right to go upon the lands of another to search for, sever, remove and appropriate any or all minerals, or any or all of a given class, does not exclude the owner of the land from taking to his own use, minerals of the same character and class from the premises embraced in the grant. Nor does the fact that such right is, by the terms of the grant, an assignable interest in the hands of such grantee, operate to the exclusion of the grantor.

When, however, the grant evidences an intent to exclude the grantor, such intent provides whether the grant extends to all mineral substances, or to all of one or more classes.

There are three modes in which the intent

first, by terms importing a sale and conveyance of the minerals, as such, in which case
*186

the grantor's right is ex*cluded, by a necessary implication, from the possession of full proprietary right on the part of the grantee; second, by words of conveyance, conferring on the grantee exclusive power over the subject-matter of the grant; and, third, by provisions excluding the grantor from the performance of acts appropriate to him as owner of the land, where the effect of such exclusion is to leave unlimited control in the grantee of all materials to which the mining right relates.

An intent to exclude the grantor, though not expressed in the body of the deed, may be implied from the nature of the consideration. The fact that the grantee is bound to pay for the substances appropriated by him according to the quantity realized, at an agreed rate, whether in kind or in money, does not, of itself, disclose an intent to exclude the grantor. But if the consideration appears to include a value fixed by the parties on the whole mineral deposit, and is demandable absolutely under the contract, without depending on the value of the actual result from the mining operations of the grantee, the grant is regarded as a sale of the mineral, and, as to it, the grantor is excluded.

We will now look into the cases, in order to verify the deductions from them already stated.

Lord Mountjoy's case (Co. Lit., 165,) determines that a reservation of the right to take minerals and turf, although existing as an assignable and heritable interest, does not necessarily exclude the owner of the land. In that case, there were no words expressive of an intent to exclude the owner of the land, independent of the nature of the thing reserved. It is true, the reservation must be regarded as made upon consideration, but the consideration, whatever it may have been, was not in a form enabling the Court to conclude that, in fixing that consideration, the parties had acted upon a real or assumed valuation of all the materials subject to appropriation under the terms of the reservation.

The authority of this case has been recognized in this State, in Clark v. Way, 11 Rich., 624; in Pennsylvania, in Caldwell v. Fulton, 31 Penn., 624, and Funk v. Haldeman, 53 Penn., 229.

Wilson v. McKreth (3 Burr., 1824,) holds that one may have, as against the owner of the land an exclusive right to take the turf. It is worthy of notice that, from all that appears in that case, the right of the plaintiff may have been limited to so much as he should require for a particular use. The question of exclusiveness was not treated in that case as at all dependent on the question,

*187

*whether, in its nature, the right conferred was corporeal or incorporeal, but wholly on the terms of the grant or prescription under which it was claimed.

Chitham v. Williamson (4 East., 469.) followed Lord Mountjoy's case. Lord Ellenborough says, in that case, "no case can be named where one who has only a liberty of digging for coals in another's soil, has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." This is far from saying, that such an exclusive right cannot be created by the use of suitable language in the grant. It is only authority for saying, that exclusion will not be implied from the naked fact of a grant of that nature.

Doe v. Wood (2 Barn. & Ald., 724,) contained nothing to take it out of Lord Mount-joy's case.

The question was, whether the grant operated as a demise or a license merely. The discussion of the question by Abbott, C. J., shows, that the question of exclusiveness, as settled by the language and intent of the grant, was regarded as laying at the foundation of the question, whether the instrument could take effect as a demise. It was not in terms a demise, and could only be made to operate as such, when the right intended to be conferred was of such a nature as to be the proper subject of a demise. The consideration of that grant tended rather to strengthen than rebut the presumption, that the grantor did not intend to divest himself of the entire property of the minerals, for, instead of its being an entire sum, including the value of all materials subject to appropriation under it, it was a reservation of a share of the minerals, as such. The idea of a grant, operating as a sale or demise of the minerals themselves, is distinctly recognized, and the case before the Court distinguished from one resting on a grant of that nature.

It is fairly inferable from the case, that had the grant conferred an exclusive right of mining for a term of years, it would have been regarded a demise, although the subject-matter was not an opened mine, but merely minerals contained in the land. This proposition is as distinctly recognized as it could well be, without being directly ruled by the decision.

Muskett v. Hill, 2 Bering., N. C., 694, while adhering to Doe v. Wood, goes a step further, holding, under a grant closely resembling that in Doe v. Wood, that a license of that character could operate as a grant in respect of minerals taken under its au
*188

thority, and *therefore constituted an assignable interest in the hands of the licensee. Clark v. Way, 11 Rich., 624, applied the

case of a right to take timber in the land of another. The applicability is put distinctly on the ground that the grant contained no words of exclusion. Caldwell v. Fulton, 31 Penn., 475, is a leading Pennsylvania case bearing on this question. The adjudications of the Courts of that State, in this branch of the law, are entitled to great consideration, both for the extent and value of the mining operations that have been affected by such adjudications, and for the great learning and experience of the Judges from which they have emanated. Apart from the nature of the consideration of the grant in Caldwell v. Fulton, it was distinctly ruled by Lord Mountjoy's case. Judge Woodward, who delivered the opinion of the Court in a previous case between the same parties, both in that case, and in Funk v. Haldeman, 53 Penn., 229, recognized the authority of Lord Mountjoy's case, as reported by Lord Coke, under the weight of authority that had, both in the English and American Courts, sanctioned its rulings, but held that the grant then under consideration was to be regarded as a sale, for a valuable consideration, of the absolute and exclusive right to all the coal under the grantor's land. The opinion in the recent case reported in 31 Penn., 475, was delivered by Judge Strong. This opinion does not so distinctly appear to place the decision on the ground of the nature of the consideration paid, but that such was the turning point of the case distinctly appears in Clement v. Youngman, where the same Judge states the point decided in Caldwell v. Fulton. Clement v. Youngman, 40 Penn., 341, contains this important expression: "In Caldwell v. Fulton we held that a grant of an unlimited right, title and privilege to dig and take away the coal, in a designated tract of land, to any extent the grantee might think proper, and for a consideration, presently paid, was a grant of the coal itself, and not merely a license or incorporeal right." To this view of Caldwell v. Fulton, the Court declares itself as adhering. The grant in that case related to two distinct kinds of material to be found on the premises, namely, iron and limestone. The Court held that the agreement was not intended by the parties to confer an absolute right to either the ore or the limestone, on the ground that, as it regards the ore, the only consideration stated was an agreement to pay for the amount of ore actually taken, and as to the limestone, no consideration of any kind was stipulated for, besides the limestone was only to be taken to be used in the

manu*facture of iron from the ore. This case is in entire harmony with Lord Mount-joy's case, and is distinguishable from Caldwell v. Fulton by the fact that there was no consideration stipulated for, that implied a

principles of Lord Mountjoy's case to the sale of all the minerals of the designated kinds on the premises. It holds that an agreement to pay a stipulated price for the minerals actually taken, estimated upon the quantity taken, is not such a consideration as implies a sale of the whole mineral content. In this last respect the case resembles Doe v. Wood, with the exception, that the consideration stipulated for, in that case, was a share of the minerals, instead of a fixed equivalent in money. This case treats the question as to whether the right granted is corporeal as depending upon the intention of the parties as to its exclusiveness, as derived from all parts of the instrument construed together.

Glonninger v. Franklin Coal Co., 55 Penn., 7. The grant in this case was held not to be exclusive on two grounds: first, the consideration was a merely nominal sum (\$6.50); and, second, the right to take coal was limited to the amount required by the grantee for his use as a blacksmith. In construing that part of the grant that operated to limit the amount to be taken, the Court took into account the state of knowledge, as to the value of coal, and its uses at the time of making the contract.

Graves v. Hodges, 55 Penn., 564, holds that an agreement to pay a stipulated price per ton for ore taken, does not import an exclusive privilege. Grubb v. Bayard, 2 Wall., Jr., 81 [Fed. Cas. No. 5,849], where the consideration was also an amount stipulated to be paid per ton for the mineral taken, holds that the grant was not exclusive. Thus we find, in cases entitled to weight as authority, the proposition that when the grantee has unlimited authority over the subject-matter of the grant, a consideration consisting of an entire sum, including the valuation fixed by the parties upon the whole mineral content of the land, or of the class of minerals to which the mining right relates, demandable absolutely under the contract, furnishes evidence of an intent to confer an exclusive right on the grantee. On the other hand, the proposition is not disputed by any of the cases regarded as of leading authority on this subject.

This conclusion appears entirely reasonable. No presumption of an intent to reserve any part of the thing granted ought to prevail against ground of reasonable inference, that the price received by the grantor is an equivalent for the whole thing granted. Certainly in equity such a presumption could not be allowed to prevail over the manifest equity disclosed by the nature of the consideration.

*190

*We are not called upon in this case to decide that the fact of such a consideration, standing by itself, is sufficient to characterize the contract as intending an exclusive right, but as in the present case there are other evidences of such intent, we are only required to hold that the existence of such a consideration tends to establish an exclusive intent. We hold, therefore, that the grant to the defendant Moses was intended to, and did in fact, exclude the grantor. Massot, from all right to appropriate to himself any of the mineral substance to which the grant relates during the term of the contract, and from conferring such right upon any other person, as against the grantee or those of right claiming under the grant.

Had Moses' right been unlimited as to time, the grant would have operated as an absolute sale and conveyance of the mineral itself, as in the case of Caldwell v. Fulton. The limitation of the right to ten years prevents it from having this effect, but does not change the character of the grantee's authority during that period, such authority being that due to a full proprietorship of the minerals during the term. The words "sell and convey" cannot have their full effect, in consequence of the limitation in point of time, but in conjunction with other expressions of the grant, they serve to fix the character of the grantee's power and right, as a full proprietorship, during such term. This conclusion is not affected by the limitation imposed, as to the extent of the surface to be worked at any given time, as that limitation does not impair the right to work the whole, but limits the use of the surface of the ground as an incident to the operation of searching for and removing the minerals.

It is clear that the grant operated as a demise of the minerals for the term of ten years, and, therefore, the interest of the grantee was divisible.

Three things are necessary to a demise; first, a proper subject-matter; second, possession for a term of years; and, third, a right to the profits during such term. The argument in behalf of the plaintiff is, that the powers conferred by the grant does not relate to any thing corporeal, of which possession may be had. If this conclusion be established, it would result, as contended for by the plaintiff, that the power being incorporeal, it was indivisible, and the defendant, having attempted to divide it, had destroyed it.

The answer to this argument is supplied by the authorities, as well as by the reason of the case. The law of England, on this subject, is stated by Mr. Bainbridge, in his work on the Law of Mines and Minerals, 163. He states that minerals contained in

*191

the land, *although unopened, as well as opened mines, are capable of forming "a distinct possession or inheritance," and that if it was requisite that livery of seizin should be made of them, still they are susceptible of such livery. That author does not cite the authority of adjudicated cases to these

other evidences of such intent, we are only required to hold that the existence of such a consideration tends to establish an exclusive intent. We hold, therefore, that the grant to the defendant Moses was intended to and did in fact, exclude the grantor. Mas-

In Doe v. Wood, the question was whether ejectment would lie in the case of unopened mines, by one having the right to mine, though not entitled as owner or lessee of the land. If property of that kind had been incapable of sustaining a possessory title, the answer to the action would have been complete without any further enquiry, in order to ascertain the intention of the parties to the grant. The fact that the Court regarded it as important to ascertain whether the parties intended it as a demise, shows, conclusively, that it was capable of acting as a demise, if the parties so intended. This case leaves no doubt as to how the law of England stood, and if no other authority for so doing existed, Mr. Bainbridge would have been justified in stating, in the manner in which he has stated it, the law of that country.

Caldwell v. Fulton, 31 Penn., 475, holds that, by the law of Pennsylvania, minerals unsevered, are land, capable of being held and transferred, apart from the ownership of the land.

This determination necessarily involved the idea, that a possessory title could be had "in minerals in place," and, therefore, we should infer that a grant or conveyance, intended by the parties to operate as a transfer of property of that character, for a term of years, accompanied by an exclusive enjoyment of the profits thereof, would create a demise. There are, however, expressions in Caldwell v. Fulton, and Clement v. Youngman, that involve this deduction in some perplexity, as it regards the effect of the Pennsylvania cases. In these cases stress was laid on the fact that the right of the grantee was wholly unlimited in respect of time, quantity and use. It is not difficult to see the bearing of that fact in Caldwell v. Fulton, for there the conclusion that the grant operated to exclude the grantor rested on the fact that the parties intended a sale and conveyance. It was important to show that the entire interest in the coal was transferred. But it would not seem to follow that there was no other mode by which the grantor could have conferred an exclu-

*192

sive right on the grantee, than by *making an instrument that was capable of operating as a sale and conveyance absolute of the whole content of coal.

The difficulty as to the construction intended by the Pennsylvania cases arises from expressions employed in the opinions. The opinion of Judge Woodward, reported in 31 Penn., 475, is clear upon this point. He

sought to rest the case upon the inferences arising out of the consideration. From the consideration he inferred a contract of sale of the whole content of coal. His language is, "he sold for a valuable consideration all he had in sixteen acres, and all the coal in his other land. I say all, because the grant is limited to no time or quantity or purpose or person." The absence of a limitation as to time is here referred to as defining how much was sold, and not for the reason that such a limitation would be necessarily decisive against the grant operating as exclusive against the grantor.

Judge Strong, in the opinion in the second case that arose between the parties to Caldwell v. Fulton, sought to place the right of the grantee on quite different ground from that previously taken by Judge Woodward. His theory of the case, started with the proposition that "minerals in place" were land, and might be transferred as such. He then lays down the principle, that a conveyance of the whole profit of land is a conveyance of the land itself. In order to apply these principles to the case in hand, it was requisite to show two things: First, that coal was a profit of land; and, second, that the grantee acquired a right to the whole profit of In answering the objection that coal being but part of the profit of the land, the principle could not be applied, he holds that the subject of the grant being coal, the whole usufruct and dominion were granted. other words, coal in place was, in itself, land, and might be conveyed as such. It is difficult to understand why, if coal is land, it should be necessary to treat it as merely a profit of land. According to this view a sale of coal was a sale of land eo nomine. Why, then, resort to a principle which is only important when the land, as such, is not conveyed? To the operation of this principle he ascribes the conclusion in Lord Mountjoy's case, Cheatham v. Williamson, Doe v. Wood and Grubb v. Bayard.

An examination of the cases last mentioned will show that the idea that a conveyance of the profit of land is a conveyance of the land, did not enter into the grounds of decision in those cases. Of Lord Mountjoy's case, Judge Strong says that the grant was of "only sufficient for a single specified pur
*193

pose, viz.: the manufacture of *alum and copperas." And thus it was not in conflict. In other words, if the right in that case had not been subject to that particular limitation, it would have been held to exclude the grantor. It is far from clear that the grant in Lord Mountjoy's case, so far as it related to ores, was subject to the limitation that clearly applied to the turf; at all events, that solution was not indicated in the case as reported.

It is very clear that Lord Ellenborough did

not so understand Lord Mountjoy's case, when, in Cheatham v. Williamson, he deduced from that case the proposition, that one having a liberty of digging for coals in another's land, has not an exclusive right to the coals, as against the owner of the soil. Had the grant in Lord Mountjoy's case been unlimited, as to the purpose for which the grantee should take the turf or minerals, it still would have been only "a liberty of digging" in another's soil, and the remark of Lord Ellenborough would be equally applicable to the case.

The comment made by Judge Strong, on Cheatham v. Williamson, that that case was decided upon the idea that livery of seizin was indispensable, does not appear to be sustained by the report of that case in 4 East. Lawrence, J., says "the covenant, therefore, can only operate as a grant, but will not pass the land itself without livery."

The allusion to the want of livery arose from the fact that E. Hyde was only the owner of the equity of redemption, and had not the legal estate in him, and as the right to mine was reserved in his deed, it was necessarily unaccompanied by livery, for E. Hyde, not having the legal estate, could not make livery. The remark of Lawrence, J., if entitled to be regarded as disclosing the point of the case, falls far short of making the assertion that such an interest as an exclusive grant would have created was incapable of being attended by livery.

Judge Strong's comment on Doe v. Wood, (2 Burr. and Ald., 719,) fails to elicit the full import of that case. It was not the fact that the grant was limited to a term of twenty-one years, that was the ground of holding it a license. The question was whether it was a demise or license. demise, it would be the limitation of a term of years that would make it such. That, of course, then, was not the turning point as between a demise and a license. Abbott, C. J., states the question as follows: "One of the questions was whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the condition mentioned, or only a license to work and

*194

*get the metals and minerals that might be found within the limits described." Here is a clear conclusion that a legal estate in the mines and minerals might be created for a term of years, and so far as to operate as a demise. The question was, then, had the parties done so? The conclusion of the Court was, that by the terms of the grant the grantee did not take a present interest in the minerals as proprietor, but that his proprietary right arose only when the minerals were severed from the land. It will be borne in mind, that in that case the grantor retained an interest in the minerals themselves

That decision clearly rests on the idea that the grant was not exclusive, because it was nothing more than a liberty to dig for minerals in the land of another. Had there been anything in the granting part of the deed, or in the consideration, showing that the parties intended it to be exclusive, it is clear that it would have been upheld as a demise. This shows clearly that the limitation, as to time, was not the turning point in the case. That case professed to follow Lord Mountjoy's case, and we are at liberty to conclude that the construction put upon the grant was the result of the principle settled in that case. This view seems to strengthen the idea that has already been advanced in regard to Lord Mountjoy's case, that the Court allowed a presumption, in the absence of words of exclusion, that the grantor did not intend to divest himself of his proprietary right as owner of the land, but to admit the grantee to a participation in certain of those rights. The conclusion of Judge Strong is summed up in these words: "When the intent is to give the entire usufruct, and power of disposal, the legal title must be held to pass." Standing by itself, this proposition is not controverted, nor was it necessary to go beyond the mere affirmation of that proposition in Caldwell v. Fulton. But it does not follow that because the entire usufruct and power are limited to a term of years, that a legal estate by way of demise will not pass. It will be observed that Judge Strong speaks of "the entire usufruct and power of disposal." There is a well defined distinction between a deed of the usufruct and the power of disposal as it regards its competency as an actual conveyance of the land to which it relates. A deed of the usufruct of land can only convey the land itself under the operation of a rule of construction enlarging the terms of the deed beyond their direct import, on the principle of implication. Not so in the case of a deed conveying the "power of disposal," when such a conveyance is made for the use and enjoyment of the grantee.

*195

*In the latter case, the subject of the grant is dominion over the land. All that a deed purporting to convey the land, specifically, can pass, is the dominion over the land.

The deed does not affect the physical attributes of the land, or confer on it any quality fitting it to become subject to the dominion of the new owner. It simply transfers to the grantee what the grantor previously possessed. "Power of disposal is dominion over the land."

When, therefore, the deed conveys both the usufruct and power of disposal, it is unnecessary to resort to the rule, that conveyance of the whole usufruct is the conveyance of the land itself, for the deed acts at once,

in the form of a share of all minerals raised. by a principle of interpretation within it-

Regarding coal as land, the deed in Caldwell v. Fulton did not merely convey the usufruct of land, but conveyed complete and absolute power of control over land, for the use and enjoyment of the grantee.

For the same reason, had that deed conveyed the same power of control and disposal for a term of years, it would have created a demise. It is quite evident, from the summary already quoted, as made in Clement v. Youngman as to the point ruled in Caldwell v. Fulton, that the Court, on mature consideration, was disposed to adhere to the conclusion that the true point of distinction between that case and Lord Mountjoy's case, was the difference in the inferences to be drawn from the considerations of the respective grants.

No one disputes the validity of a lease of opened mines, nor that such a lease covers the stratum or vein of minerals, so far as embraced within the lands described, and is not limited to the openings, which are merely conveniences for getting access to the mineral, nor to the superficial occupation of the ground.

Extensive workings may serve to develope the value of a stratum or vein of mineral, but are not essential to complete the legal idea of property in such substances.

The legal conception of land is that of a right, within the limits of law, to control some part of the earth embracing its surface and content.

In general, conveyancing deals only with the surface of the ground, and, accordingly, we have come to consider surveyors' lines as the true boundaries of property. If we find difficulty in conceiving of the ownership of *196

a vein of mineral as land, it probably *arises from the fact that we cannot conceive of the outlines of such property being traced by surveyors' lines. But this is a mere superficial idea of land. A man's possessions, as the owner of land, is a solid body of rock, soil and water, bounded by planes instead of lines. There is no good reason why he should not, if he chooses, divide his possessions with those who can make a more advantageous use of it than he can make, by horizontal planes, or oblique planes, so long as the law can comprehend and effectuate his purpose.

Such is the practice of mankind, and it is due to the practice of the law that its ideas should keep pace with the habits and usages of practical life.

The notion of accessibility forms no part of the idea of land, yet the difficulty that arises in attempting to form a legal conception of a vein of mineral as land, springs from the idea of its inaccessibility. As it regards livery of seizin, it is not, now-a-days,

a question whether the owner of the soil can reach it, in order to perfect a symbolical delivery, but whether the statute of uses can reach it so as to give effect to a deed of bargain and sale.

The interest of Moses being a demise, it was competent for him to divide it, and, therefore, the ground of the bill fails, and it must be dismissed with cost.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 196

CASKEY v. McMULLEN.

(November Term, 1871.)

[Execution \$\sim 328.]

A rule against the Sheriff must be discharged, unless it appears that the money in his hands is applicable to the execution of the party at whose instance it was granted. The Court cannot order the money to be paid to another execution creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 987; Dec. Dig. &=328.]

Before Thomas, J., at Lancaster, October Term, 1870.

Rule against James D. Caskey, Sheriff of Lancaster County.

The case, as it appeared by the Sheriff's return, was this: There were three executions in the Sheriff's office against Uriah Small, defendant, one in favor of Wm. Mc-Mullen, another in favor of Mary Small, and a third in favor of James P. Small. McMullen's execution was against Uriah Small and James P. Small as joint defendants. The other executions were against Uriah Small alone. Under these executions, the Sheriff

*197
sold property of Uriah Small, *and this rule
was granted, at the instance of McMullen,
to compel the Sheriff to apply the money
arising from the sale to his execution.

His Honor held that the money was applicable to the execution of James P. Small, and ordered the Sheriff to apply it to that execution.

The Sheriff appealed, on the ground that the Court having held that the money was not applicable to McMullen's execution, the rule should have been discharged.

Moore, for appellant. Kershaw, Connors, contra.

Dec. 11, 1871. The opinion of the Court was delivered by

MOSES, C. J. The motion here made must prevail. The only parties before the Court were the respondent, McMullen, and the Sheriff against whom the rule issued. When the Circuit Judge held that the fund, in the hands of the Sheriff, was not applicable to the execution of the plaintiff, at whose instance the rule was ordered, it should have been discharged. To hold that the money was to be appropriated to a party not before the Court, not only affected the interest of execution creditors, who had no opportunity of being heard, but possibly deprived them, as to all practical purposes, of the right to attack the judgment, which, by the order, the Sheriff was directed to pay.

The mode of proceeding by rule to compel a Sheriff to apply money raised by sale of a defendant's property, must be restricted to the end for which it was intended by the long practice which has sanctioned its use. While it was a prompt and efficient remedy against a recusant Sheriff, who, in contempt of the process committed to him, refused or neglected to appropriate money collected by sale or otherwise, to the execution of the plaintiff clearly entitled to it, it was not to be substituted, as the process through which the rights of contending parties to such money were to be decided. It is only on the supposition that the Sheriff is in contempt, that the Court enforces the rule by an order of attachment; and when it is made to appear that, as against the plaintiff who has brought him before the Court, he has violated no right or duty, the rule must be discharged.

Although a rule to compel the payment, to a plaintiff in an execution, of money collect-*198

ed by the Sheriff, lies at the instance of *such plaintiff, (Kirkpatrick & Co. v. Ford & Aiken, 2 Speer, 112,) yet if it appears by the cause shown, that the fund is claimed by different parties, and it is doubtful which of them is entitled to it, the rule will be dismissed, and the parties left to litigate their rights by suit.—Dawkins v. Pearson, 2 Bail., 619; Bruton v. Cannon, Harp., 389.

We are not disposed to extend the power of deciding rights under a proceeding by rule against the Sheriff, beyond the limit to which it has been allowed by the decisions heretofore made in the Courts of this State.

The motion is granted, and the order of the Circuit Court set aside.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 198

MeNEEL v. SMARR.

(April Term, 1871.)

[Bills and Notes =131.]

Action on a sealed note, dated in the fall of 1865, the consideration of which was another sealed note, given in 1863, payable in dollars. No other evidence was given, or offered, and the Judge charged that the note sued on was payable in United States currency. Held, correct.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 310-315; Dec. Dig. 👄 131.]

Before Thomas, J., at York, March Term, 1870.

The whole case, as stated in the brief, was this:

The action was upon a sealed note, dated in the fall of 1865, the consideration of which was another sealed note for five hundred dollars, given the 11th February, 1863.

His Honor charged the jury that he regarded the note of 1865 as a different contract from that of 1863, the one being payable in Confederate money, and the other in United States currency.

The defendant appealed, on the grounds:

First. Because his Honor erred in charging the jury, that the note sued on, although proved to have been given as a renewal of a note given for loaned Confederate States notes, bearing date the 11th of February, 1863, was a new contract, entered into after the war, and not subject to the provisions of the Act of 1869, to determine the value of contracts made in Confederate States notes. or their equivalent.

*199

*Second. Because the renewal of a note is not a new contract, but a recognition of the former contract.

Smith, for appellant.

Dec. 13, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The ruling of the Circuit Court involves the proposition, advanced as one of law purely, that when a note, given while Confederate money was the generally accepted standard of commercial values, was renewed after the restoration of the legal currency of the United States as the basis of commercial dealing, the maker of the note will not be permitted, as against the payee, to offer proof, tending to show that, according to the actual intent and understanding of the parties, the obligation is to be measured by the value of Confederate currency.

In Neely v. McFadden, 2 S. C., 169, we held that although the words "dollars" and

"lawful money" were used in a contract, still, it was competent to enquire, as a question of fact, into the intent and understanding of the parties in the use of such terms. there laid down some of the principles that should govern an inquiry of that nature.

Had the defendant offered testimony tending to show that the parties used the term "dollars" in a mistaken sense, mutually adopted, or in a sense dictated by the common understanding and usage of the community in which they resided and dealt, it would not have been competent, under the rulings in Neely v. McFadden, for the Circuit Court to have rejected such testimony. So, had proof of that character been introduced, the ruling brought before us would have to be regarded as, in effect, destroying the value of such testimony, and would be held erroneous.

But it does not appear that any other evidence was introduced tending to show that the parties intended something different from the legal import of the term "dollars," than the fact that the only consideration of the note sued upon was a previous note, made in 1863.

Had the original note been sued upon, the plaintiff would have been entitled to recover the full nominal value of that note in United States currency, unless something more was shown than the date of the note. This was distinctly held in Neely v. McFadden.

Although the Circuit Court clearly misconceived the operation of the Act "to determine the value of contracts made in Con-*200

federate *States notes or their equivalent," (14 Stat., 277,) still there was no error in the charge that the note in question was not subject to the provisions of that Act, for, as we are bound to assume from the case as it stands before us, no evidence was offered sufficient to show that the parties contracted in reference to Confederate values. By the terms of the Act, the statute did not extend to the case.-Neely v. McFadden. For the same reason, the request to charge was irrelevant to the case. Had the original note been sued upon, as has been stated, the evidence before the Court would have entitled the plaintiff to recover the full value of that note in United States currency. It was, therefore, of no importance to the defendant to connect the renewed note with the original note as part and parcel of the same transaction and obligation.

The appeal must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 200

JOHNSTONE v. CROOKS.

(April Term, 1871.)

[Payment @=12.]

A creditor who received payments in Confederate currency has no right to have such payments reduced to the value of the currency in good and lawful money.

[Ed. Note.—Cited in Blackwell v. Tucker, 7 S. C. 400; Black v. Rose, 14 S. C. 280.

For other cases, see Payment, Cent. Dig. § 38, 42-54, 59-61, 128; Dec. Dig. © 12.]

[Payment \$\infty\$12.]

Where a Commissioner in Equity received payments in Confederate currency, on a bond payable to himself as Commissioner, he cannot repudiate his own acts in receiving such currency, and in an action on the bond in his own name, have the credits stricken out.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 38, 42-54, 59-61, 128; Dec. Dig. €⇒12.]

[Payment @=12.]

The constitutionality of the "Act to determine the value of contracts made in Confederate States notes or their equivalent," approved March 26th, 1869, re-affirmed, and the provisions held applicable to a bond for the purchase money of land given to a Commissioner in Equity in 1862.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 38, 42-54, 59-61, 128; Dec. Dig. \$\square\$12.]

Action of debt on bond, by Silas Johnstone, Commissioner in Equity for Newberry District, against Thomas H. Crooks, tried at Newberry, November Term, 1869.

The bond was dated December 1st, 1862—was payable to the plaintiff as Commissioner in Equity, and was conditioned for the payment of \$9,000, in two equal installments—one on the 1st December, 1863, and the other on the 1st December, 1864, with interest from date. The consideration was the purchase money of land sold by the plaintiff under a decree of the Court of Equity for partition. Credits signed by the plaintiff

were entered on the bond as *follows: December 1st, 1862, \$173.80; December 7th, 1863, \$4,701; December 27th, 1863, \$206.66.

The plaintiff appealed from the judgment of the Circuit Court, and the questions made by the appeal appear in the opinion of this Court.

Fair, Jones, for appellant:

The parties really interested are creditors of the intestate, whose land was sold by the plaintiff for partition. The payments were made in Confederate currency. The plaintiff had no right to receive such currency, and the credits should be stricken out.—Bailey v. Bagley, 19 Ala., 172; Garthwarte v. Wentz, 19 Ala., 196; Thomas v. Thompson, 19 Ala., 487. In these cases, payments in Confederate money to an attorney on a mortgage, were set aside, and the mortgage set

up. See also Alley v. Rodgers, 19 Gratt. 366.

Where a case is opened under the Ordinance of 1865, the true value only of the payments should be allowed.—Botts v. Crenshaw, referred to in Head v. Tally, 3 Law Times, 156.

The decree of 1862, for partition, was void, there being, at that time, no lawful government in the State.—Ex parte Bibb, Law Times, 35; Coleman v. Coleman, 43 Ala., 204; Snider v. Snider, 2 W. Va., 200; Hall & Hall v. Hall, 2 Law Times, 34.

The Act to determine the value of contracts made in Confederate currency was not unconstitutional, and was applicable to this case.—Neely v. McFadden, 2 S. C., 169; Wallace v. Harmon, 2 S. C., 208.

Carroll, for respondent:

1. The ordinance of 27th September, 1865, applies to executory contracts only, and so has been repeatedly adjudged.—Austin v. Kinsman, 13 Rich. Eq., 265; Fluit v. Nelson, 15 Rich., 11.

2. The Confederate Treasury Notes accepted by the plaintiff as payment of so much money, satisfied to that extent the plaintiff's bond.

3. A bill, note, or other security, delivered by a debtor to his creditor, and accepted by the latter expressly as payment, discharges the debt, whatever may be its grade.—Costelo v. Cave, 2 Hill, 528; Peters v. Barnhill, 1 Hill, 235; Chit. on Con., 839—note M.; Sheehy v. Mandeville, 6 Cra., 264.

*202

*4. The note or bond of a third person, though for a less amount, if received by a creditor expressly as payment, will satisfy the debt.—Eve v. Mosley, 2 Strob., 207; Chit. on Con., 821—note X.

5. The extraordinary price at which the land was bought by the defendant, Crooks, and the condition of the State and the currency at the date of his bond, all show that the price of the land had reference to the currency of Confederate Treasury Notes as the measure of value.

6. The orders in the suit for the partition of the land among the heirs of Glymph, justified the plaintiff, as Commissioner, in receiving from Crooks Confederate Treasury Notes towards payment of his bond.—Mc-Pherson v. Gray, 14 Rich. Eq., 129.

7. In receiving Confederate Treasury Notes in part payment of so much of said bond, the plaintiff, as Commissioner, was not wanting in such care and caution as a prudent man under like circumstances would employ in the management of his own funds.—Polock v. Dubose, 7 Rich. Eq., 23; McPherson v. Gray, 14 Rich. Eq., 130; Thorington v. Smith, (Sup. Court of U. S., Dec., 1868), 2 Law Times, 168.

son, 19 Ala., 487. In these cases, payments in Confederate money to an attorney on a mort-gage, were set aside, and the mortgage set makes them binding evidence as against the

parties to pre-existing contracts, is invalid and void, because it impairs the obligation of such contracts, and is, in substance and effect, a palpable assumption of judicial power.—Const. of 1868, Sects. 21 and 25; 2 Story Const. § 1385; Cooley's Const. Lim., 96; Parmelee v. Thompson, 7 Hill, N. Y. Rep., 77, and note b., 80.

January 18, 1872. The opinion of the Court was delivered by

MOSES, C. J. The first assignment of error in the charge of the Circuit Judge is his instruction to the jury, "that the payments in Confederate currency should stand as a credit for that many dollars on the bond."

It is scarcely necessary to refer to authority to shew that what the creditor takes and acknowledges as payment of his debt must be so considered, unless some fraud or imposition has been practiced to induce him to receive, in lieu of his demand, that which was never intended to be accepted as an equivalent for it.

As well might one claim a restitution of his property because he had parted with it at less than the market value. If the transaction is free from circumvention, or influence

*203

of a character which *would vitiate it at law, it must stand as the considerate act of the parties, binding on both of them.

This recognized principle, it is claimed, cannot apply to a contract subject to the provision of the Ordinance of September 27th 1865, entitled "An Ordinance to declare of force the Constitution and laws heretofore in force in this State," which allows "the true value and real character of the consideration of any contract entered into between the 1st day of January, 1862, and the fifteenth day of May, 1865," to be shewn, "so that such verdict or decree might be rendered as will effect substantial justice between the parties."

It has been decided in Austin v. Kinsman, 13 Rich. Eq., 265, and in Fluitt v. Nelson, 15 Rich., 11, that the Ordinance only applied to executory contracts, and that, therefore, where part payment had been made in Confederate currency, the creditor is not entitled to have the amount of the payment reduced to its value in National currency. If the proposition so contended for by the plaintiff can prevail, what would prevent its extension to the recovery from a maker, by the payee of a note who had received the amount nominally due upon it in Confederate currency, of the difference between such currency and the legal tender notes of the United States?

The second ground of error charged involves the plaintiff in an attempt, through the aid of the Court, to repudiate his own act in accepting a depreciated currency in part payment of the bond. While an officer of the Court, the obligee and custodian of the bond, he credited the money received, and, after inducing the obligors to suppose that so much of it was extinguished, he now avers that his course was without right, "and that the payments should be stricken out."

Is he in a position to avail himself of such an advantage? The creditors and the parties interested in the estate for the benefit of which the bond was held, are not before the Court. Whatever may be their rights, (and in that regard we do not propose to intimate an opinion,) he can not ask of the defendants any abatement or diminution of the amount so credited, because received in Confederate notes.

The third ground alleged as error must be sustained. The constitutionality of the "Act to determine the value of contracts made in Confederate States notes, or their equivalent," approved March 26, 1869, 14 Stat., 277, was sustained by this Court in Neely v. McFadden, 2 S. C., 169. The Circuit Judge

*204

further charged, *that if not repugnant to the Constitution of this State and of the United States, "it had no application to the contract proved in this case, and that, after fixing the real value of the property on the day of sale, and ascertaining what proportion of the original bond had been paid, and what proportion was still due, their verdict should conform to such proportion."

The rules by which the construction and determination of contracts made during the period when Confederate States notes constituted the only circulating medium in the State, have been fully prescribed and set forth in the cases of Neely v. McFadden, 2 S. C., 169, and Harmon v. Wallace, 2 S. C., 208.

They determine the principles which must be applied to the construction of such contracts, where, from the peculiar condition of the currency then prevailing, and the state of the country, the intent of the parties is allowed to be ascertained by a resort "to proof of extrinsic facts and circumstances," in aid of the inference to be drawn from the instrument itself.

The motion is granted, and a new trial ordered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 204

SMITH & GIBSON V. PATE & STUBBS.

(April Term, 1871.)

[Fraudulent Conveyances \$\sim 312.]

Bill by junior judgment creditors of S. to set aside, as fraudulent, an older judgment for \$2,000, confessed by S. to P. The Circuit Court set aside the judgment, and, on appeal, the Supreme Court ordered two issues to be tried by a jury to determine the Supreme Court ordered two issues to be tried by a jury, to determine; (1.) Whether P., in taking the judgment, was guilty of a fraud; and, (2.) What was the actual value of the consideration of the judgment? The jury found that P. was guilty of no fraud in taking the judgment; and that the actual value of the consideration was \$600. The finding having been cartified to the Supreme Court held that there certified to the Supreme Court, held, that there being no fraud in the judgment, the jurisdiction of the Court was at an end, and the bill must be dismissed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 963–965, 967; Dec. Dig. &=312.]

[Fraudulent Conveyances SS.]

A judgment by confession, given in February, 1867, and based upon a consideration in Confederate currency, when that currency was greatly depreciated, is not fraudulent and void as against other creditors of the judgment debtor, merely because the judgment was taken for more than the actual value of the consideration. more than the actual value of the consideration in lawful money.

[Ed. Note.-For other cases, see Fraudulent Conveyances, Cent. Dig. § 232; Dec. Dig. 88.1

[Fraudulent Conveyances \$\iiii 312.]
In some cases of legal fraud, the Court, in setting aside the judgment by confession, at the suit of junior judgment creditors, will allow the judgment creditor the actual value of the consideration of his judgment, but where the fraud as alleged is found not to exist, the Court cannot proceed further, and reduce the amount of the judgment to the actual value of the consideration.

[Ed. Note.—Cited in Garvin v. Garvin, 55 S. C. 371, 33 S. E. 458; Miller v. Wroton, 82 S. C. 105, 63 S. E. 62, 449.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 963-965, 967; Dec. Dig. \$\sim 312.\]

[Fraudulent Conveyances 5 171.]
Where a judgment by confession is untainted with fraud on the part of the judgment creditor, it will not be set aside at the suit of junior judgment creditors, merely because the debtor had, when he gave the confession, expectations of benefit to himself therefrom, at the expense of other creditors, which, if communicated to the judgment creditor, would have made the confession fraudulent.

[Ed. Note.—Cited in Weinges v. Cash, 15 S. C. 58.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 522; Dec. Dig. \$\sim 171.]

*205

*On February 19th, 1867, the defendant, John W. Stubbs, gave to the defendant, L. Garlington Pate, his promissory note for \$2,-000, and a confession of judgment thereon for the same amount. On March 30th, 1867, the plaintiff, John H. Smith, recovered a judgment against Stubbs for \$733.24, and on the same day the plaintiff, Noah Gibson, re-

covered a judgment against him for \$390.02.

This was a bill in equity, by Smith & Gibson, to set aside the judgment to Pate, on the ground, as alleged in the bill, that it was without consideration, and fraudulent as against creditors.

Pate, by his answer, which was responsive to the charges and interrogatories of the bill, set forth the consideration of the note and confession, as follows:

"In February or March, 1865, this defendant, who then resided, and still resides in Sumter District, (now Sumter County) in said State, was with his wife, who is a daughter of the said Stubbs, at the residence of said Stubbs, in Marlborough District, on a visit to him and his family; that during their visit part of the army of Gen. Sherman were at the residence of the said Stubbs, and carried off or destroyed all the work animals of the said Stubbs, who was a farmer in comfortable circumstances: that after said army had left, the said Stubbs entreated this defendant to return to Sumter, and purchase or otherwise procure for him, at any cost, some mules and horses, to enable him to make a crop; that this defendant complied with his request, and accompanied by a son of the said Stubbs returned immediately to Sumter, and purchased there with his, (this defendant's) own means, one grey mule, one sorrel or bay mule, one sorrel horse and one bay horse, four in all, and returned with them to the residence of the said Stubbs, and delivered them to him there; that this defendant cannot now state the exact price he paid for said mules and horses, but is certain it was over six thousand dollars, and to the best of his recollection and belief, near seven thousand dollars in Confederate money; that such animals were at that time very scarce, and it was difficult to procure them, and on this defendant's way back to Marlborough with them, he was offered a large sum of money, three or four thousand dollars, he is not certain which, for one alone; that this defendant does not know, and, therefore, cannot state, what the respective ages of the said mules and herses were, and as to condition he would say, they were then thin, but not too thin to be worked, and were, in fact, immediately put to work by the said Stubbs -that he did not at that time apply to the said Stubbs for payment, nor did the said

*206 Stubbs *give this defendant any note or acknowledgment of indebtedness, nor did any writings pass between them; that all this occurred before the surrender of Gen. Lee's army; that the defendant did not apply to the said Stubbs for settlement of his indebtedness to this defendant, on account of his purchase of said mules and horses, until some five or six months before February, 1867, when he did make such application; that the said Stubbs then acknowledged that he was

under obligations to this defendant for what! he had done for him-said that he did not then have the means of payment—but assured this defendant that he should be paid; that nothing more passed between them, the said Stubbs and this defendant, in reference to payment or a settlement, until a short time before the confession of judgment to this defendant was made, when the said Stubbs wrote to this defendant to the effect. as well as he remembers, the letter not being now before him, that he, Stubbs, was willing to allow this defendant two thousand dollars on account of his purchase of said mules and horses, and that if he, this defendant, would draw a note for that amount, and send it to an attorney in Marlborough, he, the said Stubbs, would sign said note, and secure this defendant, by giving him a confession of judgment thereon, if he, this defendant, would stay the execution; that this defendant was satisfied with the arrangement proposed, and accordingly drew a note for two thousand dollars, and sent it to an attorney in Bennettsville, with instructions to have it signed, procure a confession of judgment thereon, and stay the execution; and this defendant afterwards learned that his instructions had been carried out."

The issues made by the pleadings were tried at Marlborough, May Term, 1869, and the Circuit Judge made a decree setting aside the judgment as "tainted not only with legal, but actual fraud." Pate appealed, and moved this Court to reverse the decree and dismiss the bill, on the ground, chiefly, of error in the conclusions of the Judge upon the questions of fact.

The appeal was heard at April Term, 1870, and this Court made an order at November Term, 1870, directing the case to be remanded to the Circuit Court, "that the verdict of a jury may be had on the following issues of fact, to be submitted to them"—defendants to be actors on the first and second issues, and plaintiff on the third:

1. What was the consideration of the note from Stubbs to Pate, on which the confession was taken; and if such consideration was horses and mules, or either, what was their value when delivered?

*207

*2. If the consideration was horses and mules, or either, and carried from Sumter to the residence of Stubbs by Pate, what, at the time, would be a fair compensation, having regard to the actual expense and the risk of transportation, for such expense and risk?

3. Was the judgment taken by Pate with the view fraudulently to delay, hinder or prevent Smith and Gibson, or either of them, in the recovery of their debts from Stubbs?

The order directed the Circuit Judge to send up to this Court a report of the evidence taken at the trial of the issues, and a copy of the verdict.

The issues were tried at Marlborough, January Term, 1871, and the jury found, on the first issue, that the consideration of the note was two mules and one horse, and that their value, at the time of delivery, was \$400; on the second, that \$200 would be a fair compensation for risk, &c., in their transportation from Sumter to Marlborough; and on the third, that the judgment was not taken by Pate with the view fraudulently to delay, hinder or prevent Smith and Gibson, or either of them, in the recovery of their debts from Stubbs.

The evidence taken at the trial, and the verdict having been certified to this Court, the defendant Pate now moved the Court to dismiss the bill, on the ground that the fact that there was no fraud in the taking of the confession being now established by the verdict, the jurisdiction of the Court was at an end-fraud being the only ground upon which the bill could be sustained. The plaintiffs moved the Court at the same time, to disregard the verdict and dismiss the appeal non obstante veredicto, on the ground that the verdict was clearly against the evidence, and failing in that motion, then for a new trial. and an enlargement of the issue, so as to embrace Stubbs in the question of fraudulent intent as well as Pate.

Townsend, J. S. G. Richardson, for appellant.

Hudson, contra.

Feb. 7, 1872. The opinion of the Court was delivered by

MOSES, C. J. The issue ordered by the Court in this cause was not only to ascertain the true consideration of the note given to Pate by J. W. Stubbs, but to determine whether the judgment confessed upon it was taken by Pate with the view, fraudulently to delay, hinder or prevent the plaintiffs, Smith and Gibson, or either of them, in the recovery of their debts from the said Stubbs. To this, the jury, on the issue so submitted to them,

have responded in the *negative. In the class of cases referred to in the argument on behalf of the plaintiffs, where the Court refused to permit the judgment to stand of force to the extent of the true consideration on which it was founded, the intent fraudulently to delay and hinder creditors was found by the jury or established by the decree. Here, however, the jury, by their verdict, ignore such intent on the part of Pate. The bill was filed to set aside the judgment on the ground of fraud alone, and when this has been negatived by the jury all claim to the interposition of a Court of Equity for a reduction of the amount for which the judgment was taken ceases.

Where an advantage has been obtained under circumstances which lead to a suspi-

cion of fraud, the party for whose benefit it | Court based its judgment. It might be was intended will not be allowed to retain it at the expense of bona fide creditors, although equity might so far interfere as to permit the instrument through which such benefit was to be obtained, to stand for the real value of the consideration. Where, however, it appears that the transaction was fraudulent in itself, and therefore void, in the language of the books, "the Court is not bound to disentangle a web of fraud to ascertain if any good material be mixed in it."

The bill in the case before us charges that the judgment was without consideration, and fraudulent as against creditors, and the jury have not only found that there was a consideration, though not equal to the whole amount for which it was taken, but that there was no fraudulent purpose on the part of Pate.

The real value of the animals and the expense of their transportation, which formed the consideration of the note, give no claim to the plaintiffs to have the judgment reduced to the amount which would represent the proper sum at which such value and expenses should be assessed. If there was no fraud by Pate, it was competent for him to fix the rate for his property and services, no matter what may have been the view of Stubbs in assenting, provided the motive was unknown to Pate, and such conclusion we are obliged to infer from the verdict.

Nor can it avail the plaintiffs that the language of the issue submitted precluded enquiry into the fraudulent intent on the part of Stubbs. It would be inconsistent with every principle of law and morals to say that Pate, who has been acquitted of all wrong by the verdict of the jury, should in any way be affected by the fraudulent motive which may have actuated Stubbs in the transaction. To visit the consequences of the improper design

of Stubbs on the head *of Pate, would not comport with the verdict which acquits him of any participation in the fraud, for had he in any way connived with Stubbs in the motive which may have influenced him, prompted by a common purpose, he would be as obnoxious to the charge of fraud as Stubbs himself. It would not only be a hard, but most unjust rule, when the jury have acquitted Pate of a fraudulent design, to deprive him of the benefit of his judgment, because Stubbs, in giving it, may have had in view some hope of advantage to himself at the expense of his creditors.

The issue was ordered by this Court, because it was not satisfied with the conclusion of the Circuit Judge, "that the judgment was tainted not only with legal but actual fraud." It is not necessary to enter into an analysis or examination of the testimony for the pur-

enough to say that it was impressed by the circumstance of the absence of all proof that Pate, when he took the confession, had any knowledge of the indebtedness of Stubbs to others. It is competent for this Court to order a new trial, or even to decree, according to its own view of the case, non obstante veredicto. The object of ordering an issue to be tried by a jury of the vicinage, was to test the questions of fact involved, by the judgment of that tribunal more peculiarly fitted by its knowledge of the witnesses to arrive at a proper solution through the evidence submitted. We do not see such manifest error in their judgment as should authorize us either to set it aside, or to decree in the face of it.

It is ordered and adjudged that the bill be dismissed, each party to pay his own costs.

WILLARD, A. J., and WRIGHT, A. J., con-

3 S. C. *210

*THOMAS v. KELLY.

(November Term, 1871.)

[Wills @= 725.]

Devise of a plantation to testator's wife for "and at her death to be appraised by three disinterested freeholders; and that my son W. have the right to said plantation at the appraised value, if he choose to do so, at a credit of one, two and three years, in equal annual payments, without interest; but if he should decline to take said plantation, then my executors are * * * to sell * * * the same, and the the same, and the money arising from the sale * * * * to be divided amongst my children." At the death of testator's widow, the plantation was appraised, and W. having elected to take it, gave executors his three sealed notes, payable in one, two and three years, each for one-third of the appraised value, but failed to pay the notes at maturity: Held, That payment of the appraised value was a condition annexed to the devise, and that W. having failed to perform the condition, his estate ceased.

[Ed. Note.—Cited in Murray v. Witte, 16 S. C. 515; National Bank of Chester v. Gunhouse & Co., 17 S. C. 499.

For other cases, see Wills, Cent. Dig. §§ 1732–1737; Dec. Dig. \$\sim 725.]

William Kelly, the testator in the cause, died in 1860, and this was a bill by his executors to settle up the estate.

The only questions made by the appeal arose under the second and fifth clauses of his will. The second clause is as follows:

"It is my wish and desire that my wife continue to live on the plantation whereon I now reside, and to hold the same in her own right, to work and to use in any manner she may deem proper during her natural life, and at her death to be appraised by three disinterested freeholders; and that my son pose of sustaining the views on which this Wm, H. Kelly have the right to said plantation at the appraised value, if he choose to do three sealed notes, each for \$4,070, payable equal annual payments, without interest; but if he should decline to take said plantation, then my executors are hereby authorized and empowered to sell and make a sufficient title to the same, and the money arising from the sale of said plantation to be divided amongst my children as hereinafter provided.

The widow of the testator died in March, 1861. In January, 1862, the plantation mentioned in the second clause of the will was appraised, as in that clause directed, and the appraisers estimated its value at \$12,210. W. H. Kelly elected to take it at that value, and on the 21st March, 1862, he gave to the executors of the will his three sealed notes, each for \$4,070, payable in one, two and three years. He took possession of the plantation as his own property, and held it until 1864, when he died, leaving a widow and children. The notes have never been paid.

The question in relation to that plantation was whether W. H. Kelly took an indefeasible estate when he elected to take it at the appraised value, or whether payment of the

*211

appraised value was *not a condition annexed to the devise on failure to perform which his estate ceased and determined.

The Chancellor who heard the case on Circuit held that W. H. Kelly took an indefeasible estate in the plantation, unincumbered with any charge, or lien, to secure the payment of the appraised value, and the appeal brought the question before this Court.

The brief furnished the Reporter contains no copy of the fifth clause of the will, nor are the facts upon which the question in relation to that clause arose stated in it.

- - for appellant.

Brawley, contra.

Feb. 9, 1872. The opinion of the Court was delivered by

MOSES, C. J. William Kelly, on January 8, 1858, executed his last will and testament, and departed this life on the day of . 1860.

The plaintiffs are his surviving executors, John W. Kelly, a son of the testator, having died after qualifying. Elizabeth Kelly, his widow, died in March, 1861. The testator left children and grand-children. The questions before the Court arise under the second and fifth clauses of the will, of which a copy is to be found in the brief. In January, 1862, (as is stated in the bill and admitted in the answer.) W. H. Kelly was elected to take the land devised by the said second clause at twelve thousand two hundred and ten dollars, the value at which it was appraised, and on the 21st of March of the same year. executed to his co-executors (the plaintiffs) sions, and renounce any right inconsistent

so, at a credit of one, two and three years, in in one, two and three years. He entered and held possession as of his own property until his death in 1864; his widow and children occupied it until 1866, when McJunkin, one of the plaintiffs, who also administered on the estate of the said John W. Kelly, rented out the premises with the consent of the widow. The notes are still unpaid.

> Harriet S. Hodges has been in possession of the Newberry tract (devised by the fifth clause of the will) since the death of the testator, but has paid no part of the money for which she was to account.

> No further statement of the matters set forth in the bill is necessary, because the motion only brings to the review of this Court the judgment of the Chancellor on the points made under the clauses referred to.

*212

*The doctrine that a vendor of land has an equitable lien for the payment of the consideration money has never prevailed in this State.-McCorkle v. Montgomery, 11 Rich. Eq., 132; Walker v. Covar, 2 S. C., 16. Even if the principle contended for had been adopted by our Courts, it could not be extended to a party who did not stand in the relation of a vendor having parted with his title for a consideration promised and still unpaid. It would be a contradiction in terms to apply it to any change of real estate, proceeding from gift and not from contract, for its very purpose is to secure the payment of the purchase money where such property has been sold without a mortgage or other security.

A will is arbitrary—the testator declares his own mind and purpose. A contract, on the contrary, is the result of an agreement with some other mind, and the intent and purpose of both the parties is to be ascertained.

When, however, a testator affixes as a condition of the devise, the payment of a sum of money, or the performance of any other act, without a compliance with which the benefit is not to be enjoyed, or when he subjects the devise to some stipulation, shewing a clear intent that it is not to vest absolutely, unless the prescribed requisition is fulfilled, the condition or stipulation so attaches to the devise, as not only to become part of it, but to operate as the controlling terms upon which its enjoyment is to take effect, or be retained.

All who claim under a will must be governed by it as a whole. If it confers a benefit which is subjected, either by express language or necessary implication, to diminution or abatement, it cannot be freed from the burthen by which it is fettered.

In Glenn v. Fisher, 5 John. Ch., 35, Chancellor Kent says: "He who accepts a benefit under a will must conform to all its proviwith them. This is an obvious and settled principle in equity. He accepts of the devise under the condition of conforming to the will, and a Court of Equity will compel him to perform the condition; for no man, says Chief Baron Eyre, (Blake v. Bunberry, 1 Ves., Jr., 523.) shall be allowed to disappoint a will under which he takes a benefit."

Mr. Jarman, in his work on wills, vol. 1, p. 797, says: "No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus, 'a devise to A, he paying,' or he to pay '\$500 within one month after my decease,' would be a condition for breach of which the heir might enter; unless the property were given over in

*213

default by way of ex*ecutory devise." Conditions are either precedent or subsequent; in other words, either the performance of them is made to precede the vesting of the estate, or the non-performance to determine an estate antecedently vested. So far as the interest of W. H. Kelley is concerned, it would now make no difference whether the condition is to be regarded as precedent or subsequent.

If the latter, a title to the land vested at the death of the widow of the testator. But the event on which it must continue is the payment of the assessed value at the expiration of the credit. On failure to perform the condition, he loses the right to retain.

In Finley v. Hunter, 2 Strob. Eq., 212, Johnston, Ch., says: "Conditions precedent are such as are, from the nature of the case, or by express requirement, to be performed before the right to which they are annexed can attach or vest. Until they are performed, the right does not vest. Conditions subsequent are such as are to be performed after the right vests or attaches in law, and the general rule is, that the right which has already vested is terminated or divested by a failure to perform them."

The indefeasible right of W. H. Kelly did not depend on his mere entry on the land, or his execution of the notes, but did depend on the payment as the annual credits ex-In fact, the executors would have fully complied with their duty by allowing him to enter and hold after the appraisement of the value had been made and agreed to by him, even without requiring any evidence of his indebtedness. No sale of the plantation was to be made to him by the executors. He took, if he accepted of the conditions, directly under the will, and the payment of the money was one of them. To hold that he was to keep the land if he failed to pay the estimated value according to the directions of the will, would be in direct conflict with the intention of the testator, that he was "to have the right to it at the appraised value, if he choose to do so, at a credit of

This is an obvious and settled one, two and three years, in equal annual equity. He accepts of the depayments, without interest."

He cannot claim a benefit under the will without giving full effect to it, as far as he can. If the devise is affected with conditions, he must take it as it stands, or reject it.

Is there any thing in the will which even intimates an intention on the part of the testator that if the son failed, for want of disposition or ability, to pay the assessed value, the absolute title should still continue in him? Is it not clear that his design was to convert the land into money by the de-

*214

vise to the son, and if this purpose *could not be thereby accomplished, then through a sale by the executors?

If it had been the intention of the testator that the son should take the land as an unconditional devise, why was its value to be assessed, and a credit given for the payment? The will does not provide for any account of advances made to the children. On the contrary, the testator declares that by property advanced and embraced in it, he had made his children nearly equal, and his desire to continue that equality is expressed.

The scheme, too, of the will, seems to favor that intent. In the disposition of his slaves, including those bequeathed to his wife for life, the son, John W. Kelly, whose devise was not subject to any condition, was excluded. We may well assume that it was, because the devise to him and his children was not encumbered with any condition.

The argument on the part of the appellee is, that W. H. Kelly did not decline to take the land, and that, therefore, one of the events on which the alternative disposition depended, did not occur. The power, however, of the executors to sell, was not to be lost by his mere willingness to accept; it could only be extinguished by his acceptance and payment.

If no credit had been fixed by the will, the payment would have been a condition precedent to the vesting of the title; and is the enjoyment of the devise to be retained beyond the period at which the credit terminates, when the intent of the will is, that its continuance shall depend on the payment by the devisee of the appraised value?

It cannot be contended that the acceptance of the notes amounted to payment. The authorities in this State are to the effect, that a note taken does not amount to satisfaction, unless it is so agreed and understood by the parties; and unless such be the understanding, it is rather to be regarded as a memorandum or acknowledgment of the amount ascertained to be due.—Barelli, Torre & Co. v. Brown & Moses, 1 McC., 449 [10 Am. Dec. 683]; Costelo v. Cave & Bradley, 2 Hill, 528 [27 Am. Dec. 404]; Kelsey & Halsted v. Ros-

31: Fraser v. Hext, 2 Strob. Eq., 250.

The devise by the fifth clause to Mrs. Harriet S. Hodges, so far as it attaches terms and conditions on which the continuance of the proposed bounty was to depend, must be governed by the same construction we have given to the devise to the said W. H. Kelly, under the second clause.

*It is ordered and adjudged, that so much of the decree of the Chancellor as declares that the plaintiffs have no lien on the plantation on which the testator resided at the time of his death, for the sum of \$12,210, the amount at which it was appraised, and interest, and that they have no lien on the plantation devised to Harriet S. Hodges, for the payment of the three thousand dollars for which she was to account to the estate, be reversed

It is also ordered, that the case be remanded to the Circuit Court for Union County, that such orders may be had as are necessary to carry out the judgment of this Court now pronounced, and to give full effect to so much of the Circuit decree as has not been made the subject of appeal.

WILLARD, A. J., WRIGHT, A. J. concurred.

3 S. C. 215

WELSH v. DAVIS.

(November Term, 1871.)

[Action =22.]

Equity is not the proper forum in which to claim damages for breach of a covenant of warranty: nor is petition the proper form of rem-

[Ed. Note.-For other cases, see Action, Cent. Dig. § 125; Dec. Dig. \$22.1

To understand this application, resort must be had to the case, as reported, ante p. 110.

March 8, 1872. The opinion of the Court was delivered by

WILLARD, A. J. At the last term, the petition in this cause was determined. (Welsh v. Davis, ante, p. 110.) The respondent now moves for a modification of the decree that will enable him to proceed on his petition against A. J. Kibler, as administrator of J. A. Cunningham. The petition sought the satisfaction of the respondent's demand out of the assigned estate. The decree of the Circuit Court considered the single question, whether the respondent was entitled to payment out of the assigned estate. That decree having been reversed, on grounds that denied the respondent's claim to satisfaction out of the assigned estate, the petition was properly

borough, 2 Rich., 244; Bank v. Bobo, 9 Rich., | dismissed, unless it could be retained for the purpose of charging Kibler, as administrator, in respect of the covenant of warranty made by his intestate during his life time.

No sufficient ground appears for pursuing this demand in equity.

The primary mode of enforcing such obliga-*216

tion is by an action *at law, and recourse cannot be had to equity when there is an adequate legal remedy; nor is there a devastavit, threatened waste, insolvency of the estate, nor want of responsibility of the administrator alleged, as ground of seeking exceptional relief in equity. Ragsdale v. Holmes, 1 S. C.,

If ground for proceeding in equity existed. the petition is not the formal remedy, and it cannot be retained for any such purpose.

The decision of this Court cannot prejudice any demand that the respondent may seek to establish against A. J. Kibler, inasmuch as the liability of the latter was no part of the question before the Court.

The motion should be denied.

MOSES, C. J., WRIGHT, A. J., concurred.

3 S. C. 216

DONALDSON v. JOHNSON.

(April Term, 1871.)

[Banks and Banking \$77.]

On March 13, 1869, the State passed an Act to place the insolvent banks of the State in liquidation, and authorized the Circuit Judges to appoint Receivers of their assets; and on February 17, 1870, a Receiver was appointed under the Act for the Bank of Camden. After the passage of the Act, and before the appointthe passage of the Act, and before the appointment of the Receiver, the President and Directors of the Bank filed a bill to wind up the affairs of the bank "according to the course they had been pursuing," and obtained orders calling in creditors to present statements of their "claims at the banking house of plaintiffs," and directing their payment 'out of the assets of the bank, the President and Cashier acting as Receivers to this end, with such further authority as the Board may rightfully confer as to collections, sales of property," &c.: Held, that the power of the Circuit Judge to appoint a Receiver, under the Act, was not superseded by the proceedings under the bill, and that the Receiver was entitled to the possession of the assets of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 165; Dec. Dig. € 77.]

Before Melton, J., at Camden, March Term, 1871.

This was an action by R. J. Donaldson, as Receiver of the Bank of Camden, S. C., plaintiff, against William E. Johnson and Wm. D. McDowall, defendants. The case will be understood from the decree of the Circuit Judge, which is as follows:

Melton, J. The plaintiff in this cause pointed the Receiver of the Bank of Camden, South Carolina, pursuant to the provisions of an Act of the General Assembly, approved March 13, 1869, entitled "An Act to enable the banks of the State to renew business, or to place them in liquidation," (14 Stat., 212,) and became vested, by the terms of

the said *Act, with power and authority "to take charge of the property and assets of the bank, and to make a final settlement of the accounts of the bank." On the 8th of March, 1870, he made demand of the defendants, who were the former President and Cashier of the bank, for the delivery to him of the property and assets of the bank. With this demand the defendants refused to comply, and this complaint is filed by the plaintiff, and prays relief: 1st. That the defendants do discover all and singular the assets of the bank. 2d. That they surrender and deliver to the plaintiff all and singular the said property and assets. 3d. That they account for and pay over to the plaintiff all moneys by them received from the collection, sales or other disposition of the property of the bank. 4th. And that the defendants be enjoined from any further dealing with, or interfering with, the property or assets of the bank.

The defendants allege, in answer to this complaint, that at the time the plaintiff was appointed as Receiver, the Bank of Camden was in liquidation, and that they were themselves the Receivers, having been so appointed by the Circuit Court, and that, as Receivers, they were rightfully in possession of the property and assets of the bank.

The facts in relation to this defense are these: On the 17th of April, 1869, a bill was filed in the Circuit Court for Kershaw, by William E. Johnson and others, the President and Directors of the Bank of Camden, S. C., against the Bank of Camden, S. C., and others, being the stockholders and creditors of the bank, which was, in effect, a bill to marshal the assets of the bank, to call in the creditors thereof, and to enjoin them from otherwise proceeding against the bank. By an order in the cause, dated May 14th, 1869, the complainants were required by public advertisement for three months, in newspapers of Charleston, Columbia, New York and Camden, to call upon all creditors to present and establish their demands at the banking house of complainants, in Camden, on or before the first day of September, 1869.

On the 22d day of September, 1869, a report was filed in said cause by the defendants, as President and Cashier, in reference to the condition of the bank and the claims presented; upon the hearing of which the following order was made by his Honor Judge Boozer, then presiding:

was, on the 17th day of February, 1870, ap- and Cashier of the Bank of Camden, S. C., filed in this cause, it is ordered that the claims presented against the said Bank of *218

Camden, on or before the *first day of September, instant, in accordance with the order heretofore made, be paid out of any of the assets of said bank, the President and Cashier acting as Receivers to this end, with such further authority, as the Board of Directors may rightfully confer as to collections, sales of property, and-so-forth, as may be necessary. It is further ordered that the said Receivers proceed to the final settlement of the Bank of Camden, S. C., and that they report to every term of this Court their actings and doings under this order until discharged by the further order of this Court. That, after paying the claims already rendered against the bank, and any others which, coming in hereafter, may be ordered to be paid by this Court, the said Receivers distribute the remaining assets among the stockholders of said bank pro rata. That, until discharged, the said Receivers shall be entitled to receive the compensation now allowed them by the Board of Directors of said bank. That the cost of these proceedings be paid by said Receivers."

By the terms of this order, the defendants claim that they were appointed the receivers of the said bank. They, however, gave no bonds as such. And it further appears that, on the first of November, 1869, they made to the Comptroller General a statement of the property, assets and liabilities of the bank, in which they say, "we are the officers of the said bank which we claim to be," and sign their names as President and Cashier. (See the report of the Comptroller General to the General Assembly, November, 1869, pages 124 and 125.)

On the other hand, it appears that at date of December 1, 1869, the President communicated to the Comptroller General that the bank was in process of liquidation under the directions of the Court, and that the assets were then in the hands of the defendants as Receivers of the Court.

Taking the view which I do of the force and effect of the provisions of the Act of 1869, it is unnecessary for me to adjudge whether the defendants were in fact, the appointed Receivers of the Court, for I should hold, even if this fact were unquestioned, that this appointment could operate only provisionally, and must yield to the subsequent appointment of the plaintiff, which was made in accordance with the provisions of that Act. It is avowed in the complaint, and not denied in the answer, that the Bank of Camden was, by reason of its condition, within the operation of the Act of 1869, that is to say, that it was a bank incorporated by the authority of "Upon hearing the report of the President the State; that by said authority it had

*219

failed to comply with its *corporate privileges by refusing to pay its bills; that at the time of the passage of the said Act, it was failing so to do; and that it continued to violate its charter until the first of December, 1869. It is further averred, and not denied, that the appointment of the plaintiff as Receiver was duly made, in accordance with the provisions of said Act, and that he filed his bond with good and sufficient security, which was approved by the Judge.

In making this appointment, the duty imposed upon the Circuit Judge was, in terms, imperative. The necessary facts being shown to exist, the only discretion with which he was invested was as to the selection of the person upon whom to confer the appointment. If this discretion were now to be exercised, with my present knowledge of what had been already ordered by the Court, I would hesitate to supersede, by a new appointment, those who had already been charged with the duty of making a final settlement of the affairs of the bank, or if it were in my power to reconsider my action, I would feel bound to give the most respectful consideration to the protest of the stockholders and creditors against their removal, which are filed with the answer. But the appointment has been made, and were it now manifestly an improper one, it is not in my power to reconsider it. The order by which it was made was not a judicial act. The power to make it might as well have been conferred upon the Governor or upon the Comptroller General, as upon the Judge of the Circuit. Having been made, it is now beyond his control, and must carry with it the full force and authority confirmed by the Acts of the General Assembly, the authority "to take charge of the property and assets of the bank."

It is, therefore, adjudged,

1. That the defendants do discover all and singular the property and assets of the Bank of Camden, South Carolina, which were in their possession at the time the demand therefor was made by the plaintiff, and that they forthwith file with the Clerk of the Court, a schedule thereof.

2. That the said defendants do surrender and deliver over to the plaintiff all and singular such property and assets as are now in their possession.

3. That the said defendants do account for and pay over to the plaintiff all moneys by them, or either of them, collected, on any of the choses in action of said bank since said demand was made, or realized from any sale or other disposition of any of the property and assets of said bank since said demand.

*220

*4. That the said defendants, and each of them, be enjoined from any further collections of the choses in action of said bank, and from further dealing or interference with the property and assets thereof.

5. And that the defendants pay the costs of this action.

The defendants appealed,

Kershaw, Shannon, for appellants:

1st. Was the Bank of Camden in such a condition as that the Act of 1869 applied to it?

Defendants will argue that it was not, being in liquidation under the decree of the Court having power and jurisdiction to close the bank and distribute the assets.

"The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid. And if the capital stock should be divided leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, in equity, be held liable pro rata to contribute to the discharge of such debts out of the fund in his own hands. This, however, is a remedy which can be obtained in equity only; for a Court of common law is incapable of administering any just relief, since it has no power of bringing all the proper parties before the Court, or of ascertaining the full amounts of the debts, &c."-2 Story Eq., § 1253.

"It is not easy, in a great variety of cases, to say what the precise duty of a trustee is; and, therefore, it often becomes indispensable for him, before he acts, to seek the aid and direction of a Court of Equity.—Ib., § 1267.

"It is incumbent upon a trustee to satisfy himself, beyond doubt before he parts with the possession of the property, who are the parties legally entitled to it."—Lewin on Trustees, 365.

"A trustee cannot be expected to incur the least risk, and, therefore, if all the equities be not perfectly clear, he should decline to act without the sanction of the Court, and he will be allowed all costs and expenses incurred by him for that purpose, * * * The proceeding may be instituted either by the trustees or the cestui que trust."—ib., 367, 368.

"The executors of an insolvent estate may, when the creditors are numerous, file a bill against the creditors to enjoin them

*221

from *proceeding at law, and to have the estate administered in equity, making the heirs and devisces defendants. This upon the familiar ground of preventing a multiplicity of suits, and thus to save unnecessary expenses and costs. The case stands as that of a trustee in possession of funds upon which numerous parties have conflicting claims, and who calls them together to interplead and to determine their claims among themselves, be-

ing ready himself to disburse the fund ac- to be admitted to possession of the fund."cording to the result. It has been the established practice among us, as is well known to every member of the profession, and is too wholesome to be abrogated."-Thomson v. Palmer, 2 Rich. Eq., 32.

2d. Was the plaintiff properly appointed, as to the mode of appointment?

Defendants will argue in the negativethat, in accordance with the practice of the Courts of Chancery, the appointment should have been after notice to the parties in interest, and after an inquiry as to competency and fitness.

"A Receiver will not be appointed over the possession of another Receiver."-Valley v. O'Reilly, 1 Hogan, 199; 3 Ch. Eq. Dig., 2476, § 1.

"A Receiver is appointed for the benefit of all parties interested, and will not, therefore, be discharged merely on the application of the party at whose instance he was appointed."-Bainbraidge v. Blair, 3 Beav., 421, 3 Ch. Eq. Dig., Tit., "Receiver," 2499.

"It is a maxim that equality is equity. The appointment of a Receiver is, therefore, made for the benefit and on behalf of all parties in interest."—Bouviers Inst., Vol. IV, No. 3803, 140.

3d. That the Circuit Judge ought to have admitted inquiry into the character and competency of the plaintiff at the hearing below, and improperly excluded the testimony proposing to show to the Court his incompetency and bad character.

"In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the Judge, in order to determine its character and value."-1 Green. Ev., § 49, 65.

"Another rule is, that the evidence must be applied to the particular fact in dispute, and, therefore, no evidence not relating to the issue, or in some manner connected with it, can be given, nor can the character of either party, unless put in issue by the very proceeding itself, be called in question, &c."-Peake's Ev., 4, 5.

*222

*"The character of either party, unless directly put in issue by the very proceeding itself, can never be called in question."-Swift's Ev., § 4, Chap. 3, 140.

"In civil proceedings, unless the character of a party be put directly in issue, by the nature of the proceeding, evidence of his character is not, in general, admissible."-2 Starkie Ev., 366.

4th. That the plaintiff being, at the time, a member of the Legislature, and United States Revenue Collector, ought not to have been appointed Receiver, and ought not now | property for its appropriate uses and ends,

Wynn v. Lord Newborough, 15 Ves., 283.

"From the principle involved in the Englis case of Attorney General v. Day, 2 Madd. Ch. R., 246, where it was decided that a Receiver-General of a County could not be a Receiver in a cause, it is believed that no officer of the United States, who has given bond for the performance of his office, and whose property, in case of malfeasance, could be swept from under him (by the United States having a preference) would be a fit subject for the situation of Receiver."-Edwards on Receivers, 64.

5. That it is not competent for the Legislature to take private property, duly placed in lawful custody, out of the hands of the proper custodians.

"A retroactive statute would partake in its character of the mischiefs of an ex post facto law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of Dash v. Van Kleeck (7 Johns. Rep., 477) and shown to be founded not only in English law but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."-1 Kent's Com., 507,

"It is a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retroactive effect. And an Act of the Legislature is not to be construed to operate retrospectively, so as to take away a vested right."-Per Kent, C. J., Dash v. Van Kleeck, 7 John., 477; Vide 3 Dall. 371, 397, 2 Gallis, 139; U. S. Dig., Vol. I. Tit. Constitutional Law, § 3, § 82, 557.

6. That the mode of appointment of defendants was perfectly proper.

*223

*"The appointment of a person as Receiver to act under the direction of another person who understands the business, is proper." Lupton v. Stephenson, 11 Irish Eq. Rep., 484.

"Upon a voluntary dissolution of a corporation, any of its officers or stockholders may be appointed receivers, if not otherwise disqualified."-Am. Ch. Dig., Tit. Receiver, Div. 1, § 30, 292.

"Courts of Equity exercise a sound discretion in the appointment of a Receiver. This is made upon principles of justice, for the benefit of all parties concerned."

As this power is discretionary, it is not easy to point out its limits, or how far it will be exercised. The object of the Court, in making the appointment, is to secure the and to preserve it from being dissipated when it is in danger of being converted to other purposes, or diminished or lost. In cases of this kind, it will take the fund into its own hands, or secure its due management by its own officers."—Bouviers Inst., Vol. IV, No. 3803, 144, et seq.

"In the matter of the Bowery Bank, where one of its officers had been appointed to wind up its business, * * * an application was made to have the Receiver set aside. Roosevelt, J.: "It may be that the selection of one of its own officers as Receiver was injudicious, but it certainly was not unlawful. The Act for the voluntary dissolution of corporations (2 R. S., 467) expressly provides that any of the directors, trustees or other officers, or any of the stockholders, may be appointed Receivers." We have the sanction, therefore, of the Legislature for the principle of such a selection. Any creditor, nevertheless, upon good cause shown, may object either before or after the appointment, and may designate a more suitable person, of his own nomination, to take the place of the nominee of the bank.--Edwards on Receivers, Appendix, 714, 715.

Chamberlain, Attorney General, contra.

March 8, 1872. The opinion of the Court was delivered by

MOSES, C. J. We do not propose to extend our enquiry beyond what we conceive to be the material question submitted by the brief for our judgment. If "the Judge of the Circuit" had the power to confer the appointment, it must stand, without regard to the consequences which the appellants anticipate will materially affect the interests of the creditors, and possibly the stockholders, of the corporation which they claim to represent.

*224

*The Act of March 13, 1869, (14 Stat., 212,) was to change the anomalous relation in which the incorporated banks of the State, which had failed to meet their issue, stood to the source from which they had derived their existence, and to the public, who had become their creditors by holding their bills. It was due to the community with which they had dealt, if they were unable to comply with the conditions intended, and provided as a security for the proper fulfillment of the duties enjoined by their charters, that their corporate rights should terminate. The Legislature, with a commendable liberality. extended the time for their resumption of specie payment to the first of December following the passage of the Act, and in the event of the failure of any bank to accept the proposed alternative, the performance of which was to exempt it from the operation of the Act, the Judge of the Circuit in which such bank was situated, was required to ap-

and to preserve it from being dissipated point a suitable person as Receiver, to take when it is in danger of being converted to charge of its property and assets.

We are not now to determine whether the mere fact of such appointment worked a forfeiture of the charter of such non-complying bank, nor whether, without resistance on the part of such bank, according to the forms of law, a forfeiture would follow, nor whether the appellants here can contest the fact of forfeiture, when, in their answer, they do not claim that their bank, on the first of December, 1869, had performed all the conditions demanded by the Act to give continuance to its charter. The objection to the exercise of the power by the Judge of the Circuit, urged by the appellants, rests entirely on the assumption "that the Act of 1869 did not apply to a bank in liquidation under a decree of the Court before the time at which the Act was operative by its terms." The other points made are only incidental to this, as, for instance, that the power of the Judge was entirely superseded by the previous appointment of a Receiver in the cause pending in the Court.

The whole design of the Act could have been readily defeated by all the banks on which it was intended to operate if this exception can prevail. If a bill had been filed after the passage of the Act by any of the suspended banks, admitting its insolvency and the violation of its charter, and praying that it might be put in liquidation and a Receiver appointed, it is not clear that a proceeding set in motion by such defaulting bank to sever itself from the power of the Judge of the Circuit in the particular conferred by the Act, would have proved a successful result. The Receiver to be appointed under the Act had prescribed duties to per-

*225

form in regard *to the State, which would not be incumbent on a Receiver appointed by a Court in the course of a case, unless required by its order. The appellants, however, so far from seeking, by their bill, the appointment of a Receiver, ask that the President and Directors be protected in the management of the institution "according to the course they have been pursuing, except it be by the order and direction of this honorable Court."

A Receiver is usually appointed on the application of a party having a claim "in some case of equitable property." It is never sought of a Court by a debtor having his own assets in his own hands. He generally considers himself perfectly competent for the management of his property, and the best judge of how it shall be apportioned among his creditors. The bank, already the custodian of its funds, would gain nothing by its application to the Court to allow it to be the possessors of its own property.

The administration of the affairs of this bank was never assumed by the Court. It

in no way undertook to vary or transfer the tained in the course of legal proceedings in possession of the assets, or to change the re- regard to the assets of this corporation, or lation in which its Directors stood to the bank or to the public.

An order had been made in the cause, requiring the "creditors of the bank to present statements of their claims, designating the number of their bills or notes of each denomination, at the banking house of plaintiffs," by a certain day. The President and Cashier made a report of the demands filed, on which the Court ordered their payment "out of the assets of the said bank, the President and Cashier acting as Receivers to this end, with such further authority as the Board may rightfully confer, as to collections, sales of property, &c., as may be necessary." This conferred no more authority on the President and Cashier, acting under the Board of Directors, than they had before, nor, on the other hand, did it restrict them in the exercise of any of their rights under the charter. The end to be accomplished by the appointment of a Receiver might be entirely frustrated, if the debtor should be selected as the custodian of the fund through which the creditor was to be paid. The Directors represented the bank. Parties are never proper appointees as Receivers. Where would be the additional security for the assets, if they are nominally taken from the Directors as such, and yet retained in their hands as Receivers? The Court cannot be supposed to have intended such an absurdity.

We are not, however, to be understood as affirming, that if, under the proceedings referred to, a Receiver had been appointed for

*226

this *corporation by the Court, after the passage of the Act of 1869, the statutory power authorized and required by the said Act would have been destroyed or impaired. The Receiver contemplated by the statute is not the ordinary provisional Receiver, ap-· pointed by a Court in the progress of a cause for the benefit of all the parties interested. Although appointed by the Judge of the Circuit, he is not, in a judicial view, the officer of the Court. If the Act had authorized the Governor to appoint the Receiver, it could scarcely be claimed that his nominee would be the officer of the Court, although all the incidents belonging to the position of the ordinary Receiver might attach to the office, and he would be answerable to the order and process of any Court having the right to administer the fund committed to his charge. He is not the creature of the Court in the sense in which the term is applied to the ordinary Receiver.

It is a mistake to suppose that the exercise of the power conferred on the Judge preference which a creditor might have ob- Acts of the General Assembly, passed in pur-

at all interfere with the vested rights of any creditor. If these are in a condition in which they can be judicially recognized, they must prevail, for they cannot be prejudiced by the mere execution of a power by one having the right to exercise it under statutory authority. As they are beyond the reach of the Legislature itself, they are still further beyond that of their mere agent.

The order affirming the judgment of the Circuit Court, and dismissing the motion, has been heretofore filed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 226

BRADLEY v. RODELSPERGER.

(November Term, 1871.)

[Homestead &=21.]
That a widow has no child or children, is of itself no ground for holding that she is not entitled to the homestead exemption allowed by the Constitution.

[Ed. Note.—Cited in Moore v. Parker, 13 S. C. 488; Rollings v. Evans, 23 S. C. 327.

For other cases, see Homestead, Cent. Dig. §§ 29, 30; Dec. Dig. \$\sim 21.]

[Homestead = 17.] The word "family," in Art. II, Sec. 32, of the Constitution, providing for a homestead exemption, is to be taken in its ordinary sense, and does not necessarily include children.

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[Ed. Note.—Cited in Garaty & Armstrong v. Du Bose, 5 S. C. 500; Calmes v. McCracken & Koon, 8 S. C. 97; Norton v. Bradham, 21 S. C. 381; Yoe v. Hanvey, 25 S. C. 97; Moyer v. Drummond, 32 S. C. 168, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850.

For other cases, see Homestead, Cent. Dig. § 18; Dec. Dig. € 17.]

Before Moses, J., at Newberry, October Term, 1871.

The case, as stated for this Court by the Circuit Judge, is as follows:

*227

*This appeal was heard on the pleadings and the grounds of appeal from the decree of the Hon. John T. Peterson, Probate Judge for Newberry, dated the 17th day of November, A. D. 1869.

By the pleadings, it appears that the petitioner is the widow of one Richard L. Bradley, who died in 1865. That the said Richard L. Bradley, during his lifetime, occupied, as the owner thereof, a house and lot in the town of Newberry as his family residence. That since his death, his widow, Mrs. Emmeline Bradley, the petitioner, has continuously occupied said house and lot. And that the said Emmeline Bradley has no children.

It is the judgment of this Court that, unof the Circuit could in any event affect the der the Constitution of this State, and the suance thereto, a widow, without child or was made by the Circuit Judge, and on the 24th children, is not entitled to a homestead in the lands of her deceased husband.

It is ordered and adjudged that the appeal be dismissed, and that the decree of the Probate Judge, which is appealed from, be af-

The petitioner appealed from the judgment dismissing the appeal, and now moved this Court to reverse the same:

Because his Honor erred in deciding that the appellant, who is a widow, and the head of a family, without child or children, is not entitled to a homestead, under the Constitution and laws of this State.

[For subsequent opinion, see 17 S. C. 9.]

Fair, for appellant.

March 8, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The case before us involves the single question whether a widow without child or children can interpose a homestead exemption under Art. II, Sec. 32, of the Constitution.

The Constitution declares that the family homestead of the head of each family residing in this State, as thereby defined, and to a limited extent, shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court. We held in re Sarah Kennedy [2 S. C. 216] that the object of the protection afforded by the homestead clause of the Constitution was the family, the head of the family standing as its representative.

The Constitution has not given any definition of the term family, nor indicated any of its necessary ingredients; the term must, therefore, be taken in its ordinary sense. In this sense, it is not essential that it should include children.

*228

*There is no ground for holding that a person without child or children cannot occupy the position of head of a family.

The decree of the Circuit Court should be reversed, and the case remanded for further consideration. The facts on which the decree were based not having been fully brought before us, we cannot finally adjudicate the right of the claimant to a homestead exemption.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 228

WEATHERLY v. JACKSON.

(November Term, 1871.)

[Appeal and Error (\$\sim 339.\$)] On the 28th May, 1869, an order setting aside an assignment of defendant's homestead,

March, 1871, defendant appealed from the or-der. Appeal dismissed on the ground that it was not taken within the time allowed by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. ⇐⇒

[Appeal and Error \$\simes338.]
Appeals from judgments, decrees, or orders prior to January 1st, 1871, are controlled by § 463 of the Code of Procedure, which limits the term for appealing in such cases to the time allowed by the law existing at the adoption of the Code, and no law then existing allowed an appeal after one year.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1881; Dec. Dig. \$238.]

Before Rutland, J., at Marlborough, May Term, 1869.

T. C. Weatherly held an execution against Emanuel Jackson, which had been lodged in the Sheriff's office. The judgment was on a contract made before the adoption of the present Constitution. The Sheriff, having made a levy on defendant's land under the execution, caused a homestead to be assigned to him according to the provisions of the Act in that case made and provided. The plaintiff thereupon moved the Court at its present term to set aside the assignment, on the ground that the Act was unconstitutional so far as it affected prior contracts, and the presiding Judge granted the order. The order was dated May 28th, 1869. The Sheriff then sold the land to one James T. Covington, for \$3.830, and conveyed the same to him.

On March 24th, 1871, the defendant, Johnson, appealed from the order, and served notice of the appeal on Weatherly and Covington, as respondents.

Johnson, for appellant.

Townsend, Hudson, contra, moved to dismiss the appeal on the ground that it was not taken within the time allowed by law. They

*229

*contended that the case was within § 463 of the Code, and that no law in existence at the adoption of the Code allowed more than one year within which to appeal. In this case one year nine months and twenty-seven days elapsed after the order was made.

March 1, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The order of the Circuit Court appealed from was made on the 28th of May, 1869. The present appeal was taken on the 24th of March, 1871. The respondent moves to dismiss the appeal on the ground that it was not taken in time.

Unless this appeal can be brought within the provisions of the Code of Procedure, it cannot be maintained. It is not necessary to consider whether the right of appeal was originally affected by the clause of Section 2 of the Act to Regulate Appeals and Writs of

which provides that "writs of error shall not be granted unless brought within one year after rendering the judgment or passing the decree complained of;" for whether governed by that clause or by the law as it stood prior to that Act, it could not be taken after a delay of upwards of a year.

The appeal in question is embraced in the language of the third subdivision of Section 11 of the Code of Procedure, it being a final order affecting a substantial right made upon a summary application in an action after judgment. The right involved, being a claim to homestead exemption, must be regarded as substantial. Appeals to the Supreme Court other than those taken under the second subdivision of Section 11, are allowed to be taken within two years.-Code, Section 357, 358. Therefore, but for the operation of Section 463, the appellant would have had two years after the entry of the order within which to take his appeal.

Section 463 provides that "wherever a right now exists to have a review of a judgment rendered, or order or decree made before the first day of January, 1871, such review can only be had upon an appeal taken in the manner provided by this Act; but all appeals or writs of error heretofore taken from such judgments, orders or decrees, which are still pending in an appellate Court and not dismissed, shall be valid and effectual. But this Section shall not extend the right of review to any case or question to which it does not now extend, nor the time of appealing." This Section was clearly intended to regulate proceedings by appeal on judgments, decrees or orders, prior to January 1, 1871, both as it

*230

regards appeals then *pending and appeals thereafter to be brought. The present appeal belongs to the last named class.

The clear intent is to give to the appellant no more right in respect to the subject-matter of the appeal, and no extension of the time as fixed by antecedent laws,

This case is controlled by the provisions of Section 463, and it follows accordingly that the appeal was not taken in time.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 230

STATE v. LONDON.

(November Term, 1871.)

[Larceny \$\sim 40.]

Where an indictment for larceny lays the ownership of the goods in Λ , and the proof clearly shows a joint ownership in Λ and others, the prisoner is entitled to an acquittal, and

Error in the Supreme Court, 14 Stat., 12, it is error in the presiding Judge to refuse so to instruct them.

[Ed. Note.-Cited in State v. Hamilton, 77 S. 384, 57 S. E. 1098.

[For other cases, see Larceny, Cent. Dig. § 122; Dec. Dig. €=340.]

Before Green, J., at Sumter, October Term,

Indictment for the larceny of one bale of cotton

The case, as stated in the brief, was this: The indictment alleged the cotton to be of the "proper goods and chattels of Thomas O. Sanders."

A jury was called, and the Solicitor for the State opened the case to the jury.

Simon Barnes was the first witness for the prosecution. Upon the question of ownership of the cotton, he testified that Thomas O. Sanders owned one-half the bale, and the other half belonged to witness and Daniel Diggs and others. He spoke of the bale as "our cotton" and "my cotton," but afterwards said that Sanders was to sell the cotton and the division was to be in the money proceeds of sale. He also stated that when Sanders wished to sell the cotton, witness and Diggs interposed and objected, insisting on holding it for a rise in the market.

Daniel Diggs was the second witness, and corroborated the testimony of Simon Barnes.

Thomas O. Sanders was the third and last witness on this point, and made the same statement as to the ownership. He claimed but one-half the bale, and said that when the

*231

stolen bale was recovered *and sold by him, he retained one-half the money, and paid over the other half to Barnes, Diggs, et al. He also said that in case of rendering at the time a schedule of his personal effects, he would have included in such schedule but one-half of this bale of cotton; and in case of a levy by the Sheriff, he would have been obliged to have excepted one-half the bale as the property of others.

Counsel for the defence requested the Court to instruct the jury that the variance between the allegation of ownership in the indictment and the proof was fatal, and the defendant was entitled to an acquittal.

This instruction the Court refused to give, and the defendant, by his counsel, then and there excepted.

The Court instructed the jury that if they believed that no severance or division of interest occurred or was intended prior to sale of the cotton, that the cotton was held by T. O. Sanders as his goods, sufficiently so to sustain the indictment.

To this instruction the defendant, by his counsel, then and there, and in the presence of the jury, excepted.

The prisoner appealed.

Fleming, for appellant.

Atkinson, Solicitor, Blanding & Richardson, contra.

March 11, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. The indictment alleged the cotton to be of the proper goods and chattels of one Thomas O. Sanders. All the testimony offered on the part of the State disclosed a joint ownership of the cotton in Sanders, Diggs, Barnes and others. Counsel for the defence requested the Court to instruct the jury "that the variance between the allegation of ownership in the indictment and the proof, was fatal, and that the defendant was entitled to an acquittal."

The Court refused to give the instruction, and the defendant excepted. The Court then charged the jury "that if they believed that no severance or division of interest occurred or was intended prior to sale of the cotton, that the cotton was held by T. O. Sanders, sufficiently so to sustain the indictment," to which exception was also taken.

In general, when the testimony is at all conflicting, the jury may determine to which side it will give preponderating weight, and thus settle the facts, although the nature of the evidence may render the task difficult. This is their province, and cannot be assumed by the Court. Where, however, the proof

*232

shows that one ingredient or ele*ment necessary to constitute the offense charged is entirely wanting, it is the right and duty of the Court so to declare to the jury; for if there is an absence of proof, the defendant is entitled to the verdict. The legal character of the charge must be made known to the jury by the Court. The counsel, therefore, had the right to ask the Judge to instruct the jury, that there had been a total failure of proof as to the ownership alleged in the indictment, for if the averment was not sustained by proof, an acquittal was a matter of course. There was not a particle of testimony that the title to the cotton was to remain in Sanders until a sale of it should be made, and yet the Judge left that question to be decided by the jury—a question that, in the face of the proof, did not arise in the case.

If it is necessary to submit any authority to show that in an indictment for larceny, the ownership, as laid in the indictment, must be proved, it is enough to refer to Arch. Crim. Pl., 118.—State v. Dwyre, 2 Hill, 287.

The motion is granted, and a new trial ordered.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 232

JOHNSTON v. CHARLESTON.

(April Term, 1871.)

[Municipal Corporations \$\sim 763.]

Where a municipal corporation is charged by law with the duty of keeping in repair the streets and sidewalks within the corporate limits, want of ordinary care is the true measure of its liability, when it is charged with having caused the death of a foot passenger by its negligence in not keeping in repair a cellar door forming part of the surface of a sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612–1615; Dec. Dig. ←763.]

Before Graham, J., at Charleston, April Term, 1871.

Action by Mary Johnston, widow and administratrix of James Johnston, deceased, against the City Council of Charleston, to recover damages for the death of the intestate, caused, as alleged, by the negligence of defendant in not keeping in safe and good repair a cellar door, forming part of the surface of a street within the city.

So much of the case as relates to the questions considered by this Court was this:

Queen street is a street within the corporate limits of the city of Charleston, having a sidewalk for foot passengers, part of
*233

the surface *of which, consists of a cellar door on the premises of Mrs. O'Neal. On the 15th of March, 1870, the intestate was going along said sidewalk as a foot passenger, and, when he reached the cellar door, it broke under him, and he fell through it. His thigh was broken by the fall, and he died on the 21st March, six days afterwards.

Evidence was given by the plaintiff for the purpose of proving that the door was rotten and unsafe at the time of the accident, and by the defendant to prove that it was sound, safe and in good condition, and that it had been examined by the chief of police shortly before the accident, who discovered no unsoundness, and pronounced it sound, secure and safe.

At the conclusion of the argument, the counsel for defendant requested the presiding Judge to charge as follows:

1. That the cellar door upon the sidewalk in Queen street, where James Johnston is alleged to have been injured, was a lawful structure, that is, it was lawful for the City Council to have or permit a cellar door there.

2. That if the jury find that the injury to said Johnston occurred from a latent defect in said door, then the City Council cannot be held responsible to the plaintiff for any injury to said Johnston, unless the City Council had express notice of such defect.

3. That the City Council, without express notice, cannot be held responsible for any

defect in said door, unless the defect was so ordinary or only for extraordinary care; but notorious as to be evident to all who had occasion to pass that place.

- 4. That the City Council cannot be held responsible unless the accident occurred wholly through their negligence, and in no part through the negligence of said Johnston.
- 5. That as to the safety of said cellar door the City Council were bound to exercise only ordinary care and diligence.

Thereupon, the Court charged as follows:

Gentlemen of the Jury: The fact of your going to visit these premises has made my observations upon the law few and simple.

The Court will say that that cellar door was a lawful structure; that it was lawful for the City Council to put it there. And, also, that, in case any latent defect existed, the Council will not be responsible. But what is a latent defect? You have been to see that cellar door and can judge. A latent defect is one that cannot be discovered by a careful examination. Suppose the City Council appointed an improper officer to go and see that door, and he merely looked at the outside, and there was a defect in the inside. That would not be a sufficient exam-

*234

ination to relieve the City Council, if *there was such a latent defect. If, by a careful observation, it could not be discovered, then the City Council is not responsible; but a mere casual observation, if there was a defect existing in that door, which, by careful observation, could be discovered, will not relieve the City Council of their responsibility; they would then be responsible.

As to the request of counsel for the defence, that the Court shall charge that this defect must be so notorious that all passers by can observe it, that is not good law, gentlemen of the jury. If a defect existed in this cellar door, which, by careful observation (which the City Council was bound to give,) could have been seen, and an accident had occurred thereby, then the Council are responsible; otherwise they are not responsible.

As to the fourth request by the counsel for the defence, that if the accident occurred by the fault or neglect of the deceased, why, certainly, he must answer for his own fault. But there is nothing in the testimony to show that. There is nothing in the testimony to show that the accident occurred from any fault or neglect of this unfortunate man. But you might consider this question, and if the jury think that because he died, therefore greater damages ought to be given him: then, you can take into consideration the fact that, perhaps, he may have contributed to his death, but not to the accident.

I don't know whether it is necessary for me to say that the City Council is liable for ordinary or only for extraordinary care; but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable. And it was the duty of the City Council to examine these bars, to see that they were strong enough.

The defendants herein excepted to the refusal to charge as requested, and also to the charge, as follows:

- 1. They except to that portion of said charge, whereby the jury were instructed that "a latent defect is one that cannot be discovered by a careful examination."
- 2. They except to that portion of said charge, whereby the jury were instructed that, if there were a defect in the cellar door, which, by careful observation could be discovered, a casual observation would not relieve the City Council of responsibility.
- 3. They except to that portion of said charge whereby the jury were instructed that it was the duty of the City Council to examine the bars (under the door) to see that they were strong enough.

*235

*4. And these defendants except to the refusal of the Court to charge as requested, as follows: That the City Council, without express notice, cannot be held responsible for any defect in said door, unless the defect was so notorious as to be evident to all who had occasion to pass the place.

5. And these defendants except to the refusal of the Court to charge as follows, as requested: That as to the safety of said cellar door the City Council were bound to exercise only ordinary care and diligence.

The jury found for the plaintiff \$1,850.

The defendant moved to set aside the verdict, and its motion being denied, it appealed to this Court.

Corbin, City Attorney, for appellant:

I. The cellar door, in Queen street, having been admitted to be a lawful structure, the Court erred in refusing to charge that the City Council, without express notice, cannot be held responsible for any defect in said door, unless the defect was so notorious as to be evident to all who had occasion to pass that place.—Shearm. & R. on Neg., §§ 147, 148; Mayor v. Sheffield, 4 Wal., 189; Griffin v. The Mayor of New York, 9 N. Y., 456: Wallace v. Mayor of New York, 18 How, Pr. R., 169; Wightman v. Cor. of Washington, 1 Bl. U. S. S. C., 52; Bacon v. City of Boston, 174; Winn v. City of Lowell, 1 Allen, 177; Wendell v. Troy, 39 Barb., 329; Congreve v. Morgan, 5 Duer, 495; Davenport v. Ruckman, 37 N. Y., 570; Nebraska City v. Campbell, 2 Blk., U. S. S. C., 590; Cooley's Const. Lim., 249; Hart v. Brooklyn, 36 Barb., 226.

II. The Court erred in refusing to charge: That as to the safety of said cellar door.

the City Council were bound to exercise only any defect he may discover in any of the ordinary care and diligence.

Upon this request the Court said: "I don't know whether it is necessary for me to say that the City Council is liable for ordinary or only for extraordinary care, but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable."

This plainly indicates more than "ordinary care and diligence." The defendants were entitled to the charge as requested.—Shearman & R., on Neg., §§ 149, 349; City of Prov. v. Clapp, 17 How., U. S. S. C., 151; Winn v. City of Lowell, 1 Allen, 177; Raymond v. City of Lowell, 6 Cush., 524; Willard v.

*236

Newberry, 22 Vt., 458; *Lobdell v. New Bedford, 1 Mass., 155; Hilliard on Torts, Vol. 1, 115, § 38; Ib., Vol. 2, 390, § 9.

Phillips, for respondent:

"An Act to provide for compensation in damages to the families of persons killed by the fault of others." Acts of G. A., 1859, 825

That the City Council have the exclusive ownership and control of the streets and sidewalks, and are bound to keep them free from obstructions and defects, injurious to person or property.

The City Council of Charleston shall be also vested with full power and authority, from time to time, under their common seal, to make and establish such by-laws, rules and ordinances, respecting the streets, lanes, harbors, and in general, every other by-law or regulation that shall appear to them requisite and necessary for the security, welfare and convenience of the said city. And the City Council may make assessments on the inhabitants or those who hold taxable property within the same, for the benefit of the city, as shall appear to them expedient.—Act of Incor., 1783, 7 Stat., 97.

The control of the streets was given to the Commissioners of Streets and Lamps. And by the Act of the G. A., of 1836, the name of the Intendant and Wardens was changed to Mayor and Aldermen of the City of Charleston, and all power and authority given by Acts of the G. A. and city ordinances were vested in them.—Ord. Nov. 20, 1806, Dig. of the Ors. from 1783 to July, 1818.

That the City Council always exercised the exclusive power and control conferred is evidenced by an ordinance, passed on the 6th February, 1869, where it is ordained: "It shall be his (the Captain of Police) duty, from time to time, to pass through the streets, lanes, alleys, squares and public grounds of the city, to observe all nuisances, obstructions and impediments thereon, or in the sidewalks thereof, and cause the same to be removed according to law. He shall report in writing immediately to the Mayor

any defect he may discover in any of the streets, lanes or alleys of the city. It shall be his duty to enforce and carry into effect all laws and city ordinances; to be vigilant to detect and bring to punishment all offenders against the same."—Sec. 6, City Ordinances, 67, 1871.

- Exception, Latent is from the Latin, latens—hidden, concealed, secret.—Johns. Dic.
- 2. Exception. That if there was a defect in the cellar door, which, by careful observa*237

tion could be discovered, a casual obser*vation would not relieve the City Council of responsibility. A municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; if this duty be neglected, and, in consequence thereof, any one is injured, the corporation is liable for the damage sustained.—2 Bla. U. S. R., 419; Chicago City v. Robbins.

A municipal corporation is responsible for damages where a duty specially enjoined upon a corporation as such has been wholly neglected by its agents, although the agents were properly selected and necessarily employed.—3 Hill, N. Y. R., 612; Mayor of New York v. Furze,

A municipal corporation, with control of its streets, and power to raise funds to repair them, is liable if it permits them to be out of repair for an injury thereby sustained by an individual, without any negligence of his own.—5 Sand., 289; Hutson v. Mayor of New York, 5 Selden, 163.

The absence of negligence on the part of the plaintiff, contributing to the injury, must be established, but in default of proof either way it is presumed.—4 Smith., 248; Button v. Hudson.

Where such a duty of general interest is enjoined, and it appears from a view of the several provisions of the charter that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, they are clearly liable to the public if they unreasonably neglect to compy with the requirement of the charter; and it is equally clear when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence or unskillfulness in its performance. -1 Black's U. S. R., 50; Weightman v. Corporation of W.

3. Exception. That it was the duty of the City Council to examine the bar. The existence of obstructions in a highway is such evidence of negligence as requires explanations from the municipality, in order to es-

from.-4 Wal. U. S., 189, Mayor v. Sheffield; Shear. & Red. on Neg., 147; 25 Verm., 162, Howe v. Castleton; Shear. & Red. on Negligence, 176.

4. Exception. That the City Council was without express notice.

It is certainly true, as a general proposi-*238

tion, that before the cor*poration can be held liable in this class of cases, it must be shown that they know of the existence of the cause of injury, or had been notified of it, or such a state of circumstances must be shown that notice would be implied.—4 Wal., 196; Mayor v. Sheffield.

To what extent negligence may be predicated of the acts or omission of a municipal corporation, as such, in the exercise of its public functions, must depend upon the nature and extent of its obligations, a violation of which constitutes the negligence complained of; for negligence can be predicated of the acts of a person of any public work only where the duty of doing the work is imposed on him by law.—Shear, & Red. on Negligence, 147; Id., §§ 132, 135 and 136; and see, particularly, §§ 146 and 148.

March 11, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The action was brought. under the statute, by the plaintiff, as the widow of James Johnston, deceased, on account of injuries received by the said James Johnston, by falling through a cellar door forming part of the sidewalk of Queen Street, and causing his death, on the ground that the cause of the injuries was the negligence of the defendants, a municipal corporation, in suffering the cellar door to be in an insecure condition, rendering the passage way unsafe for foot passengers.

The jury rendered a verdict for the plaintiff, under instructions by the Court, to which exceptions were taken, both as to matters charged and refused.

Two propositions are advanced by the exceptions: first, assuming the liability of the defendants, for injuries through their negligence, in not keeping the sidewalks in safe repair, and assuming that the side walk, at the place in question, was not in a due state of repair, as it regarded the safety of foot passengers, that the defendants are not liable unless either express notice of such defect is shown, or unless the defect was so notorious as to be evident to all who had occasion to pass the place; and, second, that they are only liable for the want of ordinary care and diligence.

These propositions, as will be seen, involve different measures of responsibility; but if either affords the correct measure applicable to the case, then the Court, as requested by

cape liability for damages resulting there- the defendants, was bound to submit such proposition to the jury, and failing to do so is error.

> The charge contains the following language: "I don't know whether it is necessary for me to say that the City Council is *239

> liable *for ordinary, or only for extraordinary care; but in this particular case, if any defect exists in that cellar door, which a careful examination would discover, they are liable."

> The charge contains other observations bearing on the same point, but the language above quoted may be regarded as fairly embodying the view of the law, under which the jury found their verdict.

> The true rule of liability is that contained in the last proposition advanced by the defendants, that they were bound only to ordinary care and diligence, as it regards the safety of the passage way over the cellar door. The cellar door in question formed part of the surface of the sidewalk, used by foot passengers for the purpose of passage, and was within the duty of repair, as incumbent on the City Council.

> The verdict must be regarded as consistent with the idea that the structure in question was a lawful structure, inasmuch as the jury were so charged. Or, in other words, that the occurrence of this cellar door, as part of the surface of the passage way, in its connection with the user of the open space beneath it, by the owner of the adjacent property, as means of access to the lower portion of his premises, was not a nuisance or unlawful obstruction of the common highway. Nor can the verdict be questioned in this respect, as no exception appears to have been taken on that account by the plain-

> There is no good ground to doubt the correctness of this view. In the case of Wendell v. Troy, 39 Barb. S. C., 329, referred to by the appellants, the proposition was advanced that "in regard to streets and highways, their use is designed for the public for the purpose of passage, travel and locomotion, and the use of them by an individual simply for his own convenience and accommodation, unaccompanied with the public user just mentioned, as for drains, sewers, vaults or cess pools, is unauthorized, and essentially a nuisance, and makes the party building or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street or highway to such mere personal use."

> If this is sound, it would follow that, when such user is authorized by the city, the latter would become liable, to the same extent as the person actually creating the nuisance; such was the view taken in that case, the city of Troy being held liable for damages resulting from the caving in of a private

drain, laid under a public street, without bins, 2 Black, 418 [17 L. Ed. 298]. It is not regard to any proof of particular negligence on the part of the city.

*240

*The conclusion, in the case last cited. rested upon the erroneous assumption that individuals could not rightfully acquire, or hold, any personal interest, privilege or license in either the surface or soil of a public street. This proposition is not true of a country highway, for such an interest may be enjoyed, either by the owner of land adjacent to the highway, or by the grant or license of such owner, although subject to the common and public user of the highway, as such. City streets are highways, having certain peculiar attributes; the ownership of the soil of the street may be vested in the municipal corporation, instead of in the adjacent owner; and the user, itself, is more comprehensive, both as it regards the surface and the soil beneath it. A street is, ordinarily, designed as a means of affording passage, transportation, light, ventilation, drainage, and access to the particular dwellings abutting upon it. The right of user is not limited to the surface, but extends to the soil beneath the surface, and has been termed an "urban servitude."

Without limiting the extent to which the public may claim an exclusive right to the actual occupation of the surface or soil, it is safe to say, that when the soil beneath the surface is not needed for any such public purpose or common user, it may, subject to the license and consent of the corporation, be used by the adjacent proprietor for a purpose not inconsistent with the public and common right of user, and which affords to him a peculiar and personal advantage in respect to any of the foregoing objects, for which a highway is designed. In other words, he may, by the license of the corporation, have the right to lay a private drain under the street, or to have an open space or area for light and ventilation, or for access to his premises, provided the public and common user is not interfered with. When the ownership of the soil is vested in the city, it is clear that its license is equally good authority to justify such particular use by the adjacent proprietor. The foregoing view is sustained by Chicago v. Robbins, 2 Black, U. S., 418 [17 L. Ed. 298]; Bacon v. Boston, 3 Cush., 174.

Under the verdict, it must be assumed that the opening into which the plaintiff's husband fell, was for a purpose within the class of general objects for which streets are designed, and that, although the adjacent proprietor was enjoying thereby a particular and individual advantage, yet that such enjoyment was justified by the license of the

The city was bound to see that the opening was properly covered. Chicago v. Rob-

to be assumed or in*ferred, that the structure designed to cover the opening was defective, either as to plan, materials or workmanship; on the contrary, it must be assumed, under the verdict, that the defect arose subsequent to its construction, either through injury received, or by reason of natural de-

Hence, it follows that the liability of the corporation must be considered solely under the duty to repair and keep safe. In such case their liability for the non-performance of such duty is measured by what ordinary care and diligence demands. Weightman v. Washington, (1 Black, U. S., 39 [17 L. Ed. 52],) places the liability of a municipal corporation, in such cases, on the same footing as that of a private individual. In Winn v. Lowell, (1 Allen, 177,) it was held, in reference to the duty of repair, that "the city is not bound to take the highest possible care, but only ordinary care. They are not insurers against accident."-Shearm. & Redf. on Negligence, Section 149.

The charge, that "if any defect exist in that cellar door, which a careful examination would discover," the defendants were liable, should have been limited, by narrowing down the duty of the defendants in detecting the existence of such defect, to what was demanded by ordinary care and vigilance. As the charge stands, it might be interpreted as requiring the exercise of more than ordinary

It is in proof that means were taken by the defendants to ascertain the safety of the cellar door previous to the accident. Of the sufficiency of the means under the rule, the jury were entitled to judge. The charge could not properly relieve them of the duty of applying the facts to the rule of law requiring ordinary care. On the other hand, the request to charge that either express notice or a defect so notorious as to be evident to all who had occasion to pass that place, must be shown before defendants can be charged, is too broad to square with the rule of ordinary care and diligence.

One charged with the care of a machine or structure of such nature that the consequences of a defect might prove dangerous to life or property, is bound, by the rule of ordinary diligence, to a higher degree of care than a person charged with no such duty, though not compelled to look beyond the safeguards sanctioned by common use in such cases, as he would be if bound under the rule of extraordinary care.

The city, having the care of the streets, is

*242

bound clearly to a *higher degree of care. as it regards obstructions, than a mere passenger along the streets busied with his own interests. Where the defendants are not bound, within the limits of ordinary care, to tate of intestate; for calling in the creditors look for defects, in order to charge them with any such defects, notice of its existence must be brought home to them, either express or inferential, but it is too much to say that, when a defect is patent, they are under no greater responsibility to see it than a mere passer by.

The charge is clearly defective in not presenting to the jury the true measure of the duty of defendants, out of which their supposed liability springs, namely, the exercise of ordinary care and vigilance in keeping the surface of the streets; including the structures forming part thereof, in repair, so as to be safe for passengers.

The judgment and verdict should, therefore, be set aside, and a new trial ordered.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 242

McKEE v. MOBLEY.

(November Term, 1871.)

[Executors and Administrators \$\sim 93.]

The father of a store keeper, who died in-solvent and intestate, leaving a stock of goods in his store, took possession of the store, for a year and upwards, sold the goods at re tail, and during this period replenished the stock with other goods purchased with his own money. He then administered on the estate, and by leave of the Ordinary, sold all the goods on hand at public sale. Under a creditor's bill to settle up the estate, in which the account was taken as in cases of regular administration: Held. (1) That the administrator was not entitled to credit for the sum advanced by him in the purchase of goods; (2) that he had not, by reason of a supposed confusion of goods forfeited all right supposed confusion of goods, forfeited all right to compensation for such advance; and (3) that he should be allowed to show what benefit the estate derived therefrom, and be allowed credit on his account for the amount of such benefit.

Note.—For other cases, see and Administrators, Cent. Dig. § 407; Dec. Dig. &=93.]

[Parent and Child \$\sim 8.]

Where a father permits his son to enter upon the father's land and put valuable improvements thereon, and by long possession to acquire title, he has no right, as against the son or his estate, to payment of the value of the land as it stood when the son took possession.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 102; Dec. Dig. ⊗∞8.]

Before Thomas, J., at Chester, September Term. 1869.

This case was heard on exceptions to the report of a Referee. So much of the report as relates to the questions made by the appeal is as follows:

This suit was instituted for the purpose of *243

marshalling the assets *of John McKee, Jr., deceased. In the course of proceedings orders have been made for sale of the real esof intestate; for making up the accounts of complainant as administrator, and to take testimony as to what compensation complainant is entitled to for the lot on which the dwelling of intestate was built.

A portion of the real estate has been sold. and report thereof made and confirmed. The creditors have been called in and report thereon made, so that the only matters referred and yet undisposed of, is an accounting by the complainant for his administration. and to take testimony as to the value of the said lot.

Upon these matters several references have been held. A statement of the accounts of the complainant, made up from the testimony, and from admissions of counsel, is hereto annexed, showing a balance against the complainant on 1st September, 1869, of two thousand nine hundred and seventy-four dollars and thirty cents.

The complainant made two points, which were stoutly contested by the creditors.

Second. Complainant alleged that since the death of his son and intestate, he has invested the sum of \$1,412 of his own private funds in carrying on the store owned by his son, and claims that that sum shall be first restored to him out of the proceeds of sale.

*

*

In regard to the second point made by plaintiff's counsel, the equity is not so clear. From the evidence it appears that John Mc-Kee, Jr., died in February, 1866; that very soon thereafter the complainant took possession of the store without inventory and appraisement thereof, and proceeded to sell the goods, as demand was made for them in the usual course of business, and to buy other goods as he had means, or the deficiencies in his stock made necessary, and to conduct the business very much as if it were his own, till August or September, 1867, when he took out letters of administration on the estate of his son. In this interval of time, between the death of his son, intestate, and the suing out of letters of administration, the plaintiff alleges he advanced from his private means, the sum of \$1,412, to pay for goods that were put into this store and mixed up with goods he found there, or which he had bought with funds belonging to his intestate, and introduced after his son's death. This allegation

is not controverted or questioned. *It is an understood fact. He claims that this sum shall be refunded to him from the proceeds of the goods.

*244

The complainant has furnished no statement of the value and character of the goods on hand, at his son's death, nor of the profit realized from sales thereafter. He has conducted the business for a period of sixteen or eighteen months, without reference to the | The second and third exceptions being as folrights of creditors, and in total disregard of the well known laws for administering estates of deceased persons. The stock on hand on the 30th of September, 1867, was sold at auction, and by far the greater portion bought in by the plaintiff. A stock of goods is seldom thrown upon the market of a small town, to be disposed of at auction, without suffering losses on the original cost. No evidence has been offered to show whether there was a profit or a loss at the sale; nor what profit or loss was sustained upon the goods purchased with the \$1,412. The plaintiff has unadvisably mixed up his own goods and moneys with those of his intestate, and he furnishes no testimony or rule by which the separation may be effected, without doing injustice to the creditors of his intestate. While admitting that the plaintiff has equity on his side in this claim, yet, because of his inability to ascertain what is justice under the circumstances, the Referee feels compelled to apply the rule laid down by Blackstone, (2 Vol., 405,) and disallow the claim.

The following facts seem to have been established by the evidence offered, as to what compensation plaintiff should receive for the lot on which his son had erected his dwelling, to wit: That plaintiff never made a formal conveyance thereof to his son; that his son claimed the lot as his for many years before he built thereon, and bought other real estate adjoining it, evidently with the purpose of occupying the lot as his own; that he put up a fine dwelling on the lot with the plaintiff's knowledge, and without any prohibitory injunction from him; that the son lived in this dwelling and occupied these premises, up to the time of his death, without hindrance on the part of plaintiff, and as if it were his own property. The public, and the creditors of the intestate, under these circumstances, might well conclude that the lot was a paternal gift or advancement, although no formal conveyance was made. As between the father and son, this could not probably be regarded as a gift. But creditors stand on a higher footing. It is impossible to say what credit has been extended to the intestate, by means of his possession of this property, and his exercising over it the rights of owner, nor, consequently, how much injustice

*245

might be done by allowing the *parent to resume his proprietory right and exclude the creditors from all benefit therein. The public and creditors may have been deluded by these acts of both parent and son, and the law will not allow the father to take advantage of his own wrong. The Referee, therefore, declines to recommend that plaintiff shall receive any compensation for said lot, unless the other property of the intestate shall be sufficient to pay all of his debts.

The complainant excepted to the report.

lows:

2. Because the Referee has not allowed complainant the sum of fourteen hundred and twelve dollars, (\$1,412,) which complainant put in and laid out, in the purchase of goods in the store lately occupied by John McKee, Jr., deceased, which increased the amount of sales made by complainant, before he made a public sale of the contents of said store, by order of the Ordinary. The Referee, alleging that the \$1,412 was a mixture of goods or money of complainant with the goods in the store occupied by said deceased, when the complainant insists and alleges the amount of money was fully ascertained and known, and did not come under the law of admixture, goods, &c., and complainant should have been allowed a credit for the said \$1.412.

3. Because the Referee has decided that the complainant should not be allowed any compensation for the lot of land on which John McKee, Jr., had built, on the ground that complainant, as the father of deceased, has stood by and seen him build on the lot, and taken no active measures to assert title in himself, when there was no proof that the complainant had given said lot to his son: no titles were ever made to the same, and no possession by the Statute of Limitation, amounting to titles, when the proof was positive that there had been no right or titles, the law of the land requiring ten years' possession to consummate the titles of deceased; the law making no distinction between father and son than the stranger; and as complainant had been willing to receive a compensation for his interest in said lot, and waive the titles and claims, the Referee should have allowed a reasonable sum therefor.

His Honor sustained the second and third exceptions, and made an order recommitting the report to the Referee, and directing him to allow the plaintiff credit on his account for \$1,412, the amount claimed by the second exception, and also to allow him \$750, the value of the lot mentioned in the third exception.

*246

*The Referee having amended his report so as to make the same conform to the above stated directions, the report, as amended, was confirmed at November Term, 1870, and made the decree of the Court.

Some of the defendants, creditors of the intestate, appealed, on the grounds:

1. Because the complainant officiously and without legal authority intermingled merchandise purchased with his own money with the goods of his intestate, thereby making such a confusion of goods that they could not be distinguished, separated or valued, and this confusion being the result of the wrongful and unlawful act of the complainant alone, the whole stock of goods should be regarded as the stock of his intestate.

termingled by him with the goods of his intestate, he should be required to set forth and prove the value of the goods of his intestate, at the time of said intermingling, so that any loss or depreciation in the value thereof should fall upon both parties pro rata, and not that the whole loss should fall upon the innocent party.

3. That the intestate having claimed the lot where he resided for ten or fifteen years, and having, with the acquiescence of the complainant, made large and valuable improvements upon it, thereby giving out to the world that he was the absolute proprietor thereof, it would be a fraud upon the creditors of the said intestate, if his father should now be allowed to come in and receive the value thereof from his insolvent estate.

4. If the complainant has any right to said lot, it consists in his reclaiming and getting possession thereof, upon payment of the amount expended by his intestate in improvements thereon.

5. If the complainant is entitled to any remuneration for the said lot, the amount allowed is excessive, and against the weight of testimony, as two disinterested witnesses (who also were the witnesses of complainant) testified that the lot was not worth more than \$500, whilst there was no witnesses, (except the complainant himself) who proved a greater value.

Hemphill, McAliley and Brawley, for appellants, cited on first and second grounds of appeal, 2 Black. Com., 405; John. Ch. R., 108 -Hart v. Ten Eych; 15 Vesey, 442; 2 Kent Com., 364, 365. On third ground: Story Eq., § 384, 385, 387, 388; Note to § 385; 1 John. *247

*C. R., 354—Wendell v. Van Rensselaer. On fourth ground, Story Eq., § 385, 388.

Williams, for appellees cited on first ground: 15 Vesey, 432-Lumpton v. White; Parton v. Parton, 439, 15 Vesey; and on fourth ground, Edney v. Whaley, 1 Rich. Eq., 301.

March 16, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The complainant, the father of intestate, at the death of his son, took possession of a store and a stock of goods belonging to the estate of his son, without authority of law, and carried on the business, selling and buying goods, and dealing with the property as owner. It was not until about a year from the death of intestate, that he sought for and obtained letters of administration on the estate of intestate. Subsequently the stock of goods was sold, under an order of the Ordinary. Complainant now claims that, in an accounting as administrator, he should be allowed, as a credit, as against the amount chargeable to him, compelled to assume that the parties are sat-

2. If the complainant is entitled to any as the proceeds of such sale, the sum of \$1,remuneration for the goods so unlawfully in- 412, alleged to have been advanced by him while conducting the business for the purchase of goods in addition to such stock.

> The Referee disallowed this claim wholly on the ground that "the plaintiff has unadvisably mixed up his own goods and moneys with those of his intestate, and he furnishes no testimony or rule, by which the separation may be effected, without doing injustice to the creditors of his intestate." He applies to the case the doctrine applicable to a confusion of goods, citing the authority of Blackstone, (2 Vol., 405.) The decree of the Circuit Court sustains an exception to the ruling of the Referee, and allows the claim of \$1,412, without diminution, directing the accounts to be recast, in that respect.

> It is clear that the view of the Circuit Court was wrong. The stock of goods was sold at public auction, and it is not to be assumed that it brought an amount equal to the first cost of the goods. If the administrator is entitled to an allowance, it must be upon the ground that the estate has been benefitted by the advance of his money .-Welsh v. Davis, ante, p. 110; Magwood v. Johnston, 1 Hill Eq. 228. It is clear that we cannot assume that the estate has been benefitted to the extent of the amount thus advanced. The decree of the Circuit Court, on this report, cannot be sustained, unless the amount so advanced affords the legal meas-

*248

ure of the benefit sus*tained, and as this proposition is unsound, the decree cannot stand.

Nor can the view of the Referee stand without modification.

The principle on which the accounting was conducted was that of debiting the administrator with the amounts realized from the sale of the stock of goods, both at public and private sale, and with interest, against which are placed amounts properly standing to his credit as administrator. The entire stock of goods, including that part purchased with the money advanced by complainant, was sold under an order of the Ordinary, as the goods of the intestate, and the whole proceeds of the sale debited against the administrator. To this course of proceeding, the complainant brings before us no exception under which we can review its correctness, nor do the defendants ask that the accounting be conducted on the basis of regarding the complainant's possession of, and interference with the assets, prior to administration, as tortious. The objection made by complainant's second exception to the Referee's report, proceeded on the ground that the sum of \$1,-412 advanced by him should have been placed on the credit side of the account, not that the amount debited as the proceeds of sale should be reduced by that sum. We are

counting was conducted, as no exception is before us calling that principle in question. We must, therefore, treat the case as one of an advance, in character of administrator, towards keeping up the stock, and carrying on the business of the intestate, and determine upon what principle an allowance should be made to him, if any is proper under the circumstances of the case.

It is clear that the principle governing a wrongful confusion of goods is not directly applicable to the case. This principle is stated by Lord Elden in Lupton v. White, (15 Ves., 432,) as follows: "If one man mixes his corn or flour with that of another, and they are of equal value, the latter must have the given quantity; but if articles of different values are mixed, producing a third value, the aggregate of both, and if, through the fault of the person mixing them, the other party cannot tell what was the original value of the property, he must have the whole."

If the complainant was before us resisting an order for the sale of the goods in question, as the proper goods of the intestate, on the ground that such order included his individual property, not subject to such sale, it might be a question how far such claim was affected by the principle just stated;

*249 but after such order of sale *has been made, and assented to, and the goods sold by the administrator, as the proper goods of the intestate, and after the proceeds of sale have been carried into the debit side of the account, it is too late to raise any question as to the title to the goods purchased with complainant's advance.

It may well be questioned, whether a Court, in the exercise of equitable jurisdiction, will go farther than Lord Elden went in Lupton v. White, in the direction of applying this principle. In that case, one who was bound to account for the mineral produced from a lead mine wrongfully suffered such mineral to become inseparably commingled with property of his own of a like nature. It was as strong a case for the application of the doctrine applicable to the wrongful confusion of goods, as can be well supposed, and the extent to which the Lord Chancellor went, was to charge the party in fault, in the first instance, with the value of the whole property thus commingled, and to leave the defendant to make such proof as he might of the value of his own property, so as to reduce this primary charge. That case involved the idea that one bound to render a clear account, who has wrongfully defeated the possibility of the taking of such account, may be charged with a gross sum, reasonably assumed as a basis of accounting, and be compelled to discharge himself therefrom. In Lupton v. White, this basis was of the intestate. It is not necessary to rest

isfied with the principle on which the ac-|arrived at, on a principle assimilated to the common law doctrine as to a confusion of goods.

> It is clear that the common law doctrine. above stated, cannot be applied in a Court administering equity, and in a matter of accounting, as a ground of forfeiture, apart from such influence as it ought to have in controlling the application of the ordinary rules governing the taking of accounts. In this respect, the Referee lays down a rule inconsistent with the nature of the accounting before him.

> In view of the principle of accounting mutually assented to in this case, the proper course would have been to allow the complainant to show, that the estate of his intestate had derived benefit from an advance made by him, in the course of administering, and to show the extent of such benefit. This should be clearly shown, or the administrator would not be entitled to the allowance.

> The third exception of complainant to the Referee's report, involved a claim, on the part of the complainant, of a credit arising out of the following facts. Many years before the death of J. McKee, the intestate, the complainant, his father, allowed him to occupy a lot of his land. He took possession *250

> of the lot, and exercised acts *of ownership thereon, and erected a valuable building, and at the time of his death had so held and occupied the lot and improvements for many years, though without a conveyance to him. The decree of the Circuit Court allowed the matter of this exception, giving a credit to the complainant of \$750, as the value of the

> The question of the title to this lot is not involved in the present aspect of the case, as it would appear either to have been actually sold under an order for the sale of intestate's real estate, or to be bound by such order, nor is any appeal from such order before us. The only question is, whether the complainant is entitled to an allowance of the value of the lot in question, exclusive of the improvements. No promise or assumption on the part of the intestate is shown as the foundation of this claim.

> It was held in Edings v. Whaley, (1 Rich. Eq., 301,) that land occupied by a child, with the assent of his parent, without a deed of conveyance, cannot be regarded as a parental gift, though the rule is otherwise with regard to personal property. In that case it was also held that the statute of limitations might run, as between parent and child, so as to make a complete title by lapse of time. It is not made clear, by the evidence, when the exclusive occupation of the lot in question, by the intestate, commenced, although the evidence makes it probable that the full statute period had elapsed prior to the death

the case upon proof of an adverse possession for the statutory term. Nor is it necessary to decide whether the fact, that the complainant stood by and allowed his son to make valuable improvements upon the premises would, in equity, characterize the transaction as a parental gift. The present controversy is between the administrator and the creditors of the intestate, and whatever equity the complainant may assert must be considered in its bearing upon the legal and equitable rights of the creditors. The complainant. as administrator, has treated the lot in question as the property of the intestate, and allowed it to become affected by the order for the sale of the intestate. If he has a right to an allowance of the value of the lot, that claim did not exist, in the specific form in which it is now advanced, prior to the death of the intestate, but arises from the fact that the complainant has abandoned a right of entry and damages in favor of the estate.

The complainant has no equity which he is entitled to set up as superior to that of the creditors of the intestate.

*251

*They had a right to assume, from the ostensible ownership of the intestate, that he held title, and must be regarded as having given him credit on the strength of such representation. The creditors not only have the superior equity, but, as the assets in the hands of the Court are legal assets, the creditor must be regarded as having the better right, both legal and equitable. The decree of the Circuit Court should be reversed, the cause remanded, and the report of the Referee affirmed and established, except as to the matters embraced in the second exception of complainant to the report, which exception should be sustained to the extent of allowing a further reference to ascertain whether any, and if any, what benefit was derived by the intestate's estate from the advance of \$1,412 made by the complainant in the purchase of goods, by way of addition to the stock in trade of the intestate, and the complainant should have a credit in account for the amount of any such benefit ascertained to have been derived therefrom.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. 251

MOWRY v. STOGNER.

(November Term, 1871.)

[Trial \$\infty\$ 136.]

At the trial of an action to recover possession of land, the plaintiffs gave in evidence, as a muniment of their title, a deed of doubtful construction, and defendants were allowed to give parol evidence of the acts and declara-tions of the parties to the deed, for the purpose of explaining the construction. The plaintiffs requested the presiding Judge to charge upon the construction of the deed, which was refused, and he left the question of construction wholly to the jury as depending upon the parol evidence: Held, that in this there was error, and new trial granted.

(Ed. Note.—Cited in Bouknight v. Epting, 11 S. C. 75; Hammond v. Port Royal & A. Ry. Co., 15 S. C. 32; Russell v. Arthur, 17 S. C. 480; De Camps v. Carpin, 19 S. C. 124; Arnold v. Bailey, 24 S. C. 497; Boozer v. Teague, 27 S. C. 360, 3 S. E. 551.

For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. \$\sim 136.]

Before Rutland, J., at Marion, January Term, 1871.

Action by Lewis D. Mowry and William S. Mowry against John Stogner and Sherod F. Legett to recover possession of a tract of land. The land originally belonged to Sherod F. Legett, who, in January, 1852, executed a deed for the same, in words and figures, as follows:

"The State of South Carolina,) Marlboro District.

"Know all men by these presents, that I, Sherod F. Legett, of the above named State and District, do, for and in consideration of *252

the *sum of three thousand dollars, lawful money, to be paid by William L. Legett, of the above named State and District, according to the conditions mentioned below, I do bargain, sell, and convey unto the said William L. Legett, his heirs and assigns, a certain tract or parcel of land containing three hundred acres, more or less." (Here follows description of the land.)

"Now the condition of the above is this, that if the said William L. Legett, his heirs or assigns, do well and truly pay to me, Sherod F. Legett, my heirs or assigns, the above named sum of \$3,000, for which I have this day received his note, made payable in three equal instalments, the first, on the 1st day of January, 1855, the second, on the 1st day of January, 1860, the third, on the 1st day of January, 1865. And I, the said Sherod F. Legett, do obligate and bind myself, my heirs, executors and assigns, to make unto the said William L. Legett, his heirs, executors and assigns, a good and lawful title to the within described land; otherwise, the said William L. Legett failing to comply with the above obligation, shall pay me one hundred dollars annually, for rent or use of said land.

"Given under my hand and seal, this 12th day of January, 1852.

"Sherod F. Legett. [L. S.] "Signed, sealed, and delivered in presence of

"Wyatt Adams. "Robertson Legett."

William L. Legett entered under the deed, and continued in possession of the land unsession to Sherod F. Legett. On the 24th erroneous. January, 1868, William L. Legett was adjudged a bankrupt. The land was inserted in his schedule, with an explanatory memorandum that it had been conveyed to him by a deed, the nature of which was uncertain, and the construction of which he left to the decision of the Court. The land was sold by his assignee, and purchased by the plaintiffs. The consideration money, mentioned in the deed, had never been paid.

The presiding Judge allowed the defendants to give in evidence acts and declarations of the parties to the deed, for the pur-

pose of explaining its construction.

The plaintiffs requested the Judge to give to the jury various specific instructions as to the construction of the deed, all of which he declined to give, stating his reasons as follows:

"I refuse so to charge, that is, I refused to give construction to the deed of 1852, it being doubtful on its face, and having to be *253

*explained by testimony. I left it to the jury to say, from the testimony, what the parties intended it to be."

The verdict was for the defendants, and the plaintiffs appealed on several grounds, one of which is as follows:

Because the Judge erred in refusing to give construction to the deed of 1852, and left it to the jury to say, from the testimony, what the parties intended it to be.

McIver, Lord, for appellants. Hudson, Townsend, for appellees.

March 16, 1872. The opinion of the Court was delivered by

WILLARD, A. J. On the trial it became the duty of the Circuit Judge to place a construction upon a deed, material to the issue between the parties. The counsel for the plaintiffs required the construction of the deed by the Court, advancing certain propositions as controlling such construction. The Circuit Judge declined to give any construction to the deed, and states the ground of such declination as follows: "I refuse so to charge, that is, I refused to give construction to the deed of 1852, it being doubtful on its face, and having to be explained by testimony. I left it to the jury to say from the testimony what the parties intended it to be."

It is unnecessary to consider the merits of the propositions of law embraced in the request to charge, as they are neither affirmed nor denied by the charge, and therefore cannot be regarded as having had an influence upon the verdict.

The submission to the jury of the whole question of the construction of the instrument, as depending upon parol testimony of

til January, 1867, when he restored the pos-, the subject-matter of the deed, was clearly

The judgment and verdict should be set aside and a new trial ordered.

MOSES, C. J., and WRIGHT, A. J., concurred. ___

3 S. C. *254

*MASSEY v. ADAMS.

(November Term, 1871.)

[Appeal and Error \$\sim 1015.]

The Supreme Court has no jurisdiction on appeal to reverse an order of the Circuit Judge, granting a new trial by the Jury upon a question of fact.

[Ed. Note.-Cited in Steele v. Charlotte, C. & A. R. Co., 14 S. C. 332; Daughty v. Northwestern R. Co., 92 S. C. 364, 75 S. E. 553.

For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. © 1015.]

[Limitation of Actions \$\infty 72.]

Where lapse of time is relied upon, as raising the presumption of a conveyance as against minors claiming the land as heirs of the owner who is alleged to have made the conveyance, the period of minority must be deducted, and if twenty years do not remain the presumption does not arise.

[Ed. Note.—Cited in Garrett v. Weinberg, 48 S. C. 42, 26 S. E. 3; Powers v. Smith, 80 S. C. 114, 61 S. E. 222; Fore v. Berry, 94 S. C. 74, 78 S. E. 706. Smith, 80 S.

For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. & 72.]

Before Thomas, J., at Lancaster, April Term, 1871.

Trespass to try title. The case is recited in the order appealed from, which is as follows:

"The plaintiffs in this action are the children and sole heirs at law of Amelia V. Hooper, deceased. Their mother, the said Amelia V. Hooper, upon the death of a former husband, Dr. Franklin Massey, became entitled under his will, to the land (445 acres) now in dispute. The plaintiffs and the defendant both claim to derive title from her -the plaintiffs as heirs at law by descent, and the defendant by purchase.

"On the 24th day of November, 1845, the said Amelia V. and Dr. Edward J. Hooper, in contemplation of their intermarriage, which occurred soon after, entered, it seems, into a contract, under seal, in Lowns County, Alabama, by which the said Edward J. promised and agreed, on the occurrence of the marriage, to convey by deed all of the estate, both real and personal, of the said Amelia V., to Samuel B. Massey, of Lancaster, S. C., since deceased, "to have and to hold the said property, both real and personal, to be deeded as aforesaid, as trustee for the said Amelia V. Massey, for her sole and separate use and behoof, subject to her what the parties said and did in regard to discretion (query, direction) and control,

es of the said Edward J. Hooper, whatso- time, that anything which ought to have But it does not appear that, in purever." suance of this contract, any such deed was ever executed by said Edward J. Hooper.

"On the 7th day of January, 1850, the said Samuel B. Massey, professing to act as attorney in fact of the said Edward J. Hooper and wife, executed (without reciting in what manner authorized) a deed of conveyance of the land in question, in their names, to one James Faulkner. But it does not appear that he was authorized by deed or power of attorney to make the conveyance; nor does it appear that Mrs. Amelia V., the wife, ever *255

relinquished her right *of inheritance in the The deed to Faulkner was not produced, but the record thereof in the Register's office is unaccompanied by any such power or relinquishment of inheritance.

"After their marriage, it seems, Dr. Hooper and wife lived on the land for about two years, and then removed to North Carolina, where they were residing in 1850, when the deed to Faulkner was executed. Dr. Hooper died some time in that year, (1850,) and his widow having survived him until October, 1851, died in Alabama, leaving her children, the plaintiffs, all infants, the eldest not having attained the age of twenty-one years until December, 1861, and the remaining two being still infants at the time this action was commenced. It appears that the execution of the deed to James Faulkner was followed by possession of the land by him, which continued up to the time of his death, the date of which is not fixed by evidence. After his death it was sold by his executors and purchased by the defendant, John Adams, to whom a deed of conveyance was executed, dated February the 19th, 1863.

"After Dr. Hooper and wife removed from this State, Mr. S. B. Massey appears to have acted as their general agent. The defendant, or rather the executor of James Faulkner, who had been vouched, relied on the presumptions arising from the marriage agreement, the lapse of time, the conduct of Mr. Massey, and upon Faulkner's possession of the land to support his claim.

"I thought, and so instructed the jury, that these were insufficient to amount to evidence that Mrs. Hooper had ever been divested of her title to the land; and inasmuch as the infancy of the plaintiffs protected them against any right Faulkner might have acquired by his possession, they should find a verdict for the land in favor of the plaintiffs. They, nevertheless, found for the defendant, and the plaintiffs made this motion for a new trial. After hearing argument on the motion, I am still of opinion that the verdict is unsupported by evidence, and the motion must prevail.

"I further instructed the jury that the pre-

free from all debts, liabilities or incumbranc-1 sumption arising from twenty years' lapse of been done to perfect a title should be presumed to have been done, was answered by the production of the deed from S. B. Massey, under which defendant claimed, according to their own testimony; that the title could not pass in that way, and only could have passed by the intervention of a Court of Equity.

> "It is, therefore, ordered that a new trial be granted, and verdict heretofore rendered be set aside.

*256

*The defendants' attorneys excepted to the order, and now moved this Court to set aside the same:

- 1. Because the lapse of time since the date of the marriage settlement between the said Amelia V. and Dr. E. J. Hooper, executed in Lowns County, Alabama, on the 24th day of November, 1845, whereby the land in dispute was to become vested in the said S. B. Massey as trustee for the said Amelia V., accompanied by the subsequent possession of Massey, Faulkner and Adams, are sufficient in law to authorize the presumption that Hooper and wife did execute to S. B. Massey, under the terms of the marriage agreement, such a deed as authorized the said S. B. Massey to convey a good title to the said James Faulkner, in the manner in which he did convey.
- 2. Because, under the circumstances of this case, the law will authorize the presumption of the execution of any paper necessary to protect the title of the defendant.
- 3. Because, after such a lapse of time, and the circumstances of the case, a ratification of the deed of S. B. Massey to Faulkner may be presumed to have been made by Mrs. Hooper after the death of her husband.
- 4. Because, the terms of the said marriage agreement being that the said S. B. Massey should hold the land subject to "the direction and control" of the said Amelia V., the authority of the latter to convey, as may be implied from the circumstances, was sufficient to render valid the conveyance from Massey to Faulkner as made.
- 5. Because, the legal estate in the said land, being, by the terms of the said marriage agreement, vested in the said S. B. Massey, the subsequent conveyance of the land by Massey is valid in law, and the plaintiffs cannot, in this Court, seek to question or to set aside the same.
- 6. Because his Honor, the presiding Judge, erred in asserting "that the infancy of the plaintiffs protected them against any right Faulkner might have acquired by his possession" of the land in dispute.
- 7. Because twenty years' adverse possession (or a less time with circumstances) by Faulkner and Adams, is sufficient in law to raise a presumption of title, even as against

infants; and the testimony of Mrs. Faulkner, that her husband purchased the land in 1848; and the testimony of John Short, that Faulkner had the land in 1849, was sufficient to warrant the jury in believing that Faulk-

*257

ner *and Adams had actual or constructive possession for twenty years, or over, previous to the 8th of January, 1869, the date of the entry of this suit.

8. Because Faulkner's title was ratified by the plaintiff, B. F. Massey, at least to the extent of any interest he may have had in said land: 1st, by his implied assent to its sale as the estate of Faulkner, in November, 1862; 2d, by his becoming surety to the purchaser (Adams) for the payment to Faulkner's estate of the purchase money; 3d, by his acquiescence in the possession of Faulkner and Adams from December, 1861, (the date of his majority,) to the 8th of January, 1869, the date of the entry of this suit; and, in any event, the share in said land to which the plaintiff, B. F. Massey, may have been entitled, of right belongs to the defendant.

9. Because the testimony of A. J. Kibler, that he had delivered to Adams several papers, constituting what he believed to be a good chain of title, and the testimony of Adams that his papers were scattered, and some of them destroyed during the war; coupled with other facts in evidence going to show that the plaintiff, B. F. Massey, and the defendant, Adams, have the same interest in this action—both antagonistic to the estate of Faulkner—were sufficient, with lapse of time, to warrant the jury in presuming that Faulkner had a good title, the evidence of which had either been suppressed or destroyed.

10. Because the ruling of his Honor the presiding Judge, in granting a new trial, is, in other respects, contrary to law, and the verdict of the jury is supported both by the law and the evidence.

Kershaw, for appellant:

The exceptions make the points:

1. That the jury had a right to presume a power of attorney from Hooper and wife to S. B. Massey, to convey the land in dispute to James Faulkner, in the manner that he did, and that Mrs. Hooper relinquished her inheritance in proper form during coverture, or released the same after the death of her husband.

2. That the jury had the right to presume that the land was conveyed to Massey, according to the terms of the marriage contract, and that one of the provisions of the presumed deed was that the land could be conveyed by Massey, as the attorney of the parties, under the direction of Mrs. Hooper.

3. That the jury had the right to presume that a deed was executed to S. B. Massey, in pursuance of the marriage agreement,

*958

*whereby the legal estate passed to Massey, and his sale to Faulkner, and the possession under it, was sufficient to vest the title to the land in defendant.

- 4. That the jury had a right to presume any possible circumstances necessary to perfect the title of defendant.
- 5. That in any event, the plaintiff, B. F. Massey, is excluded from the recovery of his share of the land, having stood by and suffered the defendant to purchase the land, and even became his surety for the purchase money.
- 1. James Faulkner purchased the land in question in 1848. Faulkner, probably, had it in 1849; was certainly in possession in 1850; S. B. Massey, as attorney for Hooper and wife, executed the deed under which defendant claims, January 7, 1850; Massey acted as the general agent of Hooper and wife; he had charge of the premises; he was the brother-in-law of Mrs. Hooper; the uncle and guardian of the plaintiffs; it was understood that he had power to sell the land; Kibler, the executor of Faulkner, gave the papers appertaining to the land to the defendant, and believes they made out a complete chain of title; one of plaintiffs is the son-in-law of defendant, and now lives on the premises, and is surety to defendant's note for the purchase money; defendant owes the purchase money, with interest from November. 1862; it is to his interest that the plaintiffs should recover. Hooper died in 1850, and his wife in October, 1851. Did these circumstances authorize the jury to presume Massey's authority and Mrs. Hooper's renunciation of inheritance or release?

The maxim "Omnia presumuntur rite esse acta" applies.—Broom's Legal Maxims, 729. Upon proof of title everything that is collateral to the title will be intended, (id., 731.)

It is sufficient that the party who asks for the aid of this presumption, has proved a title to the beneficial ownership, and a long possession not inconsistent therewith, and has made it not unreasonable to believe, that the deed of conveyance, or other act, essential to the title, was duly executed.—1 Greenleaf's Ev., § 46.

Possession, for a length of time, ought to be left to a jury, as presumptive evidence of a grant from the State.—Allston v. Saunders, 1 Bay, 26.

Distribution of an estate will be presumed after 20 years' possession.—Read & Price, Harper, 4.

After 20 years' performance of the condi-

*259

tion of a bond, other *than for the payment of money, will be presumed.—Ordinary v. Steedman, Harp., 286.

When one conveyed lands, styling himself executor, after 30 years' possession, the jury

are at liberty to presume a will and authority as executor.—Maverick v. Austin, 1 Bail., 59.

After 20 years' possession of land, a grant will be presumed.—Sims v. Maclean, 2 Bail., 101; Alston v. McDowall, 1 McM., 446.

The presumption, arising from lapse of time and possession, are rules of law, which, in themselves, are evidences or muniments of title, which a jury is as much bound to give effect to, as to a deed which is unimpeached. On this ground a non suit was sustained. Hutchinson v. Harvey, 1 Hill, 222.

Such a possession, unrebutted, is as good a title as a grant or deed.—Alston v. McDowall, 1 McM., 446.

After such a possession, the law will presume that the tenant took possession under a grant or deed, or, "whatever may be necessary to invest him with the legal title," and the presumption is not rebutted by the production of a grant to plaintiff, within the twenty years.—McLeod v. Rogers, 2 Rich., 22; Thompson v. Peck, 7 Rich., 355.

Even an Act of the Legislature may be presumed, like a grant; though the public records show that no such thing existed.—McCarty v. McCarty, 2 Strob., 10.

After twenty years' separation of husband and wife, and possession under the wife's conveyance, of personal property, a post nuptial settlement was presumed, conveying the property to a trustee, for the benefit of the wife, and giving her authority to dispose of the same, as a feme sole. Per Curiam, "In this State, we presume a grant, after twenty years' possession, and intermediate conveyances even after shorter periods."—Jones v. Jones, 3 Strob., 319.

Even where there was a minority during a great portion of the time, a deed from the person last seized was presumed from long possession. The presumption is not against the minor, but against the party last seized.—Gray v. Bates, 3 Strob., 500.

When the fee is involved, twenty years' possession is necessary to raise the presumption of a deed, but a less time will raise the presumption of the execution of a deed pursuant to an agreement. The possession being combined with other circumstances, a less time will suffice.—Stockdale v. Young, 3 Strob., 501; Stockdale v. Lee, 8 Rich., 404.

In the former of these cases, it was held

*260

that the death of the *grantee, against whom the presumption was set up, fourteen years after the possession commenced, leaving two infant children, could not rebut the presumption of a conveyance from their deceased ancestor.

Where one entered under a bond for titles, to be made upon demand, after the obligee should have procured a plat of the premises, it was held, that several possessions under the purchase could be tacked together, to

raise the presumption of a deed.—Kimbrall v. Walker, 7 Rich., 428.

The presumption, arising from long continued possession, is a presumption of fact, to which an artificial force is ascribed by the law, and which juries are recommended to make, not because they believe the fact, but because it is wise and expedient to respect what is consecrated by time, and to give the same measure to all in the same condition, by giving effect to the fixed period of twenty years, as a rule, instead of producing the uncertainty and inequality which may result from the various impressions which circumstantial evidence makes upon various minds.—Wadsworth Poor School v. McCully, 11 Rich., 428.

In cases where the general issue is pleaded, juries have a great latitude. They may find a deed themselves, if they know it, though not shown by either party. So they may find matter of record, though not shown in evidence; and as they may find such record, so, by parity of reasoning, they may take instruction concerning it, from any circumstances which carry the appearance of truth.—Brown v. Frost, 2 Bay., 132.

In that case, the jury presumed a deed from its recital in another deed.

In the leading case on this subject, a grant was presumed after thirty years' possession, though the defendant produced two grants, neither of which covered the locus in quo.—McClure v. Hill, 2 Mill Con. Reports, 420.

It is clear that the existence and loss of a deed may be presumed by a jury from circumstances; and the only control the Judges have over this right, is to require that there shall be some grounds to found the presumption upon, and that this ground shall not be a light and frivolous one.—Frost v. Brown, 2 Bay., 138.

The following is a case in point: The wife of William Arthur was seized of an inheritance in land, and joined her husband in a deed of release of the same, but there was no written evidence of her having renounced her

*261

estate in the manner provided by the *Act of the Legislature. She afterwards conveyed "all her lands" to the defendant. The question, therefore, was whether the jury were authorized to presume that she had renounced her inheritance. The possession was for nineteen years. The Court held that there was sufficient ground for the presumption in favor of the title.—Arthur v. Arthur, 2 N. and McC.

The equity cases are to the same effect.

The rule of law that the existence of a record cannot be presumed has no application to presumption from lapse of time. The interests of mankind require us to presume that the long enjoyment of a claim is rightful, and in protection of such a claim that a grant of land from the State, or, of administration

once existed, and if not produced, that it has been lost by devouring time.—Sasportas v. De LaMotte, 10 Rich. Eq., 51.

Renunciation of a wife's inheritance may be presumed from lapse of time.-Cruger v.

Daniel, Riley's Ch. Cas., 153.

In the United States Courts is the rule similar. A deed may be presumed from 20 years' possession, when the statute of limitations would be no bar.—Ewing v. Burnet, 11 Peters, 52; Barclay v. Howell, 6 Peters, 513; Richard v. Williams, 7 Wheat., 110; Zeller v. Erkert, 4 How., 297.

Also, a partition will be presumed from lapse of time and possession.

These authorities equally sustain the second, third and fourth points.

As to the effect of the presumptions which would vest the legal estate in S. B. Massey, prior to the sale to Faulkner, at law, a sale by the trustee conveys the legal estate, and the title of the purchaser is not affected by the trustee having exceeded the power to sell, given by the trust deed .- Deyly v. Loveland, 1 Strob., 46.

The legal estate being in Massey, it was barred after 10 years' possession, even if the deed did not adequately convey it.

5. B. F. Massey cannot recover his share of the land, in any event.

Where one stands by and sees his own property sold, even at law, it is held in favor of the purchaser that his conduct might well authorize the conclusion that he had assented to the sale.—Story on Agency, § 91.

Where one stood by and saw his neighbor

*262

improve land without *giving notice of his claim, it amounts to a forfeiture of his right. -Tarrant v. Terry, 1 Bay, 239.

Wilie, Moore, for respondents:

Appellant relies upon presumptions to show that the title of Mrs. Hooper to the land passed to Faulkner. 1st. Presumptions of law arising from lapse of time; and 2d. Presumptions of fact arising from the circumstances of the case.

No presumption could arise from the lapse of time which intervened between Mrs. Hooper's death, in 1851, and the commencement of suit, by the plaintiffs, in 1869; for such presumption would have been in direct conflict with the Acts allowing infants ten years after attaining to the age of 21, within which to prosecute their claims to lands.-See Act of 1788, 5 Stat., 77; Act of 1824, 6 Stat., 77; see, also, Hill v. Connelly, 4 Rich., 615.

The presumption that a conveyance of Mrs. Hooper's title to the land had been made to Faulkner could not arise unless it is found, at least, to harmonize with the other facts proven.

1st. The antenuptial contract of Hooper and wife, entered into in 1845, imposed upon

from the Ordinary, or some muniment of title the husband alone an obligation to Massey, as trustee of the land and personal property of the wife. Even if Hooper had performed his covenant, Massey could have taken, by the conveyance, no more than a right to the usufruct of the land during the joint lives of Hooper and wife, while the fee would have still remained in Mrs. Hooper.

2d. But even conceding that Massey accepted the trust, of which there is no proof, and that Hooper could have made a deed conveying to him the fee in the land, still a presumption could not arise that Massey violated his trust by selling and conveying the land to Faulkner instead of holding it in conformity with the terms of the contract of 1845.—Best on Presumptions, marg., p. 150, Vol. 16, L. Lib., 5 Series.

3d. The attempt on the part of Massey assuming to act as attorney in fact of Hooper and wife, and in their names to convey the land, by deed, to Faulkner, in 1851, instead of aiding to raise a presumption that the legal title had passed out of Mrs. Massey, was a plain admission of the reverse.

4th. No valid conveyance could have been made of Mrs. Hooper's title, either to Massey or to Faulkner, except in the manner prescribed by the Act of 1795. But had Mrs. Hooper even relinquished her inheritance, in

strict compliance with the provisions of *that Act, still, inasmuch as the certificate of such relinquishment was certainly not recorded in the Clerk's office, within six months, indeed not at all, it would have been utterly ineffectual as a conveyance of her title.—See Act of 1795, 3 Stat., 302; 1 Faust, 7; Hillegas v. Hartley, 1 Hill's Ch., 106.

5th. The jury, in the judgment of the Circuit Judge, erred in presuming the fact to be that Mrs. Hooper's title had been conveyed to Faulkner. The Judge, therefore, committed no error in granting the new trial.-Whitaker, V. 2, pp. 790, 791; Hyot v. Thompson, Ex'or., 19 N. Y., 212; Miller v. Schnyder, 20 N. Y., 524.

March 16, 1872. The opinion of the Court was delivered by

MOSES, C. J. The action was trespass to try title. A verdict was rendered by the jury in favor of the defendant, and, on the motion of the plaintiffs, an order for new trial was granted by the Circuit Judges, which the appeal to this Court seeks to set aside.

The Judge, in his charge, instructed the jury to find for the plaintiffs. This direction they disregarded, and returned a verdict for the defendant.

The only question proper for our consideration, is whether there was error of law in the order granting the new trial. If it was founded, either wholly or in part, on a

conclusion from the fact contrary to that of asserting his claim, he is barred by a prethe jury, then, according to the well established principles governing the Court in regard to appeals, in which propositions of law do not arise, we cannot interfere.-Miller v. Schuyler, 20 N. Y., 522; Byrd et al. v. Small, 2 S. C., 388. The defense involved two positions, and if either was sustained. it was sufficient to prevent a recovery by the plaintiffs: First, a seizure in fee in the defendant, by a regular chain of title not developed on the trial, but to be presumed from circumstances in testimony as a question of fact; and, second, the presumption of whatever may be necessary to confer a good and perfect title from an adverse possession of twenty years. While the conclusion raised by the presumption in the first instance may be rebutted by evidence, that which the law makes from long possession has acquired an artificial force so strong, that it must prevail to induce belief, though such belief may not be the result of actual conviction.

We are obliged to infer that the jury either regarded the circumstances proved as sufficient to satisfy them of the execution of the proper deed and power from Hooper and his wife, or supposing that full twenty years

*264

had elapsed from the commencement of *the possession on which the defendant relied, they entirely discarded the instruction of the Judge, that the infancy of the plaintiffs protected them against the presumption which might otherwise prevail in favor of such tenure.

As this ruling of the Judge forms a ground of exception on the part of the defendant, and is so much relied on in favor of the motion he submits, it is proper that it should not be passed over without examination. As the question is purely one of law, for the purpose of the argument we will assume that Adams, the defendant, and those under whom he claims, had possession for full twenty years, before action brought. If the appellant can sustain the position that the presumption of title from possession is sufficient to avail against minors, claiming the land in their own right, and that the disability of infancy cannot protect them against such presumption, then there was error in law, on the part of the Judge.

Upon what rests the presumption of right from long possession? It is, that the occupancy was adverse, and the forbearance of those having the legal power to interfere, is claimed as a recognition of the title presumed to have been conferred through a deed from the party last seized. An infant, however, is regarded in law as incapable of knowing or enforcing his rights. The consent or acquiescence which, in the case of an adult, may be considered as contributing to deprive him of his rights, can never be urged sumption which rests on a supposed consent. is to impugn the very principle on which the disability of infancy is founded.

The cases which, in the argument, were referred to from our books, where the presumption was allowed, although the party last seized left infant children, made no issue between such children and third persons; the Court properly held that the presumption in favor of the claimant could not be resisted by the disability which might protect the infants if they were before it. In Gray v. Bates, 3 Strob., 502, one of the cases, O'Neall, J., delivering the opinion of the Court, says: "With this presumption Milledge, the infant, has nothing to do. It takes nothing from him; it operates against Jackson, who was last seized of the land in dispute. It is very true that if lapse of time be set up against an infant, it cannot have any effect until he be of full age;" and in the other. Stockdale v. Young [3 Strob. 501], Colcock, J., says: "It is only necessary to remark that the fact of the grantees having left a son, who died in 1792, leaving two infant children, could not affect the possession, as they neither en-

*265

tered nor *claimed, nor in any wise rebut the presumption of a conveyance from the grantee." There seems to be no reason why the disability of infancy should operate as a protection of title to property, save in the particular instance where the minor asserts or claims it. The disability is a protection for him, and those who claim through him, not to be used for the benefit of any others.

The proposition contended for by the appellant has been decided both in the Courts of Law and Equity of this State to be without foundation.

It was held in Riddlehoover et al. v. Kinard, 1 Hill. Eq., 378, that the possession of property for twenty years confers title as against all persons who were not under legal disabilities, and after that period a Court will presume whatever may be necessary to give efficacy to the possession. In Gray v. Givens, 2 Hill. Eq., 514, Judge Harper, as the organ of the Court, said: "I think it has not before been questioned, but that the time during which the party to be affected has been under a disability must be deducted in computing the lapse of time in analogy to the Statute of Limitations." The same principle was recognized in Godfrey v. Schmidt, et al., Chev. Eq., 57. The Court in Lamb v. Crosland, 4 Rich., 540, applying the rules which had governed the cases herein already cited, held "that where a party claims a right to an easement through another's land by adverse use for twenty years, and during a part of the time, though after the commencement of the adverse use, the land was owned by infants, that period must against an infant. To say, then, that, by not be deducted in the computation of the time,

and if twenty years do not remain, the right is not established."

These authorities are sufficient to shew that the appellant has failed to establish error in law in the instruction of the Court in the particular referred to. Concluding, therefore, that no error of law is contained in the order, but that it involves a difference of opinion between the Judge and the jury on the facts, and the results legitimately deducible from them, we are not at liberty to interfere.

According to the stipulation on the part of the appellant, if the order be affirmed, the plaintiffs are entitled to judgment absolute against him, and the second subdivision of Sec. 11 of the Code of Procedure, Revised Stat., 517, requires that such judgment shall be rendered.

It is accordingly ordered and adjudged that the motion be dismissed, and that the plaintiffs in the said cause have judgment absolute against the defendant, and that the *266

proceedings be remitted *to the Circuit Court for the County of Lancaster for such further proceedings as may be necessary to render the judgment hereby given effective and complete, as provided by the Section of the Code referred to.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 266

STEWART V. KERRISON.

(April Term, 1871.)

[Assignments for Benefit of Creditors & 8.]

A deed of conveyance of real estate to a trustee, in trust "to hold the said premises as a security" for certain creditors of the assignors, who had accepted the notes of the assignors for the principal of their debts, payable in two and three years, with interest, and such other creditors as should, within a limited time, accept the same terms, with power to sell or mortgage the property to pay off the notes: Held, to be an assignment for the benefit of creditors and not a mortgage.

[Ed. Note.—Cited in Austin, Nichols & Co. v. Morris, 23 S. C. 405.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 7; Dec. Dig. &—8.]

[Assignments for Benefit of Creditors \$\infty\$=151, 159.]

The rents and profits accruing before the sale, were not, in terms, directed to be applied to the assignors' debts, and the assignors were allowed by the trustee to remain in possession of the assigned property: *Held*, that the assignment was fraudulent in law and void as against a creditor who had not accepted the terms stipulated for.

[Ed. Note.—Cited in Forbes v. Bowman, 87 S. C. 506, 70 S. E. 165, 168.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 412, 444; Dec. Dig. 5151, 159.]

[This case is also cited and affirmed in Claffin & Co. v. Iseman, 23 S. C. 425.]

Before Carpenter, J., at Charleston, June Term, 1870.

Action by A. T. Stewart & Co., plaintiffs, against Edwin L. Kerrison, Herman Leiding and Charles Kerrison, defendants.

The case is stated in the decree of the Circuit Court and the judgment of this Court.
The decree is as follows:

Carpenter, J. The defendants, Kerrison & Leiding, merchants, residing and doing business in the City of Charleston, on the 26th of May, 1860, gave their note to the plaintiffs, who were citizens of New York, for \$2,155.43, payable on the 26th December, 1860. This note was not paid at maturity, and there was due to the plaintiffs on the 1st June, 1865, not only the principal but interest, amounting to \$670. Towards the close of the year 1860, the defendants purchased goods from the plaintiffs to the value of \$15,005.97, but this amount was reduced at the commencement of the late war, by the return of goods to \$5.870.

In April, 1861, Edwin L. Kerrison happening to be in New York, two suits were commenced against him, one upon the open account on which judgment was recovered against him in 1862, for \$4,872 principal, and \$615.22 interest, and the other upon the note above referred to, upon which judg-

*267

ment was entered up for \$2,155.43 *principal, and \$151.96 interest. Some time towards the close of the year 1866. Kerrison & Leiding applied to their creditors, and to the complainants among others, to take their notes, dated the first of December, 1866, payable with interest from the first of June, 1865, in two and three years, in lieu and stead of their respective debts. All of the creditors agreed to the proposal, with the exception of Benkhard & Hutton, Lord & Taylor, Strang, Advance & Co., and the complainants, who were among the largest creditors of the firm, and whose claims amounted in the aggregate, as was stated at the bar, to be between forty and fifty thousand dollars.

On the first of May, 1867, Kerrison & Leiding conveyed all their real estate which, with the exception of their household furniture and other personalty, of inconsiderable value, constituted their entire property liable to execution, to their co-defendant, Charles Kerrison. The deed, after premising "that a majority of the creditors of Kerrison & Leiding, both in number and amount, or value, with a view to enable them, the said Kerrison & Leiding, to resume some mercantile trade or business, had agreed to take their notes, dated the 1st December, 1866, payable with interest from the first of June, 1865, in two and three years, secured by a conveyance to an approved trustee of the real estate thereinafter mentioned, and that all the other creditors of Kerrison &

Leiding might be disposed to come in upon the same footing, in which event it was intended to secure them that right," conveys the real estate to the trustee upon the following trusts:

and benefit of his creditors generally, but may by such a conveyance give a preference in payment to one creditor before another, or to one class of creditors before another class. The temptation to the abuse or un-

1. In trust to hold the real estate so conveyed as a security for the creditors who had agreed in advance to accept the provisions of the deed.

2. For such other creditors of Kerrison & Leiding, who at any time before the 1st December, 1867, should take and accept the notes of Kerrison & Leiding, dated 1st December, 1866, payable in two and three years, with interest from 1st June, 1865.

The deed directs the trustee, if the notes are not paid in the meantime by Kerrison & Leiding, to sell the assigned property in due time to provide for the payment of the notes as they should fall due, or to raise the sum required by mortgage, if practicable, or if he should deem it best for the interest of all, then to sell and dispose of the premises, or any of them, at any time after the execution and delivery thereof, as he might think proper, and to pay the proceeds of sale after deducting commissions, etc., to the holders of the notes.

Before the expiration of the time fixed by *268

the deed, all the credi*tors of Kerrison & Leiding accepted its provisions, with the exception of A. T. Stewart & Co., who instituted suit for the recovery of their debt in the Circuit Court of the United States. Judgment for \$9,387.77, was entered on the 19th September, 1868, on which execution has issued and been returned "nulla bona."

This bill has been filed to set aside the assignment to Charles Kerrison, which is said to be obnoxious to the Stat. 13 Elizabeth, which declares all conveyances "made with purpose and intent to delay, hinder or defraud creditors to be clearly and utterly void, frustrate, and of none effect." In Cadogan & Kennett, Cowp., 434, Lord Mansfield, commenting on the Stat. 13 and 27 Eliz., "These statutes cannot receive too says: liberal a construction, or be too much extended in suppression of fraud," and he further adds, that "if the transaction be not bona fide, the circumstances of its being for a valuable consideration will not alone take it out of the Statute." "It is very possible," says Ch. Dunkin, in Jacot v. Corbett, "Mr. Corbett may not have conceived that he was doing an improper act, yet if he has done that, the intent and purpose of which was to hinder and delay his creditors, the law has affixed a character to the transaction and declared it as to such creditors void and of no effect."

It has long been a settled rule that a debtor in failing circumstances may, in the absence of any statutory prohibition, not only dispose of his property in trust for the use

may by such a conveyance give a preference in payment to one creditor before another, or to one class of creditors before another class. The temptation to the abuse or unequitable exercise of this power, and the facilities it affords for coercing creditors into a surrender of their legal rights and for reserving undue advantages to the debtor, through the services of a friendly trustee, have caused the Courts, while admitting the legality of the rule allowing preferences, to watch its application with jealousy, and to annex to it such qualifications as are calculated to prevent its operation from being oppressive and unjust. Among these there is none which is better established, or which has been more rigidly enforced, than that which forbids the debtor to encumber the assigned property with considerations beneficial to himself. Accordingly assignments providing for only a part of the creditors and directing the assignee to pay back or re-assign to the assignor the surplus which may remain after satisfying the debts provided for, or reserving to the debtor any part of the income or property for his own bene-

*269

fit, *have been repeatedly held to be fraudulent and void.—Goodrich v. Downs, 6 Hill, 438; Strong v. Skinner, 4 Barbour's Ct. R., 546; Lansing v. Woodworth, 1 Sand. Ch., 43; Barney v. Griffin, 4 Sand. Ch., 552; affirmed on appeal, 2 Comstock, 365; Leith v. Holaston, 4 Com., 211; Jacot v. Corbett, Cheeves' Eq., 71. It makes no difference whether the surplus be large or small, or whether the reservation be express or implied. An assignment by a debtor for the benefit of a portion of his creditors, without a provision that the surplus should be distributed among all the creditors, has been held to be fraudulent by reason of the resulting trust of the surplus, even though it turned out that there was no surplus.-Dana v. Tull, 17 Vermont, 390. This doctrine has been recognized fully in our own case of Jacot v. Corbett. Says Ch. Dunkin, "A debtor has no right to place his property beyond the reach of his creditors under the ordinary process of the law, prescribe the terms on which they are to participate in his effects, and secure to himself, in case of neglect or refusal, a control over such funds, and thereby the power to make other terms. Such deed is a direct violation, as well of the terms as the policy of the statute. The purpose is to hinder and delay creditors by transferring a colorable title to a third person, while the real ownership is in the assignor, unless the terms prescribed are assented to. No case, I think, can be found sanctioning an assignment which sustains such control in the debtor."

Let us apply these principles to the deed now under consideration. The bill charges that no disposition was made by the assign- the law allows a debtor to give preference ment to Charles Kerrison of the rents and profits of the assigned estate, and that a trust as to such rents and profits therefore resulted to the assignors, who, with the assent of the trustee, had continued in the absolute control and enjoyment of the real es-

The trustee, in his answer, disputes the correctness of this construction of the deed, and contends, "that Kerrison & Leiding had no interest in the assigned property until all the rents, profits and sales had been applied to the creditors secured and a surplus remained." He further states that though he entrusted the management of the trust property to Kerrison & Leiding, he took care to ascertain that an account of the rents and profits was kept, and directed their application to the current expenses of the property. He admits, however, that "he did allow his co-defendants to occupy houses they had formerly lived in, E. L. Kerrison for the whole time, and Herman Leiding for a period

*270

short of one year, without any dis*tinct agreement as to rent." I need not consider which of these constructions is correct; if the complainants', then the deed is vicious on account of the reservation of the income to the grantors. If the defendants', then the possession and control of the assigned property by the grantors is inconsistent with the terms of the deed, and raises an indisputable presumption of legal fraud.

"The root of the vice in all these cases," says Justice Nelson, in Cunningham v. Freeborn, 11 Wendell, 240, "lies in the principle of preference. It affords the pretence for putting the property into the possession of a friendly trustee, and thereby may substantially secure to the debtor the control of it for a long time after the law presumes it to have passed from him, and his own possession would be incompatible with its security."

The case in hand affords a striking illustration of the justice of this remark. Here property is placed by insolvent debtors in the hands of a friendly trustee, who permits them to occupy a portion of it without "any distinct agreement as to rent," and to retain entire control of the balance "long after the law presumes it to have passed from them," and when the unsatisfied judgment of the plaintiffs was a standing admonition that their control and enjoyment of the income "was incompatible with the security of the property." The retention by the debtor of property assigned to creditors in payment of or as a security for previous debts, has been held in this State conclusive evidence of fraud. The law upon this subject has been thus laid down by Ch. Harper, in Smith v. Henry, 1 Hill, R., 16:

to one creditor over another, and this is giving latitude enough; but it will not allow him to secure an advantage to himself at the expense of creditors, as the price of such preference. If a party indebted to several goes to one of his creditors and says, 'my whole property is not more than sufficient to pay you, I will give you the preference, however, and assign it to you, provided you will allow me to have the use of it for a stipulated length of time, or until I work out the debt,' and this is assented to by the creditor, this is fraud in both. The debtor gains what he is not entitled to at the expense of his creditors, and enjoys the property independently of them. And the favored creditor gains a preference by enabling the debtor to commit this injustice to the rest. He gives a bribe for the preference. But if such a stipulation were made, it would be privately done between the parties, and incapable

*of proof. When, therefore, a debtor has made an assignment to a creditor, who permits him still to retain possession of the property, and use it as his own, the law reasonably infers, and the inference is incapable of being rebutted by proof, that there was such a stipulation or understanding between them; or if we could be sure there was no such express understanding, but that the debtor had assigned in a tacit confidence that he, to whom the preference was given, would show indulgence and permit the debtor still to enjoy the property, this would be done with a corrupt purpose, to which the creditor would make himself accessory by allowing the debtor to retain and use the property."

The possession and control of the assigned property by Kerrison & Leiding, with the consent of the trustee, and without any objection on the part of the preferred creditors, for so long a time after the law presumes it to have passed from them, and even after the maturity of the notes it was conveyed to secure, especially when coupled with the fact that the avowed object of the deed was to enable Kerrison & Leiding to resume business and work out their debts, would warrant me, upon the authority of Smith & Henry, in holding that this deed was the result of a stipulation or understanding between the assignor and the preferred creditors, that the debtor should be permitted to enjoy the property, and that this advantage was the consideration on which preference was given. Such a stipulation would be fatal to the deed. But it is not necessary that I should rest my decision on this ground alone.

Whatever may be the true construction of the deed as to the rents and profits, it is admitted on all sides that there was a resulting trust to the assignors after the payment "The true view seems to me to be this: of the preferred creditors. This, as we have The case of Jacot v. Corbett, Chev. Eq., 72, is decisive of this case. There the fraud complained of was that the deed had itself provided that the debtor should have a right to retain for his own use the assigned effects. after paying forty (40) per cent. on the debts due to a certain class of creditors; and it was held to be void on that account as a fraud in law. The provisions of this deed are substantially the same as those in the deed there set aside, and the decision must be the same. It cannot avail the defendants, that there is now no prospect that there will be any surplus after the payment of the preferred creditors. "The character of the transaction must be determined by the intent of the parties at the time, and not by subsequent events."-Jacot v. Corbett. It is suffi-

*272

cient *to avoid the assignment that the grantor, at the time of its execution, contemplated a surplus which would revert to him after the payment of the preferred debts.—Burrill on Assignment, 180.

The complainant also insists that this deed of assignment is fraudulent and void, because Kerrison & Leiding owned a considerable property not included in it, and to enable a creditor to take the benefit of the assignment he is required by it to release a portion of his demand. It is clearly established not only by the recitals in the deed itself, but by the answer of the defendants, that Kerrison & Leiding retained in their hands personal property more than sufficient to have paid the complainants' entire debt, and an inspection of the deed will show, that the complainants were debarred from all participation in the assigned estate, unless they would consent to accept a percentage of their claim and release their debtors from all liability for the balance. It is true that a formal release is not exacted, but the requirement that the accepting creditors should relinquish their claim for the interest, which had accrued prior to June, 1865, and take the notes of Kerrison & Leiding, with interest from that time, "in full discharge of their respective debts," was as much the exaction of the surrender of a portion of their debt, as if they had been required to sign a formal deed of release, and the question is whether that vitiates the deed. Upon this point I entertain no doubt. It is well settled that in a general assignment of all his property, a debtor may stipulate for a release, but it is equally well settled that an assignment to a trustee of a part of the debtor's property, upon condition of a release, is void, such a condition in a partial assignment being regarded as oppressive, coercive and unjust as against creditors.—Burrill on Assignments, 95, and cases there cited. The creditors are entitled to the benefit of the whole estate of their debtor, of which they are not to be de-

seen, is sufficient to render the deed void. | prived by an arrangement which would present to them the alternate either to run the risk of losing everything, or to give their debtor an opportunity of enriching himself at their expense. Nor had Kerrison & Leiding the right to require their creditors, as the price of the security offered, to agree that they should have an indulgence of two and three years, and pay by installments prescribed by their debtors, or lose all benefit of the assigned property. The effect of such a provision in a deed of assignment is necessarily to gain time, by coercing the creditors who may come in, and to hinder and delay those who may refuse the terms of the deed.

*273

Indulgence cannot *be demanded at the option of the debtor, and on his own terms in any case, and still less where the assignment is only partial.

Had the scheme of this deed been carried out successfully, Kerrison & Leiding would have coerced their creditors not only into releasing a large portion of their claims, but also into granting an indulgence of two and three years on the balance, while they reserved to their own use more than sufficient to have paid the complainants in full. Can there be a doubt that a deed, so framed, was made with an intent to hinder, delay and defraud creditors. I use the terms "defraud" and "fraud" in their legal sense. I see nothing in the case to warrant the imputation of moral fraud.

It is ordered and decreed that the conveyance, dated the first of May, 1867, executed by Edwin L. Kerrison and Herman Leiding to Charles Kerrison, trustee, was made with intent to defraud the creditors of the said Kerrison & Leiding, and is void as against the complainants.

It is further ordered that the complainants recover of the defendants, Edwin L. Kerrison and Herman Leiding, the costs of this suit, and that they have leave to enter up judgment and issue execution for the same.

The defendants appealed, and moved this Court to reverse the decree and dismiss the bill.

McCrady & Son, for appellants:

The following propositions are submitted in support of this appeal:

- 1. That the conveyance in question was not a general assignment, nor in the nature of an assignment by insolvent debtors for the benefit of their creditors, but was a mortgage, or in the nature of a mortgage.
- 2. That if the said conveyance was an assignment, it was only a partial assignment, and, as such, was not void.
- 3. Whatever the conveyance may be called, it is not void under the Statute of Elizabeth.
- 4. That the said conveyance is a good mortgage or security for those who hold the

notes it was given to secure, and they are entitled to the benefit of it.

There is not a word in the conveyance to justify the assumption that there was; and nothing in the transaction which can give it the character of such an assignment.

The word assign is not used in the deed.

*274

*The grantors were not then insolvent; they warranted and covenanted in a certain case to give further security.

There was no declaration, or even token of insolvency, but, on the contrary, a positive assertion of purpose and ability to re-establish themselves in business after all the disasters of a destructive war.

The circumstances of the transaction.

The conveyance was a mortgage, or a security in the nature of a mortgage, and that in a form well recognized as a mortgage at the present time. Mortgages or securities in the form of conveyances to third persons, as trustees, grew out of the effort to engraft upon these securities the power to sell. In the case of Chowning v. Cox, A. D. 1823, 1 Rand., 306, 310, a power of sale in a mortgage or trust for the creditor himself to sell, was declared to be inconsistent with the nature of a trust, and that a sale by the creditor under such a power would not bar the equity of redemption.

In Roberts v. Bozon, 1825, Lord Elden, according to Chancellor Kent, (4 Kent Com., 150, discussing powers of sale in mortgagees,) said: "That the power of sale was of a dangerous nature, and ought, for greater safety, to be placed in a third person as trustee for both parties;" and Ch. Kent goes on to say: "And this appears to be still a practice, though it is considered as rather unnecessary and cumbersome;" and cites an anonymous case from 6 Madd. Ch. Rep.

Hilliard in his Treatise on Mortgages, 1 vol., p. 90, says the principle was established after great doubt and discussion.

It seems to have been recognized in England, however, fifty years ago.

In the Court of Common Pleas, in the case of Goss v. Neale, 5, J. B. Moore, 19, 16 Eng. Com. L., p. 387, before Ch. J. Abbott:

The question was upon a deed to trustees for the benefit of certain creditors, and the trustees were empowered to sell at the expiration of a certain time.

The C. J. held the deed to be good, and nonsuited the plaintiff, and upon a rule to set aside the non-suit, the rule was refused, because the Court were "of opinion that this deed did not differ from the common case of a mortgage."

In the Anonymous case, 6 Mad. Ch. R., 15, 1821, referred to by Ch. Kent, the whole case shows that, whether made to the creditor or to a third person, it was still considered as a mortgage.—Hill v. Mansen, 11 Grat., 522.

*275

*In the cases of Alton v. Harrison, and Payser v. Same, Law Rep., 4 Ch. Ap., 622, certain hereditaments were conveyed to trustees for the benefit of certain creditors upon trust, to sell and apply the proceeds for their benefit. The Vice Chancellor Stuart, at p. 624, speaks of the deed as a mortgage, and Lord Justice Giffard, at p. 626, says of the deed: "It was in effect a mortgage not to become absolute for six months, unless process should be previously issued against the mortgagor."

After giving the old definition of a mortgage, Hilliard, 1 vol., p. 2, says: "A more correct definition of a mortgage, therefore, would seem to be the conveyance of an estate by way of pledge for the security of a debt. and to become void on payment of it. Or, a conditional conveyance of land, assigned as security for the payment of money or performance of some other act, and to be void upon such payment or performance. Or an absolute pledge, to become an absolute interest, if not redeemed at a certain time." There is in these definitions no restriction of the conveyance to the creditor. Indeed, the most important and conspicuous mortgages of the present time are those of the railroads, which are invariably conveyances to trustees with power to sell.-King v. Merchants' Ex. Co., 5 N. Y., (1 Seld.,) 547; Curtis v. Leavett, 15 N. Y., (1 Smith.) 207.

2. If the conveyance was an assignment it was only a partial assignment, and as such was not void.

That it was a partial assignment, appears from the deed itself.

And if it was only a partial assignment, it was not void.

Burrell on Ass., 97: "In some of the States partial assignments are prohibited by Statutes; but independently of such prohibition, and where they leave the unassigned residue open to the claims of creditors, they are valid conveyances, and they have been so held in England."

The contrary of this is asserted in the decree, on the same authority; but in that reference the word "full" before "release" is not noticed. Burrell's authority is Seavings v. Brinkerhoff, 5 John. Ch., 332, a reference to which will show that the ground of objection was that the creditors were required "to execute and deliver a complete discharge of their demands." The objection stands then entirely upon the bargain with the creditors who accepted, and the requisition upon others to take notes of the debtors bearing interest only from the first of June, 1865.

The first inquiry under this objection is, what were the complainants required to give up under this requisition?

*276

*In the deed itself there is no express requisition—but admitting that interest accru-

ing during the war by the terms of the notes would be given up, there is not a solitary authority produced to show that such a requisition would avoid the deed. Nothing less than the requisition of a full release has ever been declared sufficient to avoid a partial assignment.—Meux v. Howell, 4 East., 1.

time by giving security to a creditor? question seems to answer itself. Every witnesses some such transactions. But cases have been already cited where point was decided. The case of Go Neale, 5 J. B. Moore, 19, (16 Eng. Con 387.) seems to be in point; so also Alt

Lord Ellenborough says: "It is not every feoffment, judgment, &c., which will have the effect of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the Stat.; for such is the effect pro tanto of every assignment that can be made by one who has creditors; every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to the creditors. But the feoffment, judgment, &c., must be devised of malice, fraud, or the like, to bring it within the Statute.

- 3. Whatever the conveyance may be called, it is not void under the Stat. of Eliz. The particulars relied on are: (1.) The date of the notes excluding interest during the war. (2.) The time these notes were to run. (3.) Resulting trust of the rents. (4.) Occupation of some of the houses conveyed by the grantors. (5.) The relationship of the trustees to the grantors. Of these, in order:
- (1.) As to the interest during the war. No question could have been more complex just after the cessation of hostilities. It was, in fact, a question of the broadest aspect, for it depended upon the manner in which jurists and statesmen should classify the great strife.

If classed as a war, there was no doubt the interest could not be recovered.—Dickinson v. Legare, 1 DeS., 536, 542: Exors. of Blake v. Exors. of Quash, 3 McC., 340, 343, 344; Ryan v. Baldrick, Ib., 503; Davis v. Wright, 2 Hill, 560, 568; Du Belloux v. Waterpark, 1 Dowl. and Ry., 16, 16 Eng. Com. L., 12–13; Hoave v. Allan, 2 Dal., 102; Foxheart v. Nagle, Ib., 132–133; Bordley v. Eden, 3 Harris and McH., 167–168.

But how the civil strife was to be classed was in doubt.—See the Prize Cases, 2 Black Rep., 635, 666, 667, 673, 693; the Circassian, 2 Wal., 135, 148, and Alexander's case, Ib., 419.

And this right to interest during the war is still a questio vexata. See Mayer v. Reed, 37 Ga., 482; Griffith v. Lovell, 26 Iowa, 226-4; American L. Rev., 743. How could the compromise of such a claim be construed to be a legal fraud?—Ward v. Smith, 7 Wal., 447; Bigler v. Walter, 5 Am. L. R., 570, by Chase, C. J.

*277

*But, in fact, the complainants in their suit for this very debt afterwards submitted to a verdict against them on this very question of interest.

(2) The time the notes were to run.

Is it a legal fraud for a debtor to obtain

question seems to answer itself. Every day witnesses some such transactions. But some cases have been already cited where this point was decided. The case of Goss v. Neale, 5 J. B. Moore, 19, (16 Eng. Com. L., 387,) seems to be in point; so also Alton v. Harrison, 4 Ch. App., 622, already quoted. But in our own case of Tennant v. Stoney, 1 Rich. Eq., 222, seems to give the answer to both the release of interest and extension of time. The bond, and what is called a mortgage, were given to trustees for certain creditors, by an indenture inpartite: the bond was not payable for four years; the damages on the bills were to be given up, and the interest to be allowed the creditors was to be only six per cent. Yet at p. 259-260, it is said that "to regard such arrangements as obnoxious to the stigma of fraud must cut up all securities and destroy that freedom which is essential to commerce."

And this is sustained and exemplified by composition deeds. There is not a printed form, that we know of, which does not contemplate the giving of time, and some other advantage, to the debtor.

In Goss v. Neale, already cited, the creditors secured gave two years. In Scott v. Ray, 18 Pick., 360, they gave five years.

A composition deed will be good although all the creditors have not joined in it.—Eaton v. Lincoln, 13 Mass., 424; Norman v. Thompson, 4 Exch., (Wels., H. & G.,) 755.

- (3.) Resulting trust of the rents. No authority whatever is quoted to show that any trust could result under such a deed. The definition of a resulting trust, as given in the books, is "when a voluntary conveyance is made with a declaration of trusts as to a part only of the land or of the estate or interest in it, there is a resulting trust in that case for the grantor as to the part or interest of which there is no declaration."

 —1 Sanders on Uses, (3) p. 327.
- 1. This was not a voluntary deed, but one made upon good considerations, viz: a compromise of a doubtful claim and time, or forbearance, either of which would be sufficient to sustain it.
- (2.) The whole estate was conveyed to the trustee, and the grantors could neither lease nor collect rent afterwards, but by his per-

*278

*mission and authority, and the trust declared was for the whole debt, and, until paid, there could be no resulting trust.

- (3.) But the real question is this: If such a construction can be given to the deed, does that, per se, make it a fraud, although the rents, in fact, were received by the trustee for the benefit of the trust, and he offers to account for them?
- (4.) Occupation of some of the houses by the grantors.

If the deed was good when it was made,

trustee cannot deprive the creditors who accepted of its benefits.

But the objection is made upon a total misconception of the law. Possession of the grantor unexplained may be a badge of real moral fraud; and as a badge, where real fraud is justly suspected, may warrant the conclusion. But where no real or moral fraud is imputed, but, on the contrary, excluded, then it weighs nothing whatever.

Very many cases may be cited to show that possession even under assignment is not conclusive evidence of fraud, or fraud per se. In Baxter v. Wheeler, 9 Pick., 21, an express provision that the debtor making a general assignment might remain in possession, was not considered fraudulent.-Foster v. Sal. Co., 12 Pick., 451; Scott v. Ray, 18 Pick., 360; Tomkins v. Wheeler, 16 Pet., 106. This is a common condition in a mortgage, and in trusts in the nature of mortgages .-- Alton v. Harrison, 4 Ch. Ap., 622; Johnston v. Barratt, Law Rep., 1 Exch., 65.

But here the trustee is willing to account for the use and occupation of the premises, and this is all that those interested in the deed can require.

- (5.) The relationship of the trustee. This may be, in some cases, evidence of actual fraud, but it is conceded here is no actual fraud. But there was a reason for making a friend a trustee, which is apparent on the face of the deed. He had to covenant that in a certain case he would have to come under a heavy responsibility.
- 4. That the deed in this case is a good mortgage or security for those who hold the notes it was given to secure, and they are entitled to the benefit of it.

This seems to follow, necessarily, from what precedes it, but it is proper to look at it in respect to the creditors who accepted. If there was no moral fraud in the deed, what is there to deprive them of its benefit?

They are all parties to the deed, and are

*279

certainly not even charged *with fraud of any kind in the bill of complaint, and how can their security be declared void?-Head v. Ward, 1 T. J. Marshall, 281; Meux v. Howell, 4 East., 1; Tennant v. Stoney, 1 Rich. Eq., 259.

Pressley, Lord & Inglesby, contra:

This deed is void under statute of 13 Elizabeth, which declares all conveyances made with the purpose and intent to delay, hinder, or defraud creditors, to be entirely void, frustrate, and of none effect.

Before discussing the provisions of the deed, it is necessary to say something of its character. Is it an assignment or a mort-

Obviously employed for a double purpose.

certainly the subsequent conduct of the for; Second, as a mode of provision for their payment.

> The first trust requires the trustee to "hold the property as a security." This is a mortgage.

> The subsequent trusts require him to sell the property and distribute the proceeds. This is an assignment; and the authority to sell before default, stamps upon the deed the character of an assignment.

> "A mortgage with the qualities of an assignment superadded, or an assignment to take effect at a future day."-Burrell, 33.

> Same principles applicable, whether an assignment or a mortgage. The whole question rests upon the intent of the instrument.

> If this intent is to hinder and delay, it is void, whether mortgage or assignment .-Burrell on Assignments, 31; Green v. Tribier, 3 Maryland, 37.

> Under statute of Elizabeth, deed void-First, on account of the retention of the possession of assigned property by grantors; Second, on account of reservations in favor of grantors; Third, because it is a partial assignment, making preferences and requiring a release; Fourth, because it coerces the creditors to give the debtors an indulgence of two and three years upon claims long past due, under the penalty of being debarred from all participation in the assigned estate.

> First-Courts of Justice have held, but with great reluctance, that a debtor may make an assignment giving preferences amongst his creditors. This power results from the absolute dominion of the owner over his estate. They have also held that he may stipulate for releases.

But when the debtor removes his proper-*280

ty beyond the ordinary *process of law, and thus compels the creditor to stipulate something in favor of the debtor, as a condition of obtaining payment, the assignment will be deemed void, as hindering and delaying creditors, unless the grantor has parted absolutely with the property, so as to leave no interest which can revert until the creditors are paid in full.

The deed must therefore provide that, if one set of creditors do not take the property, it shall go to others, and finally to the general creditors.

The doctrine, as a text, may be seen in this sentence: "The circumstance of the debtor assigning over to trustees all his property without any reservation to himself. and giving the surplus, if any, to those creditors who do not come in and agree to release, on taking their preferred share, is deemed to disarm the transaction of all unfairness and illegality."

In Jacot v. Corbett, Chev., 76, the Court. says: "Doubtless a debtor may make a gen-First, as a security for the debts provided eral assignment of all his estate for the benefit of his creditors. He may prescribe the an opportunity of enriching himself at the exorder in which they shall be paid. I think, too, that he may prescribe the condition of a release; though if this were res integra, the Supreme Court have said in Brashear v. West, 7 Pet., 'We are far from satisfied that upon general principles such a claim ought to be sustained.' But a debtor has no right to place his property beyond the reach of his creditors, under the ordinary process of law, prescribe the terms on which they are to participate in his effects, and secure to himself, in case of neglect or refusal, a control over such funds, and thereby the power to make other terms. Such deed is a direct violation, as well of the terms, as the policy of the statute. The purpose is to hinder and delay creditors, by transferring a valuable title to a third person, while the real ownership is still in the assignor, unless the terms prescribed are assented to. No case, I think, can be found, sanctioning an assignment which sustains such control in the debtor .-See Heslop v. Clark, 14 John, 462; Austin v. Bell, 20 John, 448.

It is immaterial whether this reservation in favor of grantor is expressed in the instrument, or left to implication.—Burrell, 180.

The case of Jacot v. Corbett, is conclusive of this case.

That was an assignment by a debtor, for the benefit of such creditors as should accept a suitable proportion, but not to exceed forty per cent. of their claims; the surplus, if any, to be returned to the debtor. Held to be fraudulent.

Here the creditors are required to release

their interest for seve*ral years, amounting to at least twenty-five per cent. of their debt, and no disposition is made of the surplus.

It is, therefore, in effect, an assignment to pay such creditors as should accept a ratable proportion, but not to exceed seventy-five per cent. of their claims; the surplus, if any, to be returned to the debtor-identical with Corbett, except that in this case, if the property did not bring enough to pay the seventy-five per cent., the creditors might go against K. & L. for the balance.

This, says Chancellor Harper, "in the Circuit decree on Jacot v. Corbett, is obviously a device which, if successfully practiced, might enable a debtor to get rid of his debts by paying forty per cent. of the amount, and yet retain more property than would have been sufficient to pay the residue. Can it be doubted that this would be a fraud on creditors? Creditors, who cannot know the situation of a man's affairs so well as he does himself, will be naturally alarmed by the fact of an assignment being made. The alternate is presented to them either to run the risk of losing everything, or to give the debtor

pense of creditors."

Assignors have not, therefore, in this deed parted absolutely with their property, etc., etc.

It cannot change the law, that the assigned estate is not likely to pay more than fifty per cent. of the debts of the accepting creditors. Jacot v. Corbett, Chev., 74.

If this be a mortgage, the right of a mortgagor to the rents results from the very nature of the instrument.

If it be an assignment from the terms of the deed, for no power is given to the trustee to collect rents and profits or to apply them to the debts.

The manner of paying the debts is prescribed by the deed, to wit: out of the proceeds of sale.

The reservation that avoids a deed need not be of something permanent and durable; if it be a part of the income it is sufficient to avoid the deed.-2 Kent., 535, notes C and D.

In Green v. Treiber, 3 Maryland, 36, the Court says:

"Applying these principles to the deed under consideration, we are brought to the conclusion that the Court below committed no error in condemning it as void. If it be regarded as an assignment for the payment of his creditors, on terms proposed by the grantor, it cannot be sustained, because instead of passing the property over to the trustees for the benefit of creditors, it is re-*282

tained by the *debtor himself for six and perhaps fourteen months. During this time, the property would be protected from process issued at the instance of the other creditors, as well those not named in the deed as those who were named, and might not accept its terms."

It is not a satisfactory answer to say that the surplus as well as the income and profits would be liable in the meantime to be seized under such process.-Green v. Treiber; Jacot v. Corbett, Cheves, 77.

In the cases we have been considering, the reservation was on the face of the deed, but it is immaterial whether it be on the face of the deed or dehors the deed. Partial assignments with release void.

This is an assignment of a part of the debtor's property, in which a release of a part of the creditor's claim, to wit, the interest for nearly five years, is exacted.

The word "release" does not occur, but this is the effect of the deed.

Ordinarily the release is exacted only in case the assigned property is not sufficient to pay the entire debt. In this case the creditor is required to release, though the assigned estate is sufficient to pay all the debts in full.

In no event is he to be paid all that is due him; but if, on the other hand, the asthe compromise, he has his recourse against K. and L. for the balance.

It would be monstrous to hold that a debtor may make a valid assignment, omitting property and stipulating for a release. What is the principle on which the Courts have proceeded in holding the stipulation for a release valid? It is this: That an honest debtor who gives up everything ought not to have his future industry cramped and restrained by a heavy load of debt. Did K. and L.'s future situation, supposing them to have retained \$20,000 worth of property, require that their industry should be unfettered?—Burrell on Assignments, 95, 144-147.

"The fraud here consists in an artful combination of two things, each of which is in itself lawful; preferences given as the premium of releases exacted, and in the application of them to a case where the first thing demanded by justice, to wit, a full surrender of the debtor's property, has not been performed."-1 Rich., 219.

Because it exacts not only a release of a part, but an indulgence of two and three years upon the balance.

Giving time is delay, and if the intent was to cover up the property for the purpose of coercing creditors to give time, the deed must be void.

*283

*If a debtor with his property in his own hands, and open to the legal pursuit of his creditors, can satisfy them that it is for their interest to give time, there is no legal objection to it-they treat upon equal terms-the ordinary legal remedies of the creditor are not obstructed, but the case is materially changed where a debtor first places all his visible property in such a situation as to prevent his creditors from taking it under the process of a court of law, and then says give me two and three years' time, or run the risk of losing everything.

The very imposition of such a choice was a fraud, for it was exposing them to a peril which they were not bound to encounter.

Creditors who cannot know the situations of a man's affairs as well as he does himself, will be naturally alarmed by the fact of an assignment being made.

And for this reason the law does not tolerate any hindrance in assignments for the benefit of creditors beyond what may be reasonable and necessary to the purposes of the trust.—Burrell on Assignments, 188; 3 Maryland R., 37 and 38.

Simonton, same side.

The opinion of the Court was delivered by

WILLARD, A. J. The instrument which the decree of the Circuit Court has declared void, as against creditors, is a deed, in two parts, dated May 1, 1867, and recites among

signed estate pays less than the amount of other things that it was made to enable the assignors Kerrison & Leiding, "to resume mercantile trade or business; that it was based upon an arrangement with a majority of their creditors, both in number and amount or value, to take the notes of the assignors, dated December 1, 1866, payable, with interest from June 1, 1865, two and three years after said date, secured by a conveyance, to an approved trustee, of certain real estate thereby conveyed, in trust, for the better securing of the said notes." It declares that all the other creditors may be disposed to come in upon the footing of the said agreement and security, and, in that event, it is intended to secure to them that right.

The consideration is a nominal pecuniary sum, and the covenant of the trustee.

Certain real estate is bargained and sold to C. Kerrison, his heirs and assigns forever, "in trust, nevertheless, and to and for and upon the several uses, intents, trusts, and purposes, and subject to the several provisoes, conditions and limitations bereinafter ex-

*284

pressed *and declared, of and concerning the It then proceeds to declare the trusts, same." which are: First. To hold the premises as security for the creditors who had acceded to the terms of the assignment, and to such as, before the 1st of December, 1867, "in lieu and satisfaction of their claims, should take and accept the notes of the said Kerrison & Leiding, bearing the same date, 1st December 1866, payable at the same time, (two and three years after date), with interest from the same, (1st June, 1865,) each note for one half the principal due such creditors, as the creditors named in the first section of said schedule have taken and accepted," &c. Second. If the notes are not previously paid by the assignors, to sell at public auction, or private sale, the premises conveyed, or so much as may be necessary, or "to raise the sum required by mortgage," in due time to provide for the payment of the said notes as they shall fall due.

This power of sale was again repeated in less qualified terms, as follows: "or if he, the said Charles Kerrison, should deem it best for the interest of all, then to sell and dispose of the said premises, or any of them, at any time after the execution or delivery of these presents, as he may think proper, for eash, or on such credit as may enable him to meet the said notes at maturity; and if he should so sell for cash, or for cash and credit, before the maturity of the said notes, then, after paying and retaining all proper charges, expenses, and commissions, to pay the clear residue of the cash so received by him to the parties or holders of the said notes in average and proportion to the several and respective amounts due upon the said notes," &c.

136

also, a covenant relative to procuring a renunciation of dower affecting the premises.

The decree of the Circuit Court adjudges the instrument void as to creditors, for matters appearing on its face. The appellants contend that the decree erroneously applies to this instrument, as a test of its validity, or sufficiency in point of law, the principles and rules of law governing assignments, general and partial, made by debtors, either insolvent or in failing circumstances, for the benefit of their creditors.

They contend that it is to be considered as a mortgage, or security in the nature of a mortgage, and as such is not subject to the objections affecting the validity of assignments for the benefit of creditors.

The cardinal feature distinguishing assign-

*285

ments of this class from *mortgages, is the nature of the interest remaining in or resulting to the assignor on the one hand, and the mortgagor on the other.

An assignment for the benefit of creditors, in the form most common in practice, is a conveyance to a trustee or trustees creating express trusts in behalf of some or all of the creditors of the assignor. The title to the property assigned, whether consisting of real or personal property, passes wholly out of the assignor, and vests in the assignee, with all the powers incident to the proprietorship of such property, such as the power to sell and convey, subject only to the limitation imposed by the instrument, or incident to the relation of trustee. Its object is to devote the assigned estate to the payment of debts of the assignor, by placing it in the hands of trustees in a course of distribution. object of interposing trustees between the debtor and his creditors is to withdraw the assigned estate from liability to be subjected to process under the control of individual creditors for the satisfaction of their demands. Ordinarily, the enforced application of a debtor's property to the satisfaction of his liabilities is left to the operation of remedies taken by individual creditors, without regard to the claims of other creditors, and unaffected by any equities or considerations of natural justice, that may exist as between different creditors, or classes of creditors, in relation to the common fund, to which all must look for satisfaction.

Under the operation of the strict rules of the common law, the creditor who first reaches the fund has the superior claim to it.

Bankrupt and insolvent laws take into account the rights and equities of creditors, as a class, as among themselves. They are to be regarded as affording statute remedies of a special character, and as ordinarily only operating within the sphere of the cases brought within the terms of such statutes,

It contains a covenant of warranty, and, and not as repealing or modifying the operation of common law remedies when the peculiar jurisdiction not obtained under them is not operative.

> The equities existing among creditors, as a class, are sometimes administered by the Courts of Equity, when the character of assets can be imposed upon the estate of the debtor, in which case these Courts proceed to distribute them, either as legal or equitable assets, as the case may be, having regard to equality as the leading idea of equity, although respecting legal heirs.

> But the remedies afforded by bankrupt and insolvent laws, and by Courts of Equity, are to be regarded as exceptional; the rules and principles of the common law are to be

*286

looked to, in order to *measure the right of the debtor to establish principles peculiar to himself as the rule of applying his property to the satisfaction of the demands of his creditors.

The rule of the common law, allowing to execution creditors priority of their respective process, does not profess to cover a principle of distribution of such intrinsic excellence as to exclude all other principles or methods of distribution. It is a mere rule of practice, based on convenience, it has often been said, to put creditors on a race of diligence; but that race is more often won by the hard hearted or the lucky adventurer than by diligence, seasoned with mercy.

Until interfered with by process, the debtor may, within the limits of good faith, make any application of his estate toward the payment of his debts that he may choose.

This is not a right or privilege that he enjoys as debtor, but results from proprietorship. When, however, insolvent, or in failing circumstances, of he desires to control the application of his estate, he must divest himself of such estate, so that it shall be beyond the reach of process affecting him individually, and, at the same time, impress upon the estate itself, considered as a fund, a law governing its application.

The creation of a trust affords the means of accomplishing these ends. It accordingly follows, that to every assignment by an insolvent debtor, or debtor in failing circumstances, for the benefit of creditors, a two-fold object must be ascribed: first, to remove the assigned estate from liability to the process of creditors; and, second, to devote it to the payment of debts according to a rule prescribed by the assignor.

It is obvious, therefore, that every such assignment must, to some extent, hinder and delay creditors. That effect may result incidentally as a consequence of a lawful effort on the part of the debtor to devote his property to the payment of his debts, though upon a principle of distribution originating

in his own mind. In that case, the creditor gagee as they exist under the more common whose remedies are defeated, has no right to complain.

On the other hand, that hindrance and delay may be the direct object of the assignment, the motive therefor being some advantage to be gained to the debtor, or injury done to the creditor. In this case the law adjudges the effort to hinder and delay a fraud on the rights of creditors and avoids the instrument.

From the foregoing, it is obvious that pro-

*287

visions in such an as*signment, whether in the form of reservations or conditions tending to divert the assigned estate from application to the payment of debts, or to clog or embarrass that application, for the benefit or advantage of the assignor, are inconsistent with the object which the law regards as a justification for the incidental hindrance and delay thereby occasioned to creditors.

It also follows that the possession by the assignor of the assigned estate after such assignment, for a longer period than might be necessary in order to place the trustee in possession, and the enjoyment by the assignor of the income and profits of the assigned estate, would be wholly inconsistent with the objects of the assignment.

In case of a mortgage by a debtor to secure a pre-existing debt, the effect of the mortgagor's retaining possession of the mortgaged premises is very different. In that case the object is security, not distribution.

The power of sale is not absolute, but dependent on condition broken. The mortgagor of land is not only entitled, apart from stipulation to the contrary, to possession of the mortgaged premises, but to enjoy the rents and profits without account until condition broken.

He has an equity of redemption, which is so far considered a legal estate that it may be levied upon and sold under execution.

What the mortgagor has obtained is less than what he would have obtained by a confession of judgment; his priority is not only confined to the mortgaged lands, but cannot ordinarily be made available without a judgment or decree as the foundation of proceedings for the sale of the land.

The application of these means of distinguishing the character of the deed in question is affected by the fact, that if that deed is to be regarded as a mortgage, it is not in the form most common, but belongs to a class having, in some respects, peculiar attributes, viz: mortgages to trustees for the security of one or more persons occupying the position of cestui que trust to the estate.

It is enough for the present to say that a trust, as between the several persons formally and beneficially united under the character of mortgagee, does not necessarily affect the relations between the mortgagor and mort-

form of mortgages.

Looking, then, into the deed in question, we find that the relations established by it, as between the assignor on the one hand, and the trustee and beneficiaries on the other, are

*288

not characteristic of a *mortgage, but are such as to bring the deed within the principles and rules governing assignments by debtors insolvent or in failing circumstances.

In the first place, the deed is not, in form, a mortgage. A mortgage, strictly considered, is a sale and conveyance, subject to a condition or defeasance. It contains, within itself, that which may, on a prescribed contingency, terminate all the rights intended to be created by it. The condition binds the mortgagor to do something of advantage to the mortgagee, in order to divest the mortgagee of the estate and right formally conferred upon him.

The deed in question has no such characteristics. The only condition stipulated is one with which the creditor must comply before he can enter the relation created as between the assignor and trustee. The power of sale conferred upon the trustee is not dependent on condition broken, but is absolute; he may sell and give title at any time after the execution of the assignment at his discretion, if he judges it the best means of insuring the payment of the notes at maturity. He is not even allowed to postpone the sale until the renewed notes fall due, but must sell in advance, so as to be ready with the money in hand to pay the notes as they mature.

Neither is it, in substance, a mortgage, or in the nature of a mortgage. The absolute nature of the power of sale is as inconsistent with the substantial rights existing under a mortgage, as with its form as such. It is true that the declared object of the instrument is security, but that is not decisive, for security can be reached by other means than a mortgage, and is always an incidental object in assignments for the benefit of creditors. It is the fact that it is security coupled with a certain amount of right remaining in, and exercisable by the mortgagor, that characterizes the mortgage, while, in the present case, the assignor, if not divested of all title and control over the assigned property by the mere execution and delivery of the assignment, may be so divested at the mere option and discretion of the trustee at any moment.

The right remaining in the assignor, if right it can be regarded, is of too precarious a nature to be regarded in the law as a vendible estate or equity of redemption.

The power conferred upon the trustee to mortgage the assigned estate is inconsistent with the idea of a mortgage. . As mortgagee, the trustee has no capacity to bind the estate by a mortgage. Nor can the power to mortgage be regarded as a naked power, conferring mere authority to act as attorney in fact *289

assumed, would not have accomplished the professed object of the instrument, namely, enabling the assignors to resume mercantile business. It is obvious that it was consider-

for and in the name of the *assignor. In the first place, no such intention is expressed, it being evidently intended that the trustee should convey or mortgage as trustee. Again, the power to mortgage is coupled with the power to sell, and the title is placed in the trustee, clearly designed to be attendant on the exercise of these powers. The conveyance being in form absolute, and the powers conferred requiring an absolute estate to support them, it would be an inadmissible construction to limit the operation of the instrument so as to afford no support to the powers. Especially is this true when the grantee takes as trustee, and a resulting trust may arise to prevent the extension of these powers beyond what is required for a full discharge of the uses and trusts.

On the other hand the form of the instrument, its substantial provisions, and its objects and intent, as viewed in the light of attending circumstances, clearly define the deed in question as appertaining to the class of assignments under consideration.

The deed is, in form, a deed of trust, by its terms investing the assignee with a fiduciary character.

It devotes a specified fund for the payment of debts. It authorizes the trustee to convert the fund at any time from land into money or credit, without waiting for any default or want of performance on the part of the assignor. It is for the benefit of all creditors who may choose to comply with its terms.

Under the stipulation forming part of the case before us, we are bound to consider as established the fact that the assignors were insolvent at the time of the assignment, that fact being ascertained by the decree of the Circuit Court. The motive of the assignment is declared by that instrument to be to enable the assignors to resume mercantile business.

The leading object of the assignment is to secure forbearance upon the existing demands of their creditors. The basis of the transaction is a contract previously made with a majority of their creditors, by which they agree to cancel and discharge the existing obligations, and to take notes for the principal, with interest from a date fixed by the agreement, independently of the date from which such debts originally carried interest, and to give an extension of two and three years. The provisions made by the assignment are not limited to securing the obligations contemplated by this agreement, but are extended to all creditors who may choose to become parties thereto. gaging the land to secure the creditors who had already become parties to the agreement,

*290

though a majority in *interest, it must be

assumed, would not have accomplished the professed object of the instrument, namely, enabling the assignors to resume mercantile business. It is obvious that it was considered that all, or nearly all, should become parties to the arrangement, to accomplish that object, and the deed, in its present form, must be regarded as presenting a motive to those who had not already acceded to the arrangement to do so. The character of that motive, and its effect upon the validity of the assignment, is to be considered in another connection.

It is clear that the object of the transaction called for something more than a mortgage could afford, and taken in connection with the situation of the parties, stamps the instrument as an insolvent assignment for the benefit of creditors.

It only remains to consider the objections made to the decree as to the validity of the assignment, as such. The fact pressed by the appellants that this, if regarded as an assignment, is a partial, and not general, assignment, is immaterial under the view of the case that is regarded as decisive of its merits.

The important objection to the validity of the assignment is, that it has, as a leading object, the securing of a benefit to the debtor at the expense of his creditors. It seeks time and the settlement, favorable for the debtor, of a question of difference between the debtor and his creditors, or at least of some of them, as to whether interest rán on interestbearing accounts as between debtors resident within, and creditors residing without the Confederated States during the late war of rebellion.

The questions arise: first, whether an insolvent assignment is avoided by stipulations for the benefit of the debtor, at the expense of his creditors; and, second, whether such benefits are stipulated for in the instrument in question.

In Jacot v. Corbett, (Chev. Eq., 71,) Chancellor Dunkin, whose opinion was adopted by the Appeal Court, quotes with approbation the language of Judge Van Ness, in Hyslop v. Clark, (14 John. R., 458,) as follows: "An insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it under the process of a Court of law, and to drive them into a Court of Equity, where they must encounter great expense and delay, unless it be under very special circumstances, and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution to be made amongst them all." This language has the merit of disclosing the true *291

principles that *should be made the test of the validity of an insolvent assignment.

The deductions from it are, that to justify the hinderance and delay necessarily incident to placing the estate in the hands of trustees, other of the objects indicated, either to secure a preference, or to cause a just distribution among them all. Is this a correct expression of the law of this State, as settled by judicial authority, or as a consequence of principles applied by the Courts?

In Jacot v. Corbett, Chev. Eq., 71, the assignment had a two-fold object: first, the preferring of certain creditors who were to be paid in full; and, second, the payment to all other creditors of forty per cent. of their demands, who would accept that amount and release their demands, any surplus that remained to be paid to the assignors. assignment was held void.

This decision is in entire conformity to the principles drawn from the language of Judge Van Ness, for, although the first object, a preference of certain creditors, was allowed, yet the second object embraced neither the principle of a lawful preference nor that of equal distribution. In order to have limited the authority of the case to merely giving effect to the language quoted, it would have been sufficient to have held that the assignment lacked an element necessary to its validity, namely: the principle of equal distribution when assuming to apply the assigned estate to creditors who were not intended to be preferred. But the decision in that case was not placed on merely negative grounds alone, but upon the distinct ground that the assignor had reserved to himself that which the general creditors failed to secure by releasing, and thereby rendered the assignment void.

The language of Judge Spencer, in Austin v. Bell, 20 John. R., 448, is quoted in Jacot v. Corbett, as follows: "I am bound to say that a deed which does not fairly devote the property of a person overwhelmed with debt to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe. is in law fraudulent and void as against the statute of frauds, being made with intent to hinder, delay and defraud creditors of their just and legal actions." It will be observed, that in this language the want of devotion to the payment of creditors is recognized as the basis of invalidity, although particular stress is laid on the case of a reservation for the benefit of the assignor.

*292

*Had the assignment in Jacot v. Corbett, instead of providing for retaining to the assignor the balance remaining in the hands of the assignee in consequence of the refusal of the general creditors to release on the acceptance of part of their demands, directed that such balance should be paid to a public charity, it is evident that that circumstance, while it might have changed the language of the case and the class of illustrations resorted to, would not have changed the prin-

it must appear to have in view one or the ciples of the case nor the result of their application to the assignment. It is not the fact that the assignor secures a benefit to himself, but the fact that the fund which ought to go to creditors is diverted from that application, that works prejudice to the creditors.

> Jacot v. Corbett clearly rests on this idea. It is from this idea of diversion also that the principles laid down by Judge Van Ness are deduced. An insolvent assignment that divests a debtor of leviable property, except for the purpose of applying it to the payment of creditors, either on the principle of preference or of equality, must be regarded as a diversion of the fund from its legitimate uses, and when that diversion is coupled with a benefit intended for the debtor, the impropriety of the transaction is made clear to the ordinary sense of justice.

> Jacot v. Corbett also holds that where any one of several purposes or objects disclosed by the assignment is inadmissible, the whole assignment is avoided.

> A debtor, though insolvent, may convert his lands or his goods into cash, or even into credits or choses, and one dealing with him, in this respect, in good faith, is entitled to protection as a bona fide purchaser for value, so he may part with it to a creditor, either directly or through the medium of a trustee, and, in so doing, he may prefer one creditor to another. As was said in Smith v. Henry, (1 Hill, 16,) "this is giving latitude enough, but it will not allow him to secure an advantage to himself, at the expense of creditors, as the price of such preference."

> In the case last named it was held, that when a debtor transferred property to a creditor by way of preference, and the creditor allowed the property to remain in the possession of the debtor, the law raised an implication that could not be rebutted, that the preference conferred was upon the condition that the debtor should be allowed to remain in possession for a time, and that such a stipulation rendered the transaction void as to creditors.

> The discussion of the question by Judge Harper discloses principles in entire harmony with the views of Judge Van Ness. The

> > *293

*result of the reasoning is, that the only advantage, personal to himself, that the debtor has a right to secure, even when dealing with his creditors directly, is what is properly embraced within a fair exercise of the power of preferment. When the dealing with the creditor is through the medium of a trustee, this rule is equally applicable. This is, in effect, limiting the power of an insolvent debtor in assigning his property for the benefit of creditors, to either a preference of certain creditors, or equal distribution among them all, or to a preference of some and equal distribution among the rest.

Anderson v. Fuller, (McM. Eq., 27 [36 Am. Dec. 290].) That was, also, the case of a preferred creditor, suffering part of the property to remain in the possession of the debtor. Ch. Dunkin holds, in that case, that if, in preferring a creditor, the debtor secures "any advantage or control to himself, this provision invalidates the deed." Again, he says: "The circumstance of leaving the debtor in possession of the property supplies the place of a provision to that effect." The law presumes an understanding between the parties; infers the existence of a secret trust, and, so far as the rights of creditors are affected, the deed is void. On appeal, the views of Ch. Dunkin were approved.

The New York cases have generally adhered to the doctrine advanced by Judge Van Ness, Judge Sutherland, in Grover v. Wakeman, (11 Wen., 187.) shows that it has been sanctioned by many of the ablest jurists of the country.

Previous to Grover v. Wakeman, the principles upon which the Courts of this State, and those of the State of New York, administered this branch of the law, were substantially identical. Hyslop v. Clarke, (14 John. R., 458,) Leaving v. Brinckerhoff, (5 John. Ch., 329.) and Austin v. Bell, (20 John, R., 442,) are clear expositions of the principles recognized and applied by our own Courts.

On the question as to what should be deemed a legitimate exercise of the power of preference, Grover v. Wakeman assumed the position that conditions annexed to a preference that the creditor should release, avoided the deed upon the ground that it was a stipulation for the benefit of the debtor that might be employed to coerce creditors. Our Courts, from Niolin v. Douglas, (2 Hill Eq. 448 [30 Am. Dec. 368],) have adopted the opposite view. The inclination of the New York Courts, beginning with Grover v. Wakeman, has been to reduce insolvent assignments to close approximation to one unvarying form. Thus, in Barney v. Griffin, (2 N. Y., 365,) it

*294

was *held that when a preference had been created, but no disposition of the residue made for other creditors, the assignment was void, and, also, that authority conferred on the assignee to sell on credit, or to receive a fixed commission, avoided the deed.

This inclination was developed while the highest Court of that State consisted, in part, of the members of the upper branch of the Legislature, a circumstance that, doubtless, weighed in a question that involved the handling of a delicate legal question with legislative freedom.

Noilin v. Douglas, 2 Hill Eq. 448 [30 Am. Dec. 368], allowed the condition of releasing to be annexed to the preference. Gadsden v. Carson, 9 Rich. Eq., 252 [70 Am. Dec. 207]. limits this right of exacting a release as the

The same conclusion was arrived at int condition of preference to the case of an assignment by a debtor of all his property. In the New York Courts the discussion of this question turned chiefly on the impolicy of leaving in the hands of the debtor a power so susceptible of abuse; while in our Courts it was discussed from the standpoint that inasmuch as a debtor had a right to prefer or not to prefer, he had the constructive right to attach to its exercise such conditions as in themselves did not disclose a fraudulent intent. It may, perhaps, be safe to say, that the question of the propriety of allowing such a condition was influenced by the idea that there is a propriety in the demand of a debtor to be released on the surrender of his whole estate; a principle that is certainly recognized in most bankrupt laws.

> While the debtor would be permitted to withdraw his property from an unpreferred creditor upon any such grounds, it might be said that there was sufficient force in it to warrant his making it the condition of a preference purely voluntary on his part, especially as unpreferred creditors could not possibly be prejudiced by it.

> In Noilin v. Douglas, no provision was made for general creditors, and yet the assignment was held not to be invalidated on this ground.

> That assignment was supported by preferences, held to be legitimate. It was held to be no objection to the assignment that a trust might result to the assignor before the payment of all debts, inasmuch as the remedy of unpaid creditors is to be let into an account of the surplus in the trustees' hands. This decision is certainly in closer conformity to the rule laid down by Judge Van Ness, than the opposite decision in Barney v. Grif-That rule sustains the assignment if either of the objects enumerated is the purpose of the assignment. Now, the assignment

> > *295

in Noilin v. Douglas contained *already one of those objects, and, therefore, was good under the rule in question. Barney v. Griffin has to be tested by some other standard than that afforded by Judge Van Ness' rule. point of fact, the resulting trust can be regarded in no other light than as an incidental consequence, brought about by the rules of equity, of an act done by the debtor which he had a right to do, namely, prefer certain creditors. In Vaughan v. Evans, 1 Hill, Eq., 414, it was held that power to sell on credit did not vitiate the assignment. The conclusion from our own decisions, supported in great measure by those of New York, especially by the earlier decisions of that State, is that an assignment by an insolvent debtor, or by one in failing circumstances, whether general or partial, is to be regarded as tending to hinder, delay and defraud creditors, unless its whole purpose is either preferring certain creditors, or an equal distribution

among all: that a reservation for the benefit of the assignor of any interest in, or control over the assigned estate, or the income or profits thereof, avoids the assignment: that if the assignor is allowed to remain in the possession or control of any substantial part of the assigned estate, after the assignment, the law infers a secret trust for the benefit of the assignor, which cannot be rebutted, and avoids the assignment. Tested by these rules, the assignment is clearly void.

Its object is not the preference of certain creditors, for its benefits and provisions apply equally to all; nor does it seek equal distribution among all, for the right of the creditor to participate depends upon his assent to an alteration of the character and terms of his demand as a condition of enjoying such participation; it stipulates an advantage for the assignor to the detriment of the creditors. Finally, it is to be regarded as covering a secret trust for the benefit of the assignors, evidenced by the fact that the assignors were allowed to remain in possession and control of the assigned premises, and to enjoy the rents and profits thereof. The appeal should be dismissed, and the decree of the Circuit Court affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred in the result.

3 S. C. *296

*PARKER v. WILSON

(November Term, 1871.)

[Bonds @= 142.]

At the trial of an action on a bond payable in "dollars good and lawful money" of the State, dated in February, 1864, and given for the price of land, though it is competent to prove the value of the land for the purpose of showing that the parties contracted with reference to Confederate currency, yet it is error for the Court to instruct the jury that it is competent for them to adopt the value as proved competent for them to adopt the value as proved as the measure of their finding. In the absence of evidence, showing the value of Confederate currency in lawful money at the time of the contract, it was the duty of the jury to reduce the amount mentioned in the bond, according to the rule prescribed by the Act "to determine the rule prescribed by the Act "to determine the value of contracts made in Confederate States notes or their equivalent.

[Ed. Note.—Cited in Wilson v. Braddy, 16 S. C. 522.

For other cases, see Bonds, Cent. Dig. § 250; Dec. Dig. © 142.]

[This case is also cited in Moore v. Johnson, 7 S. C. 308, without specific application.]

Before Orr, J., at Abbeville, March Term, 1871.

Debt on bond, in the penalty of \$24,400, "good and lawful money of the said State," dated February 1st, 1864, and conditioned for the payment of \$12,200, in two equal installments, with interest from date.

It was admitted that the bond was given for the price of two tracts of land sold by the plaintiff, as Commissioner in Equityone containing 422 acres, sold at \$9,000, and the other 160 acres, sold at \$3,200. The plaintiff then called witnesses to prove the value of the land at the time of the sale. This evidence was objected to, but the objection was overruled and the defendant excepted. The witnesses testified that the land was worth \$7 per acre, in good money, at the time of the sale.

The presiding Judge charged the jury that they had a right to inquire into the real and true value of the land, for the purchase of which the said bond was given, or they might adopt the rule of the statute as laid down in the Act of the General Assembly, entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent," ratified the 26th day of March, 1869, as to them might seem proper and right.

To this instruction the plaintiff excepted. The jury found for the plaintiff \$4,205.20. The defendant appealed.

Perrin, Corbin, for appellant. McGowan, contra.

March 20, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. This action was brought *297

on a bond for the sum *of twenty-four thousand four hundred dollars, for lands purchased in the year 1864. Though the bond was given in 1864, there is nothing on the face of it that indicates that it was given with reference to "Confederate States notes or their equivalent."

The plaintiff introduced testimony to show the value of the land at the time the bond was given. This was objected to by defendant; the Court overruled the objection, and such ruling is made the ground of exception by the appellant.

With a view to arrive at the true consideration of contracts made during the years 1861, 1862, 1863, 1864 and 1865, it is not error to allow the introduction of testimony to show the value of the land at the time the contract was made.

Where there is no dispute as to whether the contract was made with reference to "Confederate States notes or their equivalent," but that is acknowledged by both parties, or appears upon the face of the contract, or it is ascertained by the jury that such contract was made with reference to such "notes or their equivalent;" and in the absence of any evidence to show the value of the obligation in lawful money of the United States, then it is the duty of the jury, as a rule of evidence, to determine the

Assembly, approved March 26th, 1869, entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent;" but until the fact is ascertained that such contract is made with reference to "Confederate States notes or their equivalent," the jury has no right to apply the rule of the statute to any contract.

There is error in that portion of the charge of the Judge to the jury where they were instructed that "they had a right to inquire into the real value of the land for the purchase of which the said bond was given, or they might adopt the rule of the statute as laid down in the Act of the General Assembly of March 26th, 1869."

The rule has been fully settled in the cases of Neely v. McFadden, 2 S. C., 169, Harmon v. Wallace, 2 S. C., 208, and McKeegan v. McSwiney, 2 S. C., 191.

The motion is granted, and a new trial ordered.

WILLARD, A. J., concurred.

MOSES, C. J., absent at the hearing.

3 S. C. *298

*CARTER v. BROWN.

(November Term, 1871.)

[Frauds, Statute of \$\leftharpoonup 138.]
In August, 1864, A made a verbal agree-In August, 1864, A made a verbal agreement with B, to serve him as overseer during the year 1865, for 16 bales of cotton, weighing 400 lbs. each, to be delivered by B to A, on the 1st January, 1866. A performed the agreement, and B refused to deliver the cotton: Held, That, although the agreement was within the Statute of Frauds, A was entitled to recover from B the value of the 16 bales of cotton—the law implying a promise, at the completion —the law implying a promise, at the completion of the services, to deliver them according to the terms of the original agreement.

[Ed. Note.—Cited in Walker v. Wilmington, C. & A. R. Co., 26 S. C. 90, 1 S. E. 366; Jacobs v. Mutual Ins. Co., 56 S. C. 561, 35 S. E. 221; Turnipseed v. Sirrine, 57 S. C. 578, 35 S. E. 757, 76 Am. St. Rep. 580; Ex parte Hiers, 67 S. C. 116, 45 S. E. 146, 100 Am. St. Rep. 713; Surasky v. Weintraub, 90 S. C. 534, 73 S. E. 1029.

For other cases, see Frauds. Statute of, Cent. Dig. § 330; Dec. Dig. &—138.]

Before Thomas, J., at Lancaster, October Term, 1871.

Assumpsit by Alexander Carter against D. W. Brown.

The plaintiff declared upon a special contract, and alleged that on the 30th August. 1864, the plaintiff agreed with the defendant to serve the latter as his overseer, from the 1st January, 1865, to the 1st January, 1866, and that, in consideration of such services to be performed, the defendant promised to deliver to the plaintiff, on the 1st Janu- his part."

value according to the Act of the General ary, 1866, 16 bales of cotton, weighing 400 pounds each; that plaintiff faithfully performed the services, and that defendant refused to deliver the cotton. The declaration also contained the common count in quantum meruit.

> The defence chiefly relied upon was the Statute of Frauds.

> The plaintiff gave evidence tending to prove a verbal agreement, made between himself and the defendant, in August, 1864, as alleged in the declaration; that plaintiff performed the services as overseer of defendant faithfully and well; that defendant refused to deliver the cotton on the completion of the agreement, and that cotton was worth. on the 1st January, 1866, 42 cents per pound.

> The presiding Judge charged the jury that the plaintiff could only recover so much as his services were really worth; that the special contract was within the Statute of Frauds, and void, and the jury had no right to consider it as evidence, fixing the sum, which defendant was liable for, at the value of 16 bales of cotton at the time of the completion of the services. To these rulings, and others to the same effect, the plaintiff excepted.

> The jury found for the plaintiff \$1,192.77. and he appealed, on the ground of error in the rulings of the Circuit Judge.

Kershaw, for appellant:

The questions made by this appeal are:

1. Is the special agreement void under the Statute of Frauds?

*299

*2. Can the special agreement be resorted to by the jury as a measure of damages under the quantum meruit counts.

1. Where the verbal contract has been entirely executed by one party, the consideration can be recovered from the other. When a deed of land is given, or goods delivered and accepted, in pursuance of the contract, an action lies to recover the value of the land or goods. And the same where the contract is within the Statute as being not to be performed within a year from the making, but has been fully performed on one side, whether within the year or not; the consideration of the performance, though by the contract not payable until after the expiration of the year, may be recovered by action when the stipulated time comes.—Browne on Stat. Frauds, § 117.

He cites, among other cases, Donellan v. Read, 3 B. & Adol., 899, where it is said by the Court (Littledale, J.): "In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year, and yet surely the law would not sanction a defense on that ground when the buyer has had the full benefit of the goods on

where, upon a verbal contract to pay for certain services on their being performed by conveying a certain tract of land, the plaintiff having performed the services pursuant to the contract, brought an action for them, the value of the land could be resorted to as a measure of damages .- Burlinghame v. Burlinghame, 7 Cowan, 92, 94.

Where the plaintiff had sold and conveyed a tract of land to the defendant, and an action was brought to recover part of the purchase money, the plaintiff was non-suited on the ground that the contract, not being in writing, was void under the Statute of Frauds. On appeal, the Court set aside the non-suit; Nott, J. saying, "after the titles were made and accepted, it was no longer a contract respecting the sale of land. The contract was at an end, and there was nothing left but a promise to pay, in consideration of the land thus actually transferred. If the promise had been in consideration of a verbal promise which had not been executed, it certainly could not have been enforced; but having been made for a consideration actually received, the plaintiff was entitled to recover."-Wood v. Gee, 3 McC., 421.

The case of Gee v. Hicks, Rich, Eq. Cas., 5, 18, decided in 1831, is the leading case on this subject in our reports, and reviews all the decisions. Judge O'Neall, delivering the opinion of the Court, says:

*"This clause of the statute was intended to be applicable to contracts wholly executory, and not intended, on either part, to be performed within a year. In other words, both the consideration and the promise must be executory, and neither to be done or performed within a year. If the consideration is executed at the time of the contract made, or is intended to be, and is performed within a year, or, after the expiration of the year, is entirely executed by one party at the request or by the consent of the other party, then the promise to pay for this performance, cannot be within the statute. The party for whom it is done has waived that protection, and placed himself upon the footing of a debtor for a past and executed consideration."

Again, "the intestate promised to pay, at twenty-one years of age, to Vernon C. Hicks, \$3,000, if he would come with him to South Carolina. The removal to this State was what was to be performed by Vernon C. Hicks. It was capable of being, and actually was performed within a year of the time that the contract was made. It was not, therefore, a contract within the statute. If it had originally been, and performance was made at the request or by the consent of the intestate, I should have held that the executory

In New York it has been decided that that it became, on the part of the intestate, debitum in præsenti, solvendum in futuro.

> This case is referred to and approved in Bates v. Moore, 2 Bail., 616.

> 2. The special agreement is evidence to fix the amount the plaintiff was bound to pay at the completion of the services, and that amount was the then value of the 16 bales of cotton.

Allison, with whom was Wylie, contra:

The specific agreement for sixteen bales, as alleged and proven, is void under the fourth Section of the Statute of Frauds, because it was an agreement not to be performed, and which could not be performed, on either side, within the space of one year from the making thereof, and it was not in writing, as required by the statute. And the Circuit Judge was correct in so charging the jury.—Browne on Stat. of Frauds, 502, reads as follows: "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

*301

same author, on p. 277, § 273, treating *of the force of the words "to be performed," says: "On these words much reasoning has been expended. The result seems to be that the statute does not mean to include an agreement which is not likely to be performed, nor yet one which is simply not expected to be performed, but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within the space of a year from the making." Same author, p. 285, § 283, says: "Where the manifest intent and understanding of the parties are that the contract shall not be executed within the year, the mere fact that it is possible that the thing agreed to be done may be done within the year, will not prevent the statute from applying." -Boydell v. Drummond is, in the same connection, referred to by the same author.

The contract must be capable of entire and complete execution within the year.-Id. 287. § 285. It is not enough that it may be commenced, or even nearly completed in that space of time.

A contract for a year's service, to commence at a future day, clearly within the statute.—Bracegirdle v. Heald, Browne, § 286.

Same author, after referring to the cases of Donellan v. Read, Sweet v. Lee, Souch v. Strawbridge, says, in § 288, p. 289: "That it is a settled law, that a promise to pay money, as much as a promise to do any other act after the expiration of a year, is within character of the contract was changed, and the statute." Same author, p. 292, § 291,

says, after a review of all the cases: "If the time to be occupied in the performance of the agreement exceeds a year never so little the statute applies." And in support of this doctrine he quotes from Lord Ellenborough: "This enactment (meaning the fourth Section of the statute) extends to all contracts, the complete performance whereof is, of necessity, extended beyond the space of a year; the · rule being, that where the agreement distinctly shows upon the face of it that the parties contemplated the performance to extend over a greater space of time than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appear to have been the misunderstanding of the parties at the time, that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period."-Chitty on Contracts, p. 74, marg. 71.

"So an agreement for a year's services, to commence at a subsequent day, being a contract not to be performed within a year from the time of the agreement, must be in writing, and therefore no action can be maintained for the breach of a verbal contract

*302

made on *the 27th of May, for a year's services, to commence on the 30th of June following."—Chitty on Contracts, p. 74, marg. 71.

Memorandum must be made at the time of the agreement or some time afterwards and before suit brought; and a memorandum made before the date of the agreement could not be said to be a memorandum of the agreement.—Browne on Statute of Frauds.

But it is insisted that the alleged special agreement is for a past and executed consideration, and therefore not within the Statute. But we cite Browne on the Statute to the contrary, from page 117 to 133, inclusive, Sections from 114 to 128 inclusive:

"Section 117. When a verbal contract is completely executed by one party, the consideration can be recovered from the other, notwithstanding the Statute of Frauds, * * * But when the consideration is itself a promise such as the Statute requires to be in writing, as if the consideration of a conveyance of land be the parol promise of the grantee to let it back to the grantor for life, then of course the rule does not apply, as the effect would be a plain violation of the Statute, namely, to enforce indirectly that parol promise."

"Section 118. The general rule is, that execution by one party, in whole or in part, does not entitle him to an action at law for damages for the non-performance by the other party."

"One who has rendered services in execution of a verbal contract which, on account of the Statute, cannot be enforced against the other party, can recover the value of the services upon a quantum meruit."

We never have and do not now deny the right of the plaintiff to recover on the quantum meruit count of his declaration or implied promise, but affirm that the alleged special agreement is within the Statute and void.

In 1832 it was decided that the 4th Section of the Statute, which requires a contract not to be performed within the year to be in writing, has been held to apply only to cases where the whole contract was executory; and not to cases where it had been performed by one of the parties within the year.—Bates v. Moore, 2 Bail., 616. Same principle decided in Gee v. Hicks, year before—Rich. Eq. Cas., 5.

The obiter dictum of O'Neall, in the latter case, viz.: "If the agreement in such a case is, after the expiration of a year, entirely performed by one party, at the request or by the consent of the other party, the promise to pay for this performance cannot be within

*303

the *Statute," applies not to cases where the consideration itself is such a promise as is required by the Statute to be in writing.

In 1848 it was decided, in construing agreements not to be performed within a year from the making, that agreement "means an agreement not to be performed in the space of one year, and expressly so stipulated. A contingency is not within the Statute—it must appear, within the agreement, that it is not to be performed till after the year, to make a note in writing necessary."—Thompson v. Gordon, 3 Strob., 199.

In 1851 it was again decided, that "the Section of the Statute which is relied on, extends only to cases where, by the appointment or understanding of the parties, there is not to be complete performance on either side within the year."—Compton v. Martin, 5 Rich., 16.

A case in 1859: "A and B agreed by parol as follows: A agreed to erect a steam saw mill on the land of B, and to manage the same at his own cost, and B agreed to deliver, at the mill, at his cost, all the timber growing on a certain tract of land belonging to B, and they were to divide the profits between them. A erected the mill, and the parties complied with the contract until B's death, and then his administrators refused further to comply: held that the contract was void under the Statute of Frauds."—Jones v. McMichael, 12 Rich., 176.

March 29, 1872. The opinion of the Court was delivered by

WILLARD, A. J. If the plaintiff was entitled to recover the contract price agreed upon, either under the special count, or the indebitatus assumpsit, then the ruling below was erroneous. The contract was clearly, at its inception, within the Statute of Frauds.

It was a contract, on the one hand, for la- | As to the second objection, this action, conbor and service for the period of a year, to commence at a day subsequent to that of ise, is not based upon the original contract, the making of the contract, and on the other side, for payment for such labor and service, in specific personal property, at the termination of such period. As the contract was not in writing, neither party could have enforced it, apart from the effect of complete or practical performance had under it.

The plaintiff has, however, rendered the labor and service intended by the terms of the contract, and now seeks to recover the value of the specific property, which, according to the terms, he ought to have received at the completion of performance on his part.

*304

*When labor and service are rendered at the special instance and request of another, the law implies a promise to pay for the same: if there is an express promise to pay, the implication does not arise, for implication only supplies that which is not otherwise evidenced. Where the price is not fixed by agreement a promise is implied to pay what it is reasonably worth. A promise may be implied to pay a particular sum, or to perform a particular act, where, although the parties may have been silent, it is evidenced by attending circumstances, that they had mutually in mind such sum or particular act as the consideration of the performance of such labor or service.

It is to be inferred in the present case, that the performance of what was required by the contract to be done on the part of the plaintiff, was mutually understood, at the time of such performance, to be conditioned on the performance by the defendant of that which he had engaged to do, according to the terms of the contract. Such being the case, a promise is to be implied on the part of the defendant to do that which the contract required him to do.

As this action can be supported upon such implied promise, it is not necessary that the plaintiff should rest his demand upon the original contract, which was affected by the Statute of Frauds.

The objections that may be anticipated to such an implication are: first, that the whole transaction having originated in an express contract, no ground for the implication of an implied contract exists; and, second, that the contract being originally void under the Statute, it cannot be resorted to for the purpose of such collateral proof as is essential to lay the ground work for such an implication.

In order to defeat the implication on the ground that the transaction was within the terms of an express contract, it would be necessary to show that such contract was proper evidence of the intent of the parties; but this is prevented by the operation of the

sidered a proceeding upon an implied promand therefore is not within the terms of the Statute of Frauds. The statute does not prevent the contract from being looked into, as matter of evidence, for any other purpose than that of supporting an action founded upon it. Again, in looking into the agreement for the purpose of characterizing the implied promise to pay, it is regarded, not

as an agreement, but as part of a *transaction between the parties; whatever obligatory force may attach to it, arises out of the subsequent fact of performance, and not upon the assumption that the agreement itself is competent proof of such obligation.

While it is to be regarded as a contract without obligation, it is capable of entering into, and forming part of the transaction connected with it.

It is evident that the promise implied, as arising on the completion of performance, is, in itself, not affected by the Statute of Frauds, for it was a promise of immediate compensation of the kind contemplated by the original agreement.

It will not be necessary to consider whether, under any circumstances, a promise implied by law is within the Statute, although such a proposition would not be without at least indirect support from the adjudicated

It will be found that the grounds of the foregoing conclusions have abundant support in the adjudicated cases. The leading cases will be considered in their bearing on the propositions.

Gee v. Hicks, Rich. Eq. Ca., 5, throws important light upon this question. By the agreement in that case an act was to be performed within the year, the pecuniary compensation for which was to be paid after the expiration of such year; the act required was, in fact, performed within the year, and it was held that the contract was not within the Statute.

The conclusion of Judge O'Neall was, that to bring a contract within the Statute, it must appear that neither part was to be performed within the year, and he concludes that if the consideration is executed at the time the contract is made, or is intended to be, and is performed within a year, the contract is not within the Statute. So far, what is said may be regarded as having reference to the validity of the original contract, but what follows clearly applies to a promise implied from the fact of performance. He says: "if a contract, not to be performed within a year, is, after the expiration of the year, entirely executed by one party, at the request or by the consent of statute, which acts directly upon the value the other party, then the promise to pay of the contract as evidence of such intent. for this performance cannot be within the

Statute." He considers Mayer v. Pyne, 11 | lessee under it, it is evident that it can sup-E. C. L., 41, as holding, that there is an implied promise to pay, arising on the delivery of goods, according to a price agreed upon, although that price was fixed by a parol contract not to be performed within a year. It is not necessary now to examine the question, whether all contracts based upon ex-

*306

ecuted con*siderations are beyond the Statute, that question not being involved in the present case. A case is possible, that may not have been before the mind of the Court, as where one, in consideration of a sum of money, presently paid, agrees to perform some act at a future time, intended to be beyond a year from the agreement. The case that was evidently in the mind of the Court was that of a beneficial act, presently performed, to be compensated for by a pecuniary sum payable after the year, and there is strong ground in the adjudicated cases for the support of such a proposition. Gee v. Hicks did not, however, rest upon the propositions advanced, involving the idea of a new promise, either express or implied, arising on performance, and the point must, therefore, be regarded as open.

In Bates v. Moore, 2 Bail., 614, the contract was also capable of being performed within the year, payment being only postponed beyond the year.

Although, under the ruling in Gee v. Hicks, this contract was originally valid, yet so strong was the impression on the mind of Judge O'Neall, derived from a promise implied from the fact of performance, that he again adverts to that principle. He says, after referring to the fact of performance on the part of plaintiff, "and this created a liability on the part of the defendant, to pay for them according to the contract."

In Wood v. Gee, 3 McC., 421, where there was a parol contract for the sale of land, Judge Nott observed, that where the contract had been executed by the delivery of the title and land, it is no longer a contract relating to land, but a promise to pay the purchase money.

We have reason to believe that the learned Judge, in using this expression, had before his mind the promise implied from the fact of performance, and not the original contract. He cannot be supposed to have affirmed that the contract had changed its character by being in part performed; such a conclusion would be in direct conflict with what was held in Cocking v. Ward, 50 E. C. L., 858.

In Compton v. Martin, (5 Rich., 14,) it was held that a parol contract, though void under the Statute, would operate so far as to sustain the title of one as lessee for years of a slave under such contract, as against the party delivering the slave. If such a con-

port an implication of a promise to pay purchase money, according to its terms.

In Jones v. McMichael, (12 Rich., 176,) the *307

only question appears *to have been, whether the contract was intended to survive the original parties; no opportunity was, therefore, afforded for the application of the principle now under consideration.

Donellan v. Read, (2 B. & Ald., 899,) and Cherry v. Henning, (4 Exch., 631.) were both cases in which the contracts were held not to be within the Statute, upon the ground that they were to be performed within the year, although to be compensated for by payments made after the year. Littledale, J., says, in the former of these cases, in reference to the Statute, "and surely the law would not sanction a defence on that ground, where the buyer had the full benefit of the goods on his part." Where the equity and justice are so strong as to form an element in considering the construction of a Statute, they are certainly strong enough to raise a new promise out of the acceptance of the benefits of the contract.

In Maver v. Pyne, (11 E. C. L., 104,) Best, J., held that the Statute of Frauds does not operate to prevent a person from being compelled to pay for what he has actually received. The proposition now under consideration is but an artifical mode of expressing this same idea.

Cockiny v. Ward, (50 E. C. L., 838,) involves an analogous principle. There, although the contract was void under the Statute, yet the plaintiff was allowed to recover upon an account stated, upon the ground of an express promise made after performance. The necessity for an express promise in that case arose out of the fact that the plaintiff claimed to recover upon account stated. Had the plaintiff claimed to recover on an implied promise, there is nothing in the case inconsistent with the idea of his recovery.

It will be observed that the last mentioned case seriously questions the proposition, that performance on one side of a contract within the Statute, is to be regarded as so far complete performance of the whole contract, that the Statute will not apply to an action to enforce the other side. If, however, the proposition now under consideration is sound, the discussion of the effect of performance on one side, upon the original contract, will become practically unimportant, for an implied promise springing up in such cases, will always form a new ground of right in the party who has actually performed.

Lockwood v. Barnes, 3 Hill, N. Y., 128, sustains the right of a party to recover on a quantum meruit who has rendered service tract can operate to support the title of a under a contract void under the Statute. If the law finds a consideration adequate to] raise a promise to pay on a quantum meruit *308

it will *certainly go a step farther, and enquire whether that consideration was affected by either an express or tacit understanding as to the measures by which it was to be compensated.

It is clear, on the authorities, that the proposition under consideration is in harmony with all the decisions, and affords a means of reconciling what little want of argument appears among them on this subject. It is certain that all these cases have been greatly influenced by the manifest injustice of allowing a party, after having obtained the advantage of a contract, to fly to a Statute, intended to prevent frauds, for impunity in refusing performance of his corresponding obligation. It is fortunate that a principle presents itself, by which this injustice may be avoided, without putting forced and unnatural constructions upon the language of the Statute.

The rulings were erroneous in excluding the plaintiff from recovering, according to the terms of the original contract, under a promise evidenced by the fact of performance by the plaintiff, accepted by the defendant.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 308

BULOW v. WITTE.

(April Term, 1871.)

[Infants \$\infants 39.]

Under a petition, filed in 1859 by trustees, for the sale of real and personal estate of two infants, aged twelve and ten years, named in the petition, but not as parties thereto, an order was made directing a master "to assign a guardian ad litem to the infants to appear to this petition." The Master made an order appointing the mother of the infants, with her consent, their guardian ad litem—the order reciting that "the minors being brought into Court, and selecting their mother," &c., but neither the petition, nor a subporna ad respondendum, was served on the infants, nor was an answer put in for them. The petition was then referred to a Master to report on the facts, and whether a sale would be to the advantage of the infants, and on his report com-Under a petition, filed in 1859 by trustees, facts, and whether a safe would be to the avantage of the infants, and on his report coming in recommending a sale—in the propriety of which, as the report stated, the guardian ad litem of the infants concurred—it was confirmed, and a decree for sale made. On bill filed by the infants against the purchaser of the real estate under the decree: Held. That the infants had been made parties to the petition and were concluded by the decree.

[Ed. Note.—Cited in Walker v. Veno, 6 S. C. 463; Brown v. Coney, 12 S. C. 152; McCrosky v. Parks, 13 S. C. 91, 93; Trapier v. Waldo, 16 S. C. 276, 282; Finley v. Robertson, 17 S. tioned.

C. 435, 440; Rollins v. Brown, 37 S. C. 347,
 16 S. E. 44; Morgan v. Morgan, 45 S. C. 334,
 23 S. E. 64.

For other cases, see Infants, Cent. Dig. § 86; Dec. Dig. \$\ighthank{1}{\infty} 39.]

[Infants > 89.]

Under the former system of equity procedure, there was no prescribed mode of making an infant a party defendant except his appearance by a guardian ad litem, appointed by Court for that purpose-neither service of a subpæna ad respondendum on the infant, nor an answer put in by him, was essential, though both were usual.

[Ed. Note,—Cited in Tederall v. Bouknight, 25 S. C. 283; Robertson v. Blair & Co., 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see Infants, Cent. Dig. §§ 257, 258; Dec. Dig. €=89.1

[Infants \$\infants 40.]

Decree in Equity, in March, 1859, for sale of infants' real estate, to be made by a Mas-"at such time and place, and on such terms as he, with the advice of the trustees" of the infants, "might approve." The sale was made in June, 1862; Held, That the sale was not void merely because the Master received payment from the purchaser in Confederate currency.

[Ed. Note.—For other cases, see Infants, Cent. Dig. \$\infty\$90; Dec. Dig. \$\infty\$10.]

[Infants \$\infants 40.]

*A sale of real estate of infants was made by a Master, at public auction, in June, 1862, under a decree which gave no direction as to advertising. It was advertised in a newspaper for a period less than one week before it was made: *Held*, That the sale was not irregular and void.

[Ed. Note,—Cited in Ex parte Alexander, 35 S. C. 412, 14 S. E. 854.

For other cases, see Infants, Cent. Dig. § 90; Dec. Dig. & 40.]

[Infants @== 40.]

A sale in June, 1862, by a Master in Equity, was not irregular because the decree for sale made in March, 1859, and renewed in March and November, 1860, had not been renewed within a year and a day before the sale.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 90, 91; Dec. Dig. \$=40.]

[Infants 35, 40.]
A sale of the real estate of infants, made by a Master in Equity in June, 1862, under a decree made in March, 1859, and continued by an order of March, 1860, and again continued by an order of November, 1860, was not void because the decree had not been renewed as directed by Section 4 of the Act of December, 1861, commonly called the Stay Law.

[Ed. Note.-For other cases, see Infants, Cent. Dig. §§ 79, 90; Dec. Dig. 535, 40.1

Before Carpenter, J., at Charleston, April Term, 1870.

This was a bill in Equity by Thomas Leonel Bulow, and John Charles Bulow a minor, by his next friend, plaintiffs, against Chas. O. Witte, defendant. Its object was to obtain a decree setting aside the sale to the defendant, made June 3d, 1862, by a Master of the Court, of the Long Savannah plantation, hereinafter more particularly menThe facts of the case are stated in a report of Master Tupper, dated 13th of March, 1867, made under a bill filed by Thomas Leonel Bulow against Arthur G. Rose, surviving executor and trustee under the will of John Joachim Bulow, deceased, and John Charles Bulow. The report is as follows:

"On the 11th January, 1859, Joseph Winthrop and Arthur G. Rose, by the title and designation of Trustees under the will of John Joachim Bulow, deceased, filed a petition in this Court, (the Court of Equity for Charleston,) setting out that Mr. Bulow, on the 17th January, 1840, by his will, among other things, gave his Savannah plantation, in St. Andrew's Parish, with about two hundred negroes, to James Louis Petigru, the petitioners, and Alexander Brown, in trust for his son, Thomas L. Bulow, for life, and after his decease to his children living at the time of his death, and appointed them his executors. That the first named refused, and the others accepted the trust, and proved the will, and when the said Thomas L. Bulow came of age settled with him as executors, and let him into possession. The petitioners proceed to say that he died 15th July, 1857, leaving two sons, infants, to wit: Thomas Leonel Bulow, then of the age of twelve, and Charles Bulow, of the age of ten years: that by his will Joseph Winthrop and Thomas Lehre were appointed guardians of the children. That there were two hundred negroes. but they had not increased, and that the crops were deficient. That the petitioners

*310 *were inclined to sell the whole property, but if the land cannot be disposed of at a reasonable price, they would retain negroes enough to cultivate provisions, and cut wood for market, but that it was out of their power to cultivate the plantation in rice or cotton to any advantage. That, in fact, it would be a breach of trust in them to continue to plant, if they had power to sell. That the legal interest was in them, as they were advised, and they could lawfully sell land and the personalty with the permission of the Court, or the personalty with the permission of the Court of Ordinary. They proceeded to pray that the Court would take the case of the infants, as well as themselves, into consideration, and grant them the opportunity of proving these allegations, and sanction the sale of the whole property, or as many negroes as may be spared from the unprofitable culture of rice and cotton, according to the circumstances.

"On the 16th February, 1859, Chancellor Wardlaw ordered that it be referred to one of the Masters of this Court to assign a guardian ad litem to the infants, Thomas Leonel Bulow and Charles Bulow, to appear to this petition.

"On the 19th February, 1859, I reported that the minors being brought into Court,

and selecting their mother, Mrs. Caroline Bulow, as their guardian ad litem, and the said proposed guardian also appearing in person and consenting to act, it was ordered that Mrs. Caroline Bulow be appointed guardian ad litem of the minors, Thomas L. and Charles Bulow.

"By my report of the 15th March, 1859, I certify that upon the evidence submitted it was manifestly for the interest of the infants that the plantations, that is to say, a plantation on Santee that belonged to the estate of Thomas L. Bulow, and the Long Savannah plantation in St. Andrew's Parish, and the negroes, be sold,(a) and this report was confirmed on the same day, and I was ordered to sell at such time and place, and for such terms as I, with the advice of the trustees, may approve, all the real and personal estate of John Joachim Bulow, and that the proceeds be invested in the name of Joseph A. Winthrop and Arthur G. Rose, trustees for the infants, Thomas Leonel Bulow and J. Charles Bulow, as devisees under the will of their grandfather, the said John Joachim Bulow.

"Under this decree I sold one hundred and seventy of the said slaves on the 10th and 31st January, 1860, and reported the sales to *311

*the Court on the 13th March, 1860. I further reported that the real estate consisted of a rice and cotton estate in St. Andrew's Parish, known as "Long Savannah." That no sufficient offer having been made for this property, and, with the concurrence and advice of the trustees, that I withdrew it from the sale, and, for the purpose of protecting the plantation from depredations, also reserved twenty negroes to remain upon and cultivate the provision land under the charge of the trustees, until a purchaser could be obtained for the real estate. I reported that from the cash proceeds of sale I had paid to Joseph A. Winthrop, Esq., \$52,-520, and he had, under my direction, invested this sum in city 6 per cent. stock in the name of himself and Arthur G. Rose, trustees of Thomas L. and J. Charles Bulow, as directed by the decree.

"On the 13th March, 1860, the report was confirmed, and the order of sale extended as to the real and personal estate unsold.

"On the 5th November, 1860, I reported that on 13th March, 1860, I had submitted a report of sales, and that I now submitted a detailed statement of all the sales and an account of receipts and disbursements, and that I had paid to the trustees, in cash, stock, and bonds, \$106,201.02. I further reported that the plantation called "Long Savannah,"

⁽a) This report set forth the facts and the evidence, and stated that "Mrs. Caroline Bulow, the mother and guardian ad litem of the infants, concurs with the executor and trustee in the propriety of a sale of the whole property."

in St. Andrew's Parish, and the twenty ne- 1 DeS., 109, Dinckle v. Timrod: Id., 115. groes retained thereon for its preservation, as reported on the 13th day of March, 1860, still remained unsold, no purchaser having been found for them, and I asked a further extension of the order of sale in respect to the said plantation and negroes. On the same day the report was confirmed.

"This plantation and the twenty negroes, increased to twenty-three, remained unsold until May, 1862, when, by the request and advice of the trustees, and with the approval of the Solicitors then in the cause, I sold the said plantation at private sale, as the decree authorized, to Mr. C. O. Witte, for the sum of \$7,500, and the negroes at public sale, for \$7,215, as appears by my account of sales and of disbursements herewith filed, and from which it will be seen that the proceeds of said sales were paid over to Mr. Winthrop on the 16th October, 1862."

(In the above statement there was an error in this, the Long Savannah plantation was in fact sold, not at private sale, but at public auction to the highest bidder. sale and conveyance were made June 3d, 1862, and the advertisement of sale was first inserted in the Charleston Courier on the 28th May, 1862, six days before the sale. Payment was made in Confederate Treasury notes.)

*312

*His Honor the presiding Judge made a decree which, in effect, set aside the sale of the Long Savannah plantation to defendant on plaintiff paying to defendant the value in lawful money of the Confederate Treasury notes paid to the Master.

The defendant appealed on the following grounds:

- 1. That defendant is a bona fide purchaser for valuable consideration under the decree of the Court, and his title is not affected by any irregularity of the Court-1 N. & McC., 408, Barkley v. Screven; 1 McC., 187, Mc-Daniel ads. Richards; 1 Bail., 512, Henry v. Ferguson; 1 Bail., 611 [21 Am. Dec. 492], Williamson v. Farrow; 1 McC., 272, Turnipseed v. Hawkins; 2 Sch. & Lef., 576, Bennett v. Hamill; 4 Rich. Eq., 491, Williman v. Holmes.
- 2. That the irregularities set forth in these proceedings must be brought up by a bill of review; they cannot be reached by a bill to set aside the decree.—Adams' Eq., 828; Story's Eq., 404; 2 Rus. C. P., 1,044; Bennett v. Winter, 2 John. Ch., 206; Taylor v. Sharp, 3 P. Wm., 371; Hinson v. Picket, 1 Hill Ch., 35.
- 3. That the proceedings are sufficient to carry the infant's estate.—3 Stat., 707; Id., 708; 2 Story Eq., 575; 5 Strob., 7, State v. Tidewell; 2 Keen, 185; 2 P. Wm., Eyre v. Countess of Shaftesbury; Id., 125; 31 Eng. C. L., 681; Rex v. Isley, 2 Fon., 247; 2 Sto. Eq., 550; Bail. Eq., 463, Spencer v. Bank; 150

DeBrahm v. Fenwick; Rich. Eq. Cas., 403, Bulow v. Buckner; 1 Rich. Eq., 361, Pell v. Ball; 1 Johns. Ch. R., 370, Mills v. Dennis; 6 Ves., Jr., 6, Lord Ashburton v. Lady Ashburton; 3 DeS., 21, Huger v. Huger: 16 Ohio S. R., White v. Turpin.

Phillips, Memminger, for appellant:

1. Defendant purchased for value under decree, and is not bound to look to regularities in the proceedings.

Barkley v. Screven, 1 N. & McC., 408, was a purchase at Sheriff's sale, where the objection was that all the intermediate executions between the first and the pluries were not produced.

McDaniel v. Richards, 1 McC., 187, record of naturalization held to imply proof of all prerequisites, although not recited or proved.

McNish v. Guerard, 4 Strob. Eq., 80, Court substituting a trustee, bound to presume that a conveyance was made by preceding trustee.

Curtis v. Price, 12 Ves., 105, recites ir-*313

regularities the most sub*stantial, in the case of Lloyd v. Johns, 9 Ves., 37, which were not allowed to affect a purchaser:

- 1. An account of the personalty previously ordered, which was never taken, which was a condition precedent to the application of the real estate.
- 2. Cause brought on for further directions on a separate report, which was never filed.
- 3. The decree on further directions for a sale, was to pay not only the testator's debts, but also those of one Pugh, which were no charges upon the estate.

The Lord Chancellor held that the purchaser could not be affected, although he had notice of all the proceedings, being stated in his agreement for the purchase.

Thompson v. Tolmie, 2 Peters, 157, the law appears to be settled that Courts will go far to sustain bona fide titles acquired under sales made by order of Orphans' Courts. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the Court jurisdiction appear on the face of the proceedings.

Williman v. Holmes, 4 Rich. Eq., 491, "the power of the Court to sell trust estates is not doubted, and when such an estate is sold under its decree, the Court is one of the contracting parties—is, in fact, the vendor. It assures the purchaser of its power to sell, and to make good titles. The purchaser thus becomes the owner of the fee, bona fide, and for valuable consideration. His equity is high. Would it not be hard to affect him with notice of equities, and to charge him with trusts which the Court itself has overlooked or disregarded. When the Court assumes the administration and orders a sale,

it is its duty to protect the rights and interests of all parties related to the estate. If the Court omits to make the proper administrative orders, or the persons to whom the Court commits the management should prove unfaithful and the fund be lost, ought that to affect the title of the purchaser? I think not, when he pays his money into Court or into the hands of its confidential agents, that should discharge him.

Bennett v. Hamil, 2 Sch., 8 Lefroy, 565. A purchaser, under a decree, shall not be affected by error in the decree—e. g., in its not having given a day to an infant defendant to show cause, or in directing a sale of lands to satisfy a judgment without an account of the personal estate.

A purchaser has a right to presume that *314

the Court has taken the *necessary steps to investigate the rights of the parties, and that on that investigation it has properly decreed a sale. But he ought to see that proper parties are before the Court.—See, also, 2 Wall., 239.

II. The irregularities set forth in these proceedings can only be reached by bill of review—not by bill to set aside the decree.

What are they? They are alleged to be:

- 1. Making the infants parties by their personal appearance in Court, and not by subpæna.
- 2. That the order of sale, under which the Master acted, was not extended.

By the prayer of Winthrop's petition, (Simons' brief, p. 2,) the Court is asked to take the case of the infants into consideration-11th January, 1859.

February 16, 1859-Master ordered to assign a guardian ad litem of the infants.

February 19, 1859—The minors brought personally into Court, and mother appointed and brought personally in and consenting. She is appointed guardian ad litem.

March 7, 1859-Master reports that the mother and guardian ad litem concurs in the propriety of sale, and recommends the sale.

March 15, 1859-Order confirming report, and ordering sale.

March 13, 1860-Report sales of personalty. Extension asked of realty. Granted.

November 5, 1860-Further extension asked. Same day, report confirmed, and extension implied by granting.

It seems clear, therefore, that the Court had jurisdiction of the subject, and had before it all the parties, and that the alleged errors are formal.

- 1. Want of subpœna and answer.
- 2. Want of a former order, extending the time of sale.

An infant is as much bound by a decree, as one of full age-when the infant is a party.-1 Danl. C. P., 92; Gregory v. Molesworth, 3 Atk., 626.

Now, then, if these alleged errors existed in a decree against adults, how are they to be corrected?

A decree, in this country, is considered as enrolled by filing the decree.-Whiting v. Bk. U. S., 13 Peters, 6; and in this State, 2 Hill Ch., 353, Hinson v. Pickett.

So that all the English law, as to enrolled decrees, applies to decrees filed as usual.

*3 Dan. C. P., 1724, if a party seeks to reverse an enrolled decree, he must file a bill of review.

Same, p. 1727-If decree has been signed and enrolled, so that the cause cannot be re-heard, and a party seeks to reverse the decree, the remedy is by bill of review.

So early as Lord Bacon's ordinances, it was provided that no decree should be reversed, altered or explained, being once enrolled, but upon bill of review.

Taylor v. Sharp, 3 P. W., 371.

Young v. Keightly, 16 Ves., 348, error apparent on the face of decree-ground only of bill of review.

Bennet v. Winter, 2 J. C. R., 205—a final decree enrolled cannot be opened or altered but on a bill of review.

Story's Eq., p. 411.

Error in matter of form only, although apparent on the face of a decree, seems not to have been considered a sufficient ground for reversing the decree; and matter of abatement has been also treated as not being capable of being shewn for error to reverse a decree.

III. Proceedings are sufficient in any event to convey the infant's estate.

1. This case differs from any ordinary case of trusteeship, in that one of the petitioners was the testamentary guardian of the infants, and had actual possession.

After an infant is once a ward in chancery, any subsequent matter may be determined on petition or motion, and he can be made a ward by simply filing a bill, to which he is party.—Adams' Eq., 281.

The Court, ex officio, was bound to notice the infant's rights, and did so by ordering a guardian, and an appearance by both.

The Court accepted the appearance as sufficient, and made the infants wards of Court.

As to the formalities usual in such cases, the best evidence is to be found in C. J. Dunkin's opinion, in Moore v. Hood, 9 Rich. Eq., 329, 330, as follows:

"Until within a few years past it was not the practice, when a guardian applied to the Court, either for instruction or for a change of his ward's personal estate, to make his ward a formal party before the Court. Latterly, he is usually made a party; and this is done by appointing the crier of the Court, or some other person, his guardian ad litem, who signs his formal answer submitting his rights. The appointment is commonly made by the *316

Commissioner, *and it is very difficult for the Court to do more. After all, the proceeding is necessarily very much under the direction of the guardian. The Court, and its officer, is presumed to examine the evidence as to the expediency of the proposed change of investment—and this is equally done whether the proceeding be in the name of the guardian alone, or of the guardian and the minor suing by his prochein ami, (the guardian,) or by the guardian against a formal defendant, the guardian ad litem."

Bulow v. Buckner. Rich. Eq. Cas., 401, is conclusive to show that the Court of Equity has jurisdiction to sell minor's real estate. "The jurisdiction of Chancery to sell and convey an infant's estate, however questionable it may have been when first exercised, is now too firmly established to be shaken. It has been familiarly exercised ever since a Court of Chancery has existed in this State, and very many titles now depend upon it. It is in many instances an exceedingly beneficial jurisdiction, especially in this country, where land is frequently the least valuable and productive sort of property."—Per Harper Ch., 403.

In this case, the petition was on the part of the trustee and guardian, without making the children parties.

Huger v. Huger, 3 Des., 21, in 1809, establishes the jurisdiction of the Court of Equity to sell infant's real estate—declaring that the reason for the distinction between real estate and personal property, which existed in England, did not exist here.

Lord Ashburton v. Lady Ashburton, 6 Ves., Jr., 6, executors and trustees were directed by the will to invest in the funds for the benefit of a minor. The minor files a petition to invest in lands, and the Court, after enquiry as to the practice, allowed the change.

Capel v. Butler, 3 Sim. & Stu., 457—If a person who is named as a defendant, but has never been served with a subpœna, or appeared to the bill, appears by counsel at the hearing and consents to be bound by the decree, the defect is cured.

Spencer v. Bank of the State, Bail, Eq.,

The jurisdiction of the Court of Equity to dispose of the real estate of infants and other persons under disability, has been too long exercised to be now questioned; and a conveyance or mortgage executed by the master in pursuance of the order of the Court, which was intended to operate on the title of infants, is binding on them, if they are parties to, or represented in the proceeding in which the order is made.

Simons, contra:

*317

*1. That the title to the plantation was in complainants at the time of the application for sale by Messrs. Winthrop and Rose.

Ramsay v. Marsh, 2 McC., 258; Posey v. Cook, 1 Hill, 414; 2 Cruise Dig., Chap. VII, § 2, par. 5, 337; 2 Blackstone, 170, 171; 2 Crabbe, § 1866; 2 Cruise, Chap. VII, § 1, Ib. 356, Ib. 363.

2. That the complainants in the present case were not made parties to the petition of Messrs. Winthrop & Rose, and that the decree for sale thereon was not binding on them.—Moore v. Hood, 9 Rich. Eq., 311; Hull v. Hull, 2 Rich. Eq., 87; Wightman v. Gray, 10 Rich. Eq., 531; Sollee v. Croft, 7 Rich. Eq., 34; Bailey v. Boyce, 5 Rich. Eq., 187, 193, 197; Buckner v. Bulow, Rich. Eq. Cases, 404; 3 Danl. Ch. Pr., 1801, 2094, 2102; 1 Danl. Ch. Pr., 500; A. A., 1791, 5 Stat., 263; 7 Stat., 258; House v. Folconer, 4 Des., 86; Edwards on Parties, 1; 2 John. Ch., 244; 1 Danl. Ch. Pr., 205.

3. That the sale was irregular and unwarranted by the orders in the cause, and therefore void.—Bailey v. Bailey, 9 Rich. Eq., 394; McNeill v. Shaw, 1 Phillips N. C. Eq., 91; A. A., 1861, Stat., 1861, 19; Wardlaw v. Buzzard, 15 Rich., 162; Bennet v. Hamil, 2 Sch. & Lef., 577-8.

4. In reply as to Bill of Review.—Mitford Pl., 101, 109, 110; Haskell v. Roul, 1 McC. Ch., 29–30; Hinson v. Pickett, 2 Hill's Ch. 351; Ex parte Vandersmissen, 5 Rich. Eq., 519; Thomlinson v. Thomlinson, 11 Rich. Eq., 52; Story Eq. Pl., § 426, 427; Cooper's Eq. Pl., 96, 98; Mitford Pl., 94; McPherson on Infants, § 6, 274; Carew v. Johnson, 2 Sch. & Lef., 250; Lewin on Trusts, 2 Am., from 3 Lond. Ed., 1858, top. mar., 597, side m., 753; Goodhue v. Barnwell, Rice Eq., 238; Bird v. Railroad, 8 Rich. Eq., 46; Code, § 92, § 190.

Dunkin, same side:

"Where an infant considers himself aggrieved by a decree he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he bound to proceed by petition for re-hearing, or bill of review, but he may impeach the former decree by an original bill, in which it will be enough for him to say the decree was obtained by fraud or collusion, or that no day was given to shew cause against it," or that it was otherwise improper.—Richmond v. Tayleur, 1 P. W., 337; Adams Eq., 420; Story Eq. Pl., § 427; Carew v. Johnson, 2 Sch. & Lef., 292; Hamilton v. Hamilton, 2

*318

Rich. Eq., *379; Gordon v. Sims, 2 McC. Ch., 158; Young, v. Teague, Bail. Eq., 22, 23.

In all forensic contests between those sui juris and infants, the weaker parties are in peril of injury, but it is some safeguard to infants to require that they shall always be before the Court when their rights are in question, and that they shall be properly represented.—Solee v. Croft, 7 Rich. Eq., 43.

But whatever may have been the validity

is submitted that the sale of 3d June, 1862, was not warranted, and was void for irregmlarity.

Last ofder of renewal was 5th November, 1860. Sale one year and nine months after the order of November, to wit: 3 June, 1862.

Regularly and according to the usual practice, order should be renewed at every Court.

This both from analogy to law Courts and from reason.

After expiration of year and day, plaintiff law cannot proceed until scire facias. "The reason," says Mr. Tidd, 2 Tidd, 103, "is because he lyes bye so long after judgment, it shall be presumed that he had released the execution, and therefore the defendant shall not be disturbed, without being called on to shew cause why the execution should not go."-See also Castro v. United States, 3 Wallace, 46; United States v. Villabolos, recognized 6 Wallace, 356.

In analogy to this the Act of Assembly, 1784, 7 Stat., 209, provides that every suit or petition in Chancery shall be finally decided within one year unless the Court shall think proper to extend the time by continuance or otherwise.—Bennett v. Calhoun, 9 Rich. Eq., 171.

The case was out of Court certainly in one year from November, 1860.

Sale itself was irregular and void, because:

1. Without legal notice.

2. In fact, a private sale.—Farr v. Sims, Rich. Eq. Cas., 131; Baily v. Baily, 9 Rich. Eq., 392; Martin v. Wallace, 2 Rich. Eq., 373; Wightman v. Gray, 10 Rich. Eq., 531; Rule of Court of Appeals, March, 1840, Miller's Compil., 59.

April 16, 1872. The opinion of the Court was delivered by

MOSES, C. J. We are without the benefit of the views which induced the conclusion of the Circuit Judge, which the motion here seeks to reverse.

The bill before him prayed relief against *319

the order of the Court *of Equity under the petition of the said J. A. Winthrop and A. G. Rose, so far as it directed the sale of the plantation called Long Savannah, claimed by the plaintiffs under the will of their grand-"Regarding father, John Joachim Bulow. the proceedings which led to the decree as at least irregular, and the sale not in accordance with the spirit or letter of the decree," and assuming that the prayer of the bill authorized him to declare the order erroneous under the Act of March 16, 1869, 14 Stat., 214, he required its amendment "in conformity with his opinion," and decreed a restitution and delivery of the premises to the plaintiff with the muniments of title \$52.520, and he had, under his direction, in-

of the order of sale, 15th February, 1859, it therefor, on their returning to the defendant the purchase money in United States currency, in the proportion which it bore in value to Confederate money at the date of the sale.

> On discovering, by a consideration of the plea filed to the said amendment, that he had committed error in holding that the provisions of the said Act applied to the case before him, he vacated his order for amendment, leaving in force his decretal order which in effect sets aside the sale by the Master, and we are to infer from the argument here, that it rested on the following propositions:

> First. That the children (the plaintiffs) were not properly parties to the petition of Joseph A. Winthrop and Arthur G. Rose, filed on the 11th February, 1859; and, therefore, not estopped by the order made under it; and, second, That the sale was irregular, unwarranted by the orders in the cause, and, therefore, void.

> We do not think it of consequence to determine what interest the children of Thomas S. Bulow, who are the plaintiffs here, took under the will of their grandfather, John Joachim Bulow, in the Long Savannah lands. Whether the legal title vested in them by the force of the devise, or whether the use not being executed, it remained in the said Winthrop and Rose as their trustees, they had at least such a beneficial interest in the estate, as could not be disposed of by the Court through any proceedings to which they were not parties. "Upon the general principles of Courts of Equity, there would be an impropriety in binding either the legal or the equitable claimants unless they were fully represented and permitted to assert their rights before the Court; and, if not bound, the decree would not be final on the matter litigated."—Story Eq., § 208. It is, however, worthy of notice and regard, that in the cause in which the order for sale was made, the petitioners were recognized by the Court as "trustees." Not only are they so styled in the petition, and in the report of the Mas-

ter, but, in the order of Chancel*lor Wardlaw, of 15th March, 1850, the proceeds of the sale are directed "to be invested in the name of Joseph A. Winthrop and Arthur G. Rose, trustees for the infants, Thomas Lionel Bulow and J. Charles Bulow, as devisees under the will of their grandfather, the said John Joachim Bulow." It would appear from this that the judicial construction of the words of the will as to the interests of the petitioners recognized the legal right in them, while the beneficial use was in the children.

On the 13th of March, 1860, the Master reported the sale of one hundred and seventy negroes under the order of March 15, 1859, and "that he had paid to Joseph A. Winthrop vested the sum in city 6 per cent. stock, in the name of himself and Arthur G. Rose, Trustees of Thomas L. and J. Charles Bulow, as directed by the decree." On the same day, the order was confirmed by Chancellor Inglis, On November 6, 1860, a detailed report of all the sales was made, and a payment of \$106, 201.02 in cash, stocks, and so forth "to the trustees," and this report was confirmed by Chancellor Carroll as soon as presented.

Under the bill filed on 26th of March, 1866, by the said Thomas Lionel Bulow against A. G. Rose (survivor of the said Winthrop) and the said John Charles Bulow, among other matters, for an account of the rents and profits of the said plantation, the fact of the sale came to the knowledge of the parties by the report of the Master on the 13th day of March, 1867, and on the 16th day of the same month it was adjudged in an order, manifestly taken by counsel in the interests of the plaintiffs here, "that the said Arthur G. Rose had fully accounted as executor and trustee under the will of the said John Joachim Bulow, and that he be absolutely acquitted, &c., from any further account, &c., as executor or trustee, saving, and so forth.' It would thus appear that until the filing of the bill which was the origin of the proceedings now before us, that whenever the said Winthrop and Rose were before the Court connected with the said devise, the representative character which they assumed as trus tees was recognized.

If Chancellor Wardlaw granted the order on the motion of the petitioners, because he regarded the legal title to the property as in them, and if he therein erred, his error of judgment would constitute no ground for now holding the order void. If the Court had jurisdiction over the subject-matter and the parties, and all who were to be affected by its judgment were before it as parties, then its order is legal, binding and final.

*321

*It is not disputed that the Court of Chancery has the power to sell and convey the estate of an infant. However doubtful it may at one time have been considered, "it is now too firmly established to be shaken."-Bulow v. Buckner, Rich. Eq. Cas., 401. In fact, the authority has not been questioned in the case before us. The exercise of this jurisdiction, through the process of petition, however originating, has been sanctioned and confirmed by long established practice; and the right of the Court in this respect is no more to be disputed than its right to order the sale of property for investment under the more expensive procedure, by bill. Whether Winthrop and Rose are to be regarded as seized of the legal estate, or only as executors of the will, holding possession for the benefit of the infants, and either as such executors, or through Winthrop, as guardian, in the control and direction of the property, they were the parties petitioners, and it was

the propriety of the prayer which they submitted, but whether, on a proceeding to which alone they were parties, the relief sought could be obtained. It appeared that, on considering the petition, the Chancellor was of opinion that the children were proper and necessary parties. He, accordingly, referred it to the Master "to assign a guardian ad litem to the infants, Thomas Lionel Bulow and John Charles Bulow, to appear to this petition;" and under the authority of the order, their mother, Mrs. Caroline Bulow, at their selection, was appointed. The required formalities in such cases were complied with. The petition was referred to the Master, who reported on the facts, and recommended a sale of the negroes and land as manifestly for the interest of the children. In this opinion, according to the report, the guardian ad litem concurred. It remains now to be considered whether these infants were parties to the proceeding, and, therefore, estopped from averring against the validity of the judgment rendered upon it.

What is the object to be secured by assigning a guardian ad litem to infants interested in a matter before the Court? It is identical with that to be accomplished by the service of a subpœna on an infant in the nurse's arms. It is to attract the attention of its friends, that a due regard may be had to its rights, and that the mind of the Court may be directed to them. Is this end in any way more effectually attained by the filing of a formal answer on the part of the guardian ad litem, than by bringing to the notice of the Court the facts upon which its judgment is to be exercised in disposing of the rights and interests of the infants involved in the matter before it?

*322

*An infant before the Court stands in the same relation to it as does one of its own wards. "Whenever a suit is instituted in the Court of Chancery relative to the person or property of an infant, although he is not under any general guardian, appointed by the Court, he is treated as a ward of the Court, and as being under its special cognizance and protection."—Story Eq., § 1352.

Whenever the rights of others are sought to be enforced against an infant by a judicial proceeding, the Court first attempts to secure him full means of defence by the appointment of a guardian ad litem, who occupies the same relation (if not a more immediate and direct one) to the infant, as the prochein ami does, who is appointed to protect the interests of a minor seeking redress against others for a violation of his rights. Parke, B., says, in Morgan v. Thorn, 7 M. & W., 408: "It is perfectly clear that every prochem ami is to be considered as an officer of the Court, specially appointed by it to look after the interests of the infant, on whom the judgment is consequently binding, and who cannot be allowed, on attaining his age, to commence the guardian ad litem which does not bind fresh proceedings founded on the same cause them, these, it is alleged, are still necessary of action."

The argument of the counsel for the appellee, exhibiting much research and learning, has been conclusive to shew that minors cannot be affected by judicial proceedings, unless it appears that they were parties before the Court. But what requisitions must be complied with to make them parties has not been prescribed in any of the cases referred The answer on their behalf by a person not appointed guardian ad litem, will be disregarded.—Bailey v. Boyce, 5 Rich. Eq., 197. So it would appear that though brought into Court by service, and an answer filed by a party not guardian ad litem, the infant would not be bound. Is it not apparent that the Court regarded the appointment of some one authorized and in duty required to look after the interests of the minor, as indispensable to the validity of its decree against him? We are not to be understood as laying down any general rule as to what may be necessary to bind an infant as a party defendant to a cause. Our inquiry is limited to the question, whether these infants were so parties to the petition that they are precluded from now averring against the judgment pronounced under it.

The petition claimed no rights against the infants. It created no contest putting them in an antagonistic position to the petitioner. Its whole scope was to present to the view of the Court the condition of the property, and,

*323

from the experience of the past, the like*lihood that it would not be productive or remunerative if continued as a planting investment. It prayed that "the case of the infants, as well as of the petitioners," might be taken into consideration, and the sale of the whole, or a part of the property, sanctioned. It at once occurred to the Chancellor, that with the parties then alone before him, he could not consider the subject-matter of the petition, as it involved rights in which the grand-children of the devisor were interested. The object of the order was to make them parties, and to bring them before the Court by the appointment of a guardian ad litem. Recognizing them as before him, he ordered the reference; required "a report upon the facts," to ascertain "whether it is for the advantage of the infants that the real and personal estate referred to in the petition be sold." When it appears by the fact of the appointment of such guardian, her acceptance and concurrence in the recommendation of the Master, that the Chancellor passed upon the petition with all proper reference and security to the rights and interests of the infants, is it to be said that there is still something more which is necessary to bind them? The barren form of the service of a subpæna, the purpose of which the infants are supposed not to understand, and the answer of

them, these, it is alleged, are still necessary to give validity to the order. As was said by Chancellor Kent, in Mills v. Dennis, 3 John. Ch., 368, "a decree cannot safely be obtained against an infant upon the mere fact of taking the bill pro confesso, or upon an answer in form by the guardian ad litem.' The answer in such cases generally is that the infant knows nothing of the matter, and, therefore, neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself on the protection of the Court. If we stretch the obligation of purchasers at judicial sales beyond the mere duty of ascertaining whether the Court had jurisdiction in the matter in which it claimed to act, and whether all the parties to be bound are before it, in the language of Lord Redesdale in Bennett v. Hamill, 2 S. and L., 577, "we shall introduce doubt on sales under the authority of the Court, which would be highly mischievous." Something is certainly due to the purchasers at these sales from the confidence which the public reposes in the judgments of the Courts of the country. must be upheld, at least so far as they operate on the title of parties to the proceeding, and if the title, though of infants, is thus alienated by the sale, the conveyance of the officers of the Court operates as an estoppel

*324

to the same extent, and in the *same manner, that the proper deed of an adult conveying his title would bar him from asserting it against his grantee. Regarding the plaintiffs as parties to the petition, and bound by the judgment of the Court directing the sale, we are next to consider the further ground upon which it was endeavored to sustain the decree of the Circuit Judge, now under review. That proceeds upon the affirmation "that the sale was irregular, unwarranted and void."

The order was made 15th March, 1859, and it directed the Master "to sell, at such time and place, and on such terms, as he, with the advice of the trustees, might approve." It did not require the master to consult with the guardian ad litem, as to the time or condition of the sale, and his failure to do so could not be regarded even as an irregularity.

On 13th March, 1860, an extension was ordered, and again on the 5th November, 1860. On 3rd June, 1862, without any intermediate proceeding, the sale was had.

It is urged that the order contemplated the payment of the purchase money in gold and silver coin or its equivalent, and the sale being made at a time when such currency was expelled from the country by the existence of the war, and the acceptance of payment in a depreciated medium, so varied the conditions as to render it absolutely void.

It should not be forgotten that the question

here is between these plaintiffs and the pur- [207], are restrained in their application to chaser, not the plaintiffs and the Master. Whatever rights and equities they may have against him, cannot be interposed to the prejudice of the purchaser, if there was authority in the Master to make the sale. it was an existing order of a Court having jurisdiction over the subject-matter, and the parties whose interests its judgment was intended to affect, no subsequent irregularity on the part of the officer charged with the sale can destroy the validity. No fraud is alleged against the purchaser, and no collusion with the Master. In addition to the careful consideration of the propositions contended for on the part of the appellees, we have examined, with much attention, the authorities referred to on this point, in the argument of a case at this Term, depending to a large extent upon the application of the same rules and principals by which this must be governed, and find nothing in them to sustain the position, that the change made in the order, by selling at a time when a depreciated currency was in existence, so affected it as to render it void. U.S. v. Slade, 2 Mason, 75 [Fed. Cas. No. 16,312], turned upon the fact

*325

that the statutory power on *which alone the title depended, was not apparent on the record, and further, that the appraisement was concurred in only by two of the appraisers, and the non-concurrence of the third not explained. Thatcher v. Powell, 6 Wheaton, 119 [5 L. Ed. 221], proceeded upon the ground that where a Court exercises extraordinary powers under a special Statute, the course it directs must be pursued, and the facts that give it jurisdiction must appear on the record, otherwise the proceedings are void, because non coram judice. Bigelow v. Forrest. 9 Wall., 351 [19 L. Ed. 696], held that the decree of the Court only operated on and extended to the interest of Forrest in the property for life—that the Court had no power to order a sale of the fee simple; and it was the duty of the purchaser to look at the decree "and they were bound to know its legal effect." The language of Chancellor Wardlaw in Whiteman v. Gray, 10 Rich. Eq., 531, may well be repeated in this connection: "The action of the Court never proposed to bind parties beyond the legitimate interpretation of its orders and decrees, and not at all to conclude the titles of third persons who are not parties."

That the order contemplated such currency as could be readily convertible into coin, might be admitted, and yet the sale, as against the purchaser, would not be void, because the payment required was received by the Master in a depreciated currency, which, at the time, was the only circulating medium prevailing in the country.

The principals sustained by the Court in Ward v. Smith, 7 Wallace, 447 [19 L. Ed.

the case before us by the decision of the Appeal Court in McPherson v. Gray, 14 Rich. Eq., 130. The bill there sought to annul a settlement made between Mr. Gray, the Master, and the purchaser of the bonds given for the purchase money of the lands sold by the order of the Court, and to set up the bonds and mortgage, or make the Master liable, on the ground that the bonds were executed when gold or silver coin was the only currency, while their payment was received in Confederate Treasury notes. The Court, so far from enforcing the instruments as existing obligations, held "that the Act of the Master was entitled to its sanction," and did not even make him liable for the difference between the value of the Confederate money he accepted and United States currency. We are not prepared to say that the case, in all its aspects and bearings, meets our concurrence, but, standing as an authority not sought to be impugned by the mode authorized by the Court, we must so regard and re-

*326

spect it. *If the purchaser there was entitled to hold, under all the circumstances which attended the reception of the money as payment of the mortgage, it is in vain to say that the title of the purchaser here is void, because the Master received the purchase money in a currency different from and less valued than that in circulation at the time that the order for sale was made.

Although the advertising of sales by Sheriffs is regulated and fixed by statute, there is no Act of the Legislature or rule of Court prescribing what public notice shall precede a sale made by the Master or Commissioner under an order of the Court of Equity. Where the order requires notice for a certain time, it forms one of the conditions on which the authority is to attach. The manner of the execution of the power is then fixed by law, and if defectively performed, cannot be relieved by a Court of Equity. It has been the practice, in analogy to Sheriff's sales of real estate, to pursue the notice there required. In the absence of all Statute requisition, a failure to do so cannot vitiate the sale unless fraud has been practiced, or some design intended against the interest of those on whose behalf the sale is ordered.

Neither can the failure to renew the order within a year and a day be held to affect the sale. The order of the Court, of 15th March, 1859, extended by that of 5th November, 1860, stood as the direction and authority of the Court. The principle which forbids procedure at law, after a year and a day, has no application to the Court of Equity. There the presumption on which it is formed can seldom exist. To admit the application to the practice in the Courts of Equity of this State, would be in singular inconsistency with the construction which was given in

Jeannerett v. Radford, Rich, Eq. Cases, 470, to the Acts of 1784, 1789 and 1810. In regard to suits in that jurisdiction, "under this Act," said the Court, "no doubt a defendant may have a bill dismissed at the end of three years after a decretal order made, whatever cause may be shown for a further continuance. But the uniform practice has shown that the cause is not ipso facto out of Court if such motion be not made." The Chancellor, delivering the opinion of the Court in Bennett v. Calhoun Association, 9 Rich. Eq., 178, says: "This Court is well satisfied with the observation of Chancellor Harper, in Jeannerett v. Radford, that, according to the uniform practice of the Court, the cause is not regarded as ipso facto out of Court, although these directions may not have been strictly observed."

It is further contended that the 4th Sec*327

tion of the Act of Decem*ber 21st, 1861, 13 Stat., 19, commonly known as the Stay Law, suspended the operation of the order for sale until renewed, and as it never was renewed, that the sale under it was utterly null and void. It is not proposed to examine, by any close investigation, whether the said Section of the Act is within the legitimate power of the Legislature. If its design had been to establish a new rule or direction for the government of the Court in future orders for the sale of property, it would not have been an encroachment on the exclusive powers of the judicial department of the government. If, however, the practical result of its operation is to annex new conditions to the orders of the Court already pronounced, and thereby change or modify its judgment as therein declared and expressed, it is an assumption of the powers which pertain to another and independent department of the government. Neither is it proposed to inquire, conceding that one part of an Act may be unconstitutional, and yet all the other portions of it not obnoxious to that objection, whether the 4th Section is not to be taken in connection with the first as forming part of a system by which final decrees in equity, as well as final process at law, were to be inoperative unless permitted to have effect through renewal by a Judge of the Court which had ordered it. and thus assuming in such enactment a power not properly within the competence of legislative authority.

The Act stays the sale authorized by the order until the same shall be renewed by one of the Judges of the Court which originally granted it.

The judgment, then, of the Chancellor which, at the passage of the Act, was final and conclusive, becomes inoperative until renewed by another Chancellor. If not renewed, the object which the judgment was to accomplish can never be obtained, and its whole purpose is defeated.

We cannot regard the Section as of such mandatory force as to render the sale made in disregard of its requirements void, and conferring no rights on the purchaser. If there were no irregularities in the sale amounting to defects, while the Master may be subject to the animadversion of the Court, and liable to the plaintiffs for any loss which ensued from his neglect of observances intended for their benefit and protection, as against the purchaser, the sale cannot be decreed void.

The interference of the Court is invoked on behalf of these plaintiffs, who, it is said, were unable to protect themselves on the application under the petition, by reason of *328

their infancy, and its power *is claimed to set aside the title of the purchaser both on principles of law and equity. All the propositions of law on which they rested have been solved against them, and the general aspect of their case does not recommend it so favorably to considerations of equity that by the application of the rules which govern its administration, the prayer of their bill can be favorably answered.

Through the order for the sale, which they aver was not binding on them, the negroes which they would otherwise have lost, were converted into stocks and securities, of which they have received the benefit, and it must be held to have been recognized by them as valid, by the order of the 16th March, 1867, in the case of Thos. L. Bulow v. Rose and John Charles Bulow, which directed the payment of the said stocks and securities for the use and benefit of these very plaintiffsnay, on the same day that the Long Savannah land was sold, twenty-three negroes were also disposed of by the Master, and the proceeds paid over to Winthrop and Rose, as trustees. These proceeds were included in the funds for which Rose was to account by sáid order, which also declares that he had accounted, as executor and trustee, under the will of John Joachim Bulow, and on "paying, assigning and transferring the funds, stocks, bonds and securities, in his hands as he was directed that he be absolutely acquitted, exonerated and discharged from any further account as executor aforesaid," saving and reserving the rights and equities to these plaintiffs to test the sale of the Long Savannah plantation, or the rights of the purchaser thereto, the proceeds of which sale had been paid by the Master to Rose and Winthrop, on the 16th October, 1862, and by the said order were directed to be delivered to the Master "to remain until the further order of the Court." Whether Winthrop and Rose were express trustees under the will, or whether, as intermeddling with the property, they became, as to the children, voluntary trustees, by the order of the Court they, with the Master, were to fix the time, place and

terms of the sale. The plaintiffs, so far from asserting any claim against the said Winthrop and Rose, by reason of their action in the matter of the sale of the land actually by Circuit Judge ruled out the evidence: Held, the order above referred to, discharge the said Rose, who was the survivor of Winthrop and Rose, and declare that he was not to be "held liable for any miscarriage in relation thereto," If they have rights against the said parties they have surrendered them by the discharge. If they have any against the Master, they have not pursued them, while they seek redress of the purchaser against whom they aver no fraud or wrong design, *329

*and who certainly is as innocent as either of the parties who fixed the time, place and terms of the sale.

It appears difficult to reconcile the claim now preferred with any of the recognized principles admitted by Courts of Equity, even in favor of infants.

It is ordered and adjudged that the motion be granted, and the bill dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 329

DUPONT v. COLLINS.

(November Term, 1871.)

The principles of the preceding case, Bulow v. Witte, except those relating to the want of proper parties, affirmed.

Phillips, for appellant. Rutledge & Young, contra.

April 16, 1872. PER CURIAM. This bill seeks to set aside a sale of real estate made by the Master, on the same grounds as are taken in the case of Bulow v. Witte, [3 S. C. 308], heard at this term, with the single exception that here there is no complaint as to the want of all proper parties to the proceeding under which the order for the sale was made.

In all other respects it is identical, and claims to avoid the purchase set up by the defendant, by the interposition of the like principles of law and equity. They have been fully considered and passed upon in that case, to which we refer, as affording the views which the Court took of them.

It is ordered and adjudged that the motion be granted, and the bill dismissed.

3 S. C. *330

*ROBERTSON v. EVANS.

(November Term, 1871.)

[Evidence \$\infty 444.]

Action by payee against maker on a sealed note. Defendant offered evidence to show that

Error.

[Ed. Note.—Cited in McDaniel v. Anderson, 19 S. C. 215; Harrelson v. Sarvis, 39 S. C. 19, 17 S. E. 368.

For other cases, see Evidence, Cent. Dig. § 1936; Dec. Dig. ⇔444.]

[Evidence \$\sim 420.]

Upon a question of delivery it is admissible to show by oral evidence that the defendant delivered the deed to plaintiff upon the condition that he would get others to execute it, which he had not done.

[Ed. Note.—Cited in Arthur v. Anderson, 9 S. C. 250; Harrelson v. Sarvis, 39 S. C. 20, 17 S. E. 368; Cline v. Farmers' Oil Mill, 83 S. C. 205, 65 S. E. 272.

For other cases, see Evidence, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929–1944; Dec. Dig. \$\sim 420.]

Before Rutland, J., at Chesterfield, Term. 1871.

Separate actions by John E. Robertson, plaintiff, against Albert Evans and Leonidas Lowry, defendants.

The case is stated in the following report of the presiding Judge:

"These were several actions, on a joint and several sealed note, executed by the defendants and one Jackson Miller to the plaintiff, for six hundred and seventy-three dollars and sixty cents.

"It seems that Robertson, the three makers of the note, and four other persons, were trustees of an academy. The defendants offered evidence to show that they signed the note upon an understanding and agreement with the plaintiff that they were not to be bound by their signatures unless the note should also be signed by the remaining four trustees, who were not then present. plaintiff objected, and I ruled the evidence to be inadmissible, to which ruling the defendants excepted. A verdict was rendered by the jury for the plaintiff for eleven hundred and thirty-four dollars and fifty-nine cents, the principal and interest of the note.

"The defendants moved for a new trial on the ground that there was error in excluding the evidence ruled as above to be inadmissible. I refused the motion, and they appealed from my decision, on the ground:

"Because, it is respectfully submitted, his Honor the Circuit Judge erred in excluding as inadmissible the evidence offered by the defendants to show that by their agreement with the plaintiff they were not to be bound by the note signed by them upon which these actions are based, unless the same should be also signed by four other persons who were not then present."

Moore, Hough, for appellants:

The evidence should have been admitted. Spencer v. Bedford, 4 Strob., 96.

*331

*A delivery of a deed may be made by words,—Id.

It may be shown by parol that the deed was never delivered, or was delivered merely as an escrow, or to take effect only on a contingency which has never happened.—2 Stark. on Ev., 272; 3 Phil. Ev., C. & H., 1450, note.

It may be different where the agreement is between the principal maker and a surety to which the payee is no party.—Martin & Walker v. Stribling, 1 Sp., 23, which, however, fully recognizes the doctrine laid down in Spencer v. Bedford.

McIver, contra:

1. If the proposed evidence was offered for the purpose of qualifying, varying, or contradicting the instrument sued on, it is incompetent.—Boyce v. Foster, 1 Bail., 540; Harris v. Caston, 2 Bail., 342; Falconer v. Garrison, 1 McC., 209; Price v. Perry, 2 M. Con. Rep., 31; King & Co. v. Colding, 1 McM., 134; McClenaghan v. Hines, 2 Strob., 123; Rambo v. Metz, 5 Strob., 108; Smyley v. Head, 2 Rich., 592; Blodgett v. Merrill, 20 Ver. Rep., 509, cited from Redfield's American Railway Cases, 155; Piscataqua Ferry Co. v. Jones, 39 N. H. Rep., 491, cited from Redfield's American Railway Cases, 187.

2. The only point of view in which the evidence might have been admissible was to prove that the single bill was delivered as an escrow. This view, however, cannot be sustained, because the delivery was to the obligee—the possession of a bond being with the obligee is sufficient evidence of the delivery.—2 Stark. on Ev., Pårt 4, p. 477, note 1.

3. To make an escrow the delivery must be to a stranger, and not to the obligee.—1 Shep. Touch., 58; Co. Litt., 36 A., 1 Co. Inst., 276; 1 Bouvier's Law Dic., 475-6; Jackson v. Catlin, 2 Johns., 248; Hagood v. Harley, 8 Rich., 325; 2 Stark. on Ev., Part 4, p. 477.

April 16, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. It appears that John E. Robertson, plaintiff, and seven other persons, were trustees of an academy, and that three of them (two of whom are appellants) executed a sealed note to the plaintiff. Action was brought upon the said note. At the trial the defendants offered evidence to show that at the time the note was given the understanding and agreement was with the plaintiff, that they were not to be bound by their signa-*332

tures unless the note was *signed by the other four trustees, and that the note was placed in the hands of the plaintiff to obtain the signatures to it of the other four trustees, which signatures plaintiff did not obtain. The Court ruled such evidence inadmissible. The only question for this Court to consider is, did the Court below err in excluding as inadmissi-

ble the evidence offered by the defendant? It appears that the question of delivery is raised, and where that question arises, evidence on that point should be admitted, especially as between the parties to the instrument.

In 4 Philips' Ev., 538, it is said: "As where a question arises whether an instrument was in fact delivered; if handed over to some person, whether it was delivered absolutely or only on a condition. In these, and similar instances, the execution being mostly a matter in pais, oral declarations of intention connected with the delivery may come in as part of the res gestæ, or, as against the party claiming in virtue of it, his subsequent declarations are competent." There are a great variety of ways by which persons may improperly come in possession of notes and other instruments of writing; and were the rule such that parol evidence could not be admitted to show how or by what way possession was obtained, gross injustice would evidently, in many instances, be practised. Evidence was offered to show that the holder of the note had it placed in his hands by the makers to do a certain thing with it, which was necessary to its validity or its absolute delivery, and that the said holder failed to carry out that agreement. If the validity of the note, by agreement between the parties to it, depended upon a certain condition, testimony to show what that condition was ought to be admitted as between such parties. The note was no more nor less than a portion of the contract between the parties. The other portion was not written, and the unwritten portion they wished to show by parol evidence. In the case of Barker v. Prentiss, 6 Mass. R., 434, Parson, C. J., said: "But parol evidence may be given to contradict a written simple contract, or to show that the whole of it was not reduced to writing, but that it was made with certain conditions or limitations expressly agreed upon, but not contained in the written contract, where the action is between the original parties. Thus it is, every day's practice, notwithstanding a promissory note is expressed to be for value received, to permit the promisor in an action by the promisee to prove that there was no consideration."

The case of Johnson et al. v. Baker, 4 B. and Ald., 440, where the instrument was a deed, recognized the principle that all that *333

*formed part of the agreement in regard to its execution was a part of the transaction, and could be offered in evidence. The same doctrine is to be inferred from Martin & Walker v. Stribling, 1 Speers, 23, and affirmed in Spencer v. Bedford, 4 Strob., 96.

The motion is granted, and a new trial ordered.

MOSES, C. J., and WILLARD, A. J., concurred.

3 S. C. 333

SMITH v. GATEWOOD.

(April Term, 1871.)

[Municipal Corporations \$\infty\$=978.]
Where lands, subject to a lien for taxes due the city of Charleston, are sold under a decree of foreclosure, in a cause to which the city was not a party, the remedy of the city is not against the proceeds of the sale—the lien not having been displaced by the decree and sale thereunder

[Ed. Note.—Cited in Annely v. De Saussure, 12 S. C. 511.

For other cases, see Municipal Corporations, Cent. Dig. \$ 2108; Dec. Dig. \$ 978.]

Before Graham, J., at Charleston, March Term, 1871.

Bill to foreclose a mortgage of real estate in the city of Charleston, dated 30th May, 1856. The City Council of Charleston was not a party to the proceeding.

The mortgaged premises were sold in 1870, under a decree of foreclosure, and the proceeds being under the control of the Court, the City Council presented a claim against the same for city taxes assessed upon the premises for the years 1868 and 1869. The claim was founded upon an Ordinance of the City Council, ratified the 14th June, 1868, which declared that city taxes shall constitute a specific lien upon the property taxed in preference to mortgages, judgments and

other liens. The plaintiffs resisted the claim. His Honor ordered the taxes paid, and the plaintiffs appealed.

Memminger, Pinckney & Jervey, for appellants.

Corbin, City Attorney, contra.

April 16, 1872. The opinion of the Court was delivered by

WILLARD, A. J. Certain premises, in the city of Charleston, having been sold under proceedings for the foreclosure of a mortgage, a claim was made against the proceeds of sale, in behalf of the city of Charleston, for the payment of an amount claimed to be chargeable upon such property for city taxes for 1868 and 1869. This claim was contested *334

on grounds questioning the validity *of such lien. It is not material to examine this question, for the order appealed from is subject to an objection of a jurisdictional nature.

Assuming the ground contended for by the respondents, (the City Council,) that the taxes in question constituted a specific lien on the premises sold, still the question arises whether they are entitled to this particular remedy in order to enforce the payment of such taxes. If such specific lien exists, it is to be considered as prior, in law, to the claim of the mortgagee in the present case. In the case assumed, the City Council would stand, in regard to the present foreclosure

suit, in the same relation in which a prior mortgagee would stand in reference to proceedings to foreclose a subsequent mortgage. If not made a party, and the land was sold for the foreclosure of the jumor mortgage, the purchaser under the latter would stand as purchasing subject to the lien of the elder mortgage, and the price paid by him would have to be regarded as representing the value of the land subject to the prior mortgage. If, therefore, the prior mortgagee is not made a party to the proceedings by the junior mortgagee, and subjected to the order of sale in behalf of the junior mortgagee, then two results would follow: First, that he would not be debarred from subjecting the lands. in the hands of the purchaser, to the payment of his prior lien; and, second, that he would have no claim to any portion of the proceeds of the sale under the junior mortgage.

The City Council was not a party to the suit, nor bound by the decree of sale; consequently a sale under that decree cannot bar the proper remedies to enforce the city taxes. The purchaser must be regarded as having purchased subject to the prior lien of the city, and the consideration paid by him cannot be regarded as including any part of the amount due for city taxes. It is to be noticed that the purchaser, under foreclosure, is not now before us seeking to compel the application of the purchase money to the payment of the taxes, upon the ground that this was a consideration of his purchase.

I cannot but regard the mode of enforcing the payment of taxes pursued by the City Council, in the present case, as unusual, and attended with many disadvantages. In the first place, it in effect concedes the right of private parties, in a suit as between themselves, to bar the right of the city to enforce its collection of its taxes in the usual manner, while the city is neither a necessary or proper party to such suit; for unless they have *335

a right to sell, as against *the city taxes, the City Council has no right to make a claim of that kind against the proceeds of sale. The practice would be equally inconvenient and unreasonable to allow private parties to compel the city to become a defendant in such cases, for it would require the city to be represented by legal counsel in every case, within the city limits, where a judicial sale of land, bound by city taxes, is intended, at the peril of losing the amount assessed, unless a remedy therefor was sought in such proceeding. In this way, not only may taxes be lost, to the public inconvenience, but the cost of collection swelled by fees and expenses of litigation, that would have to come out of the city, or fall as an unnecessary burden on citizens litigating in the Courts.

In the next place, the mode provided by law for the enforcement of taxes is the sim-

plest and most inexpensive, and should be strictly adhered to by the city. Such is understood to be the general practice, both here and elsewhere, in regard to the collection of taxes, and it ought not to be disturbed. The order in question should be set aside, so far as the same directs that the taxes of 1868 and 1869 be paid out of the fund now in Court, without prejudice to the City Council.

" MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 335

PRINGLE v. SIZER.

(November Term, 1871.)

[Appeal and Error \$== 1216.]

Where the judgment of the Circuit Court, upon a remittitur, does not conform to the judg-ment of the Supreme Court, the remedy is by appeal, and not by motion to set aside the judgment of the Circuit Court.

[Ed. Note.—Cited in Whaley v. Bank of Charleston, 5 S. C. 263; Ex parte Dunovant, 16 S. C. 300; Hartsfield v. Chamblin, 44 S. C. 112, 21 S. E. 798.

For other cases, see Appeal and Error, Cent. Dig. § 4700; Dec. Dig. © 1216.]

[Appeal and Error \$\infty\$1216.]

Where the remittitur issues upon a judgment remanding a cause, the Supreme Court loses its jurisdiction, and can neither order a re-argument, nor correct an error or mistake, in its judgment

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4700; Dec. Dig. ⊚ 1216.]

[Appeal and Error € 1210.]
Where a remittitur is ordered by the Supreme Court, and a party gives notice of trial, and brings the case on for trial in the Circuit Court, he cannot afterwards object to the jurisdiction of that Court, on the ground that no remittitur had in fact issued.

[Ed. Note.—For other cases, see Appeal and rror, Cent. Dig. §§ 4670, 4710; Dec. Dig. Error, Ce

Before Thomas, J., at Lancaster, Oct. Term, 1870.

To understand this case, it is necessary to refer to the same case as reported in 2 S. C., 59. It will be seen by referring to pp. 66-7, that this Court stated the balance in the hands of the defendants to be \$206.64, and by its judgment at p. 68, that the Court dismis-*336

sed the *bill as to Pringle, one of the plaintiffs, and further ordered as follows: "As to Chafee" the other plaintiff, "let the case be remanded to the Circuit Court, that the parties representing him," he having died pending the proceedings, "or the firm, as they may be advised, may have an opportunity of becoming parties to it, and of moving for such orders as may place them in a condition to carry out the views and principles announced in this opinion.'

According to "the views and principles announced in this opinion," the firm of Chafee, St. Amand & Co., of which Otis J. Chafee, the plaintiff, had been a partner, was entitled to a pro rata proportion of the sum of \$206.-64, but what that proportion was the judgment does not show.

No remittitur was issued, but the plaintiff gave notice of trial in the Circuit Court, and both parties submitted motions to the Circuit Judge. His Honor adopted the views of defendants' counsel, and signed the following order, submitted by them:

It is ordered that upon the payment into Court of the sum of fifty dollars, to be applied under the decree of the Supreme Court to the claim of Chafee, St. Amand & Croft, and the further payment by the defendants of their own costs already incurred in this case, the bill be dismissed, unless within thirty days from the date of this order, the proper parties representing the said claim of Chafee, St. Amand & Croft, file an amended bill against the defendants to recover any further sum which they may consider due upon said claim under the terms of the said decree. That upon the dismissal of the bill, in accordance with the terms of this order, and the payment of the costs then remaining by the proper parties representing the said claim of Chafee, St. Amand & Croft, that the Clerk pay to them the sum paid into Court under the terms of this order.

Plaintiff did not appeal, but gave notice that he would move this Court to set aside the order, on the grounds:

1. That, unless said order of the Circuit Judge be set aside, the judgment of the Supreme Court in this cause cannot be made, and become the judgment of the Circuit Court.

2. Because said order in effect reverses the judgment of the Supreme Court, in that it directs the dismissal of the bill as to Chafee, St. Amand & Croft, in direct violation of the decision and order of said Court.

The motion was now made, the plaintiff, at the same time, moving for a re-argument on the ground, as alleged, of error in the *337

judgment *of the Supreme Court in stating therein that the balance in defendants' hands was \$206.64, whereas said balance was \$447.15.

[For subsequent opinion, see 7 S. C. 131.]

Moore, for the motion.

Allison, contra.

April 16, 1872. PER CURIAM. There is no doubt of the power of the Court to correct its judgment founded on a misconception of facts while it has any control over the case.

The statement of the amount due on the confession of Sizer to his sureties, was supposed to have proceeded from the appellants. Whereas it really was submitted by the re-| [Execution ←= 258.] | Irregularities of form and procedure do not spondents. It was in manuscript, without signature, and it is not, therefore, surprising that it was regarded as the statement of the one party rather than of the other. If counsel would always affix their names to their papers the like error might not easily occur.

Strictly speaking, after a cause has been once remitted, this Court loses all jurisdiction over it; but if before the remittitur has, in fact, issued an error as to figures is made apparent, or any obvious mistake of fact is shown, the Court would reform its judgment in conformity to the truth of the matter.

The case before us was not only taken up by the Circuit Court without objection, but motions were submitted on both sides in regard to the orders which should issue to give effect to the judgment of the Supreme Court on a notice of trial served by the appellants. They must be regarded here as at least not objecting to the jurisdiction of the Court in that regard. If they were permitted now to set aside the order which was passed, because the cause should first be again submitted to this Court, it would be a surprise on the other side, and the plaintiffs would really be taking advantage of their own wrong.-See Judson v. Gray, 17 How. Prac., 289, 296. The Circuit Court on the remittance of a case is bound to follow the directions of the Appellate Court. It cannot change, alter or modify them, or allow new issues. If, in the case in hand, it failed in any plain duty enforced by the judgment of this Court, and issued orders inconsistent with it, the remedy lies in the right of appeal to which the appellants have not resorted. There is no ground for ordering a re-argument. The motion to set aside the order, and for a re-argument, is dismissed, without prejudice to the plaintiffs in any other course of contesting the said order as to which they may be advised.

3 S. C. *338

*WARD v. COHEN.

(November Term, 1871.)

[Execution \$\sim 319.]

The Sheriff, under an execution against W, levied upon a lot in the village of Kingstree, on which there was a building on Main street, with two stores in it. His advertisement of Kingstree, His advertisement of sale described the property as "two stores in the village of Kingstree, situated three doors the village of Kingstree, situated three doors from Academy street, on Main street, levied upon as the property of W, at the suit," &c. At the sale, B was the purchaser, and the Sheriff conveyed to him the lot, with the building thereon, by metes and bounds, and B entered into possession. In an action by W against B, to recover the possession of the lot: Held, That the conveyance transferred the title to the whole lot, and not merely to the building and the land on which it stood.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 936; Dec. Dig. &=319.]

vitiate a Sheriff's sale under an execution, as between the purchaser and the judgment debtor, and an imperfect description, in the Sheriff's advertisement, of the property to be sold, is an irregularity of that class.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 737; Dec. Dig. ६—258.]

Before Green, J., at Williamsburg, Sept. Term, 1869.

Action of trespass to try title by W. W. Ward, plaintiff, against L. Cohen & Co., defendants. The case, as stated in the brief, is as follows:

The action was trespass to try title to a lot of land in Kingstree, in Williamsburg County. The lot had been sold by the Sheriff of said County, by virtue of executions in his hands, founded on judgments against the said W. W. Ward.

The Sheriff's levy is as follows, to wit: "I have this day levied on one storehouse and lot, situated on the corner of Main and Academy streets, occupied by Heirsch and Levin, and store on Main street, occupied by Louis Cohen & Co., and Weimberg and Strauss, and adjoining lots of James M. Staggers, E. J. Porter, and W. M. Wallace; also one tract of land, with the building thereon, whereon defendant resides, and containing thirty-three acres, more or less, at the suit of J. F. Nesmith and others."

The Sheriff's advertisement is as follows, to wit .

"By virtue of sundry executions to me directed, I will offer for sale at Williamsburg C. H., on the first Monday and the day following, in July next, within the legal hours of sale, to the highest bidder, for cash, the following real property-purchasers to pay for titles:

"One tract of ---- acres of land in Williamsburg, adjoining lands of estate of Samuel P. Matthews, S. W. Maurice and others, levied upon as the property of W. W. Ward, at the suit of G. E. Pritchat and others.

"One store in the village of Kingstree, sit-*339

uated at the corner of *Main and Academy streets, levied upon as the property of W. W. Ward, at the suit of G. E. Pritchat and oth-

"Two stores in the village of Kingstree, situated three doors from Academy street, on Main street, levied upon as the property of W. W. Ward, at the suit of G. E. Pritchat and others, June 13, 1868."

The sales were made on the 6th day of July, 1868; defendants were purchasers at sixteen hundred dollars; paid their bid and took title from the Sheriff; the money was applied to executions against the said Ward, and left a balance in the Sheriff's office against him.

The deed of the Sheriff recited levy, ad-

compliance, and conveyed as follows, to wit:

"All that piece, parcel and lot of land, with the building thereon, situated, lying and being in the District of Williamsburg aforesaid, adjoining lots of J. M. Staggers, E. J. Porter, J. A. Wallace and W. W. Ward, being the storehouse occupied by the said Louis Cohen & Co., and Weinberg & Strauss, and one-half of so much of the lot purchased by the said W. W. Ward from John E. Scott, as was, at the time of the said levy, the property of the said W. W. Ward."

The cause was heard without a jury by the Judge, who rendered the following judgment:

This was an action brought by plaintiff to 'try the titles to a lot of land situated in Kingstree, purchased by defendants at a sale by the Sheriff of said County. It was sold as the property of plaintiff.

The defendants went into possession of one of the stores sold by the Sheriff, as the tenants of the plaintiff, and were his tenants at the time of sale. The plaintiff claimed that the defendants were bound to deliver up the possession of the premises to him, and bring their action against him, although they had purchased his title at Sheriff's sale. I decide against this position. From the moment of the execution of the conveyance by the Sheriff the title to the premises vested in them. They were no longer tenants, but owners; by purchase of the very title under which they entered, and to which they owed allegiance, they were not bound to give possession to the plaintiff.

The next and last position taken by plaintiff was this: The deed of the Sheriff conveys not only the stores advertised by him, but also the whole lot on which they are located.

The plaintiff contends that under the terms

*340

of the Sheriff's ad*vertisement no more could be sold, and, of course, no more could be conveyed than the storehouses and the land upon which they are located. (The two stores were in the same building.)

In my judgment this position is well taken. Under the terms used in his advertisement (and by this his sale must be governed) the Sheriff could sell nothing more than the two stores and the land upon which they stood, and, of course, could convey no more than he could lawfully sell.

Let the plaintiff recover the lot of land in dispute, except so much thereof as is covered by the storehouse of defendants, (purchased at the Sheriff's sale,) and for his damages let him recover the sum of ten dollars.

The defendants moved for a new trial before the Circuit Court, and that motion being overruled, they appealed, stating the error of which they complained as follows:

The error complained of consists in this: That Judge Green ruled that though there

vertisement, sale to defendants, and their was no fraud in the sales, and though the defendants paid their bid of sixteen hundred dollars, and took a deed for land by metes and bounds, from the Sheriff, who sold the same as the property of the plaintiff in this cause, defendants were only entitled to the storehouse and lot of land on which it stood, because of irregularity in the advertisement.

Spain, for appellant:

The levy was valid, and on valid process.-Murphy v. Reynolds, 3 Rich., 11; Dawkins v. Samuel, 10 lb., 61; 1 Jarman on Wills, Chap. 17; Cain v. Maples, 1 Hill, 304; Cruickshanks v. Fearn, 3 McC., 84; Hopkins v. De Graffenreid, 2 Bay, 446; Manning v. Dove, 10 Rich., 402.

Ward waived any irregularity in the advertisement, and is estopped by the Sheriff's deed, as well as his own conduct from insisting on it.-Manning v. Dove; Stickney v. Crosswell, 12 Rich., 273; Davis v. Murray, 2 Mill. 143.

Irregularities and omissions in advertisements on the Sheriff's part do not vitiate his sales; advertising is non-essential; it gives no authority; it is simply an official duty, for neglect of which the officer only is responsible, not the innocent purchaser.-(See 5 A. A. 1796, 5 St., 283; § 2, A. A. 1797, Ib., 305; Turner v. McRae, 1 N. & McC., 11; § 9, A. A. 1791, 7 St., 263; § 58, A. A. 1839, 11 St., 37; Cain & Maples, 1 Hill, 302; *341

Barfield v. Stevens, Harp. *Eq., 52; Maddox v. Sullivan, 2 Rich. Eq., 4; Manning v. Dove, 10 Rich., 395; Stuckey v. Crosswell, 12 Rich., 273; Nixon v. Bynum, 1 Bail., 148; Giles v. Pratt, 1 Hill, 239; Sartor v. McJunkin, 8 Rich., 451.

Maurice, Dozier & Porter, contra.

April 22, 1872. The opinion of the Court was delivered by

WILLARD, A. J. This action was tried before the Circuit Judge, without a jury. The decisions as to questions of law, alone, can be reviewed by this Court. If it appears that the judgment in the action rested upon an error of law, this Court may set aside the judgment and the decision or finding of fact, with the like effect, as if the cause had been heard before a jury or referees.

The decision involves the proposition, that the title of a purchaser of land at a Sheriff's sale, under execution, is invalid, as to any portion of the land sold and conveyed by the Sheriff, which was not comprised within the terms of the advertisement. In the application of this rule to the case, it was held that, when the advertisement described two stores, without the mention of any land, and the sale and conveyance by the Sheriff embraced the whole tract of land on which they stood, that the title of the purchaser was good as to that part of the land

only, on which the stores stood, and that, as taken of them in any other action or proceedto the residue of the tract, the judgment ing where they are involved incidentally or debtor was entitled to a recovery against collaterally. The power exercised by the the purchaser in possession. This conclusion is unsupported by reason or authority, and is in conflict with a line of decisions settling the law on this subject.

The Sheriff's deed is not before us, but from the statement of the case, we are to assume that it contains the recitals usual in such cases. The judgment does not rest on the insufficiency of the levy, but wholly upon the terms of the advertisement of sale. We must assume, as the case stands before us, that the Sheriff's deed is, on its face, evidence of the title of the purchaser, embracing the whole tract of land, and that no defect in the proceedings appears from it.

It must also be assumed, that the purchaser's bid was made in reference to the whole tract sold and conveyed by the Sheriff, and that the price paid by him was intended by him, and received by the Sheriff, as the consideration for the conveyance to him of the whole tract. It must also be assumed, that the judgment debtor who is seeking to recover the land from the purchaser, has re-

*342

ceived *benefit from the application of the consideration to the payment of the judgment under which the land was sold.

It must be borne in mind that the plaintiff does not seek a rescission of the sale upon a tender of the amount paid, but to retain the consideration paid by purchaser, and to regain possession of part of the thing purchased.

It is well settled that when lands, bound by a judgment of a Court of general jurisdiction, are levied upon under an execution issued under such judgment as the property of the judgment debtor, and are sold and conveyed by a Sheriff's deed, in due form, the title of the purchaser to such lands is good as against all persons who were parties to such judgment, or whose rights are derived thereunder, notwithstanding irregularities may have been committed by the Sheriff, or parties to the judgment, in the proceedings under such execution, when the purchaser is free from fault.

It is also settled that the fact that the Sheriff has not acted in strict conformity to the provisions of the law requiring the advertisement of lands intended to be sold upon execution, is not sufficient to invalidate the title of the purchaser at such sale.

The proceedings of the Sheriff, under an execution, are part of the proceedings in the cause.—Bank of Georgetown v. Geary, 5 Peters, 113, [8 L. Ed. 60]. They are subject to the rule that mere irregularities in matters of form and procedure, committed in the course of an action in a court of general jurisdiction, must be corrected in such action, and in due time, and advantage cannot be mitted in a course of proceeding under the

Sheriff in the execution of the judgment of a Court, is in its nature judicial, though exercised in the hands of a ministerial officer, and where such Court possessed general jurisdiction, it is not defeated by mere irregularities of form and procedure, but such irregularities must be corrected in the course of such proceeding, or they will not avail. Although the duties of the Sheriff, under an execution, are in some respects fixed by the Statute, as in the case of the time and place of sale, and the advertisement of such sale, yet it is not to be presumed that the Statute intended to change the force and effect of acts done in the course of a judicial proceeding, as affected by the rule just stated. Such Statutes would primarily be regarded as fixing the duties of the ministerial officer, and affording a personal remedy in the case of their non-performance, and not as invalidating completed judicial proceedings, on *343

the ground of irregularities of form *and procedure. This view will be found in harmony with decisions.

Three things are essential to the title of the purchaser under a Sheriff's sale in execution-a judgment, an execution, and an official act of the Sheriff, in conformity with the execution. Under the judgment, the lands of the judgment debtor are bound for its satisfaction. Under the execution the Sheriff derives authority to levy, sell and convey to the purchaser. A levy, sale and conveyance, in due form of law, complete the title of the purchaser, as against the judgment debtor.

It was held in Sims v. Randall, 2 Bay, 524, that the authority of the Sheriff is limited, in point of time, by the return day of the execution. As this case is reported in Bay, it would appear to have held that a sale of lands, made after the return day of the execution, was invalid, without regard to whether a levy had been made prior or subsequent to the return day, although the rule was held to be otherwise in the case of a seizure and sale of goods, which might be sold after the return day, if seized before that day.

The case last referred to was explained and limited by the decision in Toomer v. Pinckney, 1 Mill, 323, where it was held that if the levy was made before the return day, the sale might take place after that day.

Although under the authority of Sims v. Randall, as explained and settled, a levy made after the return day is void, still the rule in regard to irregularities in form and procedure, above stated, remains unimpaired. The question, when the Sheriff levies after the return day, is one of his authority to act at all, and not of an irregularity comauthority derived to him through the execution. Having failed to exercise that authority in due time, it has passed from him, under the limitation in point of time, to which it was originally subject.

The effect of irregularities in the advertisement, as affecting the purchaser, appears to have been first fully considered in Turner v. McCrae, 1 N. & McC., 11, where, although the dissenting minority embraced the names of Judges Nott and Grant, still a strong majority united in the views expressed by Judge Colcock. His language is as follows: "The Act imposed it as a duty on the Sheriff to advertise all his sales in the public gazette, (2 Faust, 142; 2 Brev. Dig., 222); but his failing to do so could not invalidate the sales. If any damage resulted to the defendant from his failing to comply with the requisites

*344

of the Act, the defendant would be enti*tled to his action for the recovery of damages, but it certainly was never intended to impose it, as a duty, on a purchaser, to see that this duty was performed by the Sheriff. As well might it be said, that the purchaser should inquire into all the other duties enjoined on the Sheriff before he proceeds to sell. I cannot conceive that the title of a fair purchaser should be made to depend on such perishable testimony. If it were unnecessary for him to have proven a compliance with the requisites of the act in this suit, it would be equally so in any suit which he might be compelled to bring fifty years hence. Public convenience and policy forbid such a construction of the Act." Although the reasonings in support of such conclusion are drawn from considerations of convenience, yet, the conclusion will be found to rest on sound principles. It recognizes the fact, that a ministerial officer, entrusted with the exercise of authority appertaining to the judicial power, may have duties cast upon him incidental to the exercise of such authority, yet that such incidental duties are not necessarily a limitation of the powers themselves, so that the validity of their exercise is dependent on the due performance of such incidental duties. The support of the title of the purchaser, in that case, was in effect a determination, that judicial powers lodged for exercise in the hands of a ministerial officer, are not to be regarded as affected in their incidents and consequences by any implication arising from statutes imposing particular duties on such ministerial officer, though connected directly with the exercise of such powers.

So it was held in Cain v. Maples, (1 Hill, 315 [26 Am. Dec. 184],) that a purchaser could not be affected by an irregularity committed by the Sheriff, in postponing a sale under execution until Tuesday, when such sale might have been made on Monday, as required by law.

In O'Neall v. Duncan, (4 McC., 246) it was held that the judgment debtor was estopped by the Sheriff's deed from denying the title of the purchaser under the judgment. Court says: "The Sheriff's title (he being the organ of the law to convey the defendant's right) is considered as the deed of the defendant, and operates as an estoppel." It would be a very narrow view of this conclusion to suppose that it depended on the idea that the ordinary relation of principal and agent existed, as between the judgment debtor and the Sheriff as Sheriff. The Sheriff, as such, has a right to receive and execute the process of the Court within his bailiwick, but it is only under the process of the Court, lodged in his hand, that he becomes "the organ of the law to convey the defendant's rights."

*345

*Estoppels between private parties, whether acting in person or by agent, involve, more or less, the idea of fraud and misrepresentation. The notion of an estoppel, as derived from the force and effect of a judgment or other judicial act, is technical, and involves the idea that what one does by the hand and operation of the law, the law will not lend its hand to undo or render void. When jurisdiction is obtained in a cause, the parties are regarded as present and acting in every act of the Court; though their action may be compulsory, the compulsion is of right, and the duty of standing by the act, as if voluntarily performed, is enforced against the parties by analogy to the idea of estoppel, as applied to voluntary acts.

Maddox v. Sullivan, (2 Rich. Eq., 4 [44 Am. Dec. 234],) is a case of importance, as showing that the same doctrines prevail in equity, as at law, on this subject. In that case two grounds were urged against the validity of a Sheriff's sale; first, that the advertisement of sale was not for the statute period; and, second, that no levy had been made under the executions on which the land was sold. As to the last mentioned ground the facts were, that a levy was made on the land, but only under a senior execution, which was paid off by the proceeds of the sale of the personal property, yet the Sheriff continued the sale, under junior executions, and sold the land in question. The Chancellor, whose opinion was adopted by the Appellate Court, says: "Both of these grounds are based on mere irregularities or omissions of the Sheriff in the discharge of the duties of his office, and that these do not vitiate a sale of property made by him, has been so long and so fully settled, and upon such well defined principles, as to render all commentary upon them unnecessary." Whether that case is to be regarded as turning on the idea that a levy was unnecessary to support the title of a purchaser, or that a levy would be presumed, although the execution showed no endorsement of such levy, it is equally clear in the support given to the principles now under consideration. It shows that the force and effect of such a judicial act of a Court of law is recognized in equity as binding the conscience as well as establishing technical rights.

In Manning v. Dove, 10 Rich., 395, it was held that the principle of estoppel laid down in O'Neall v. Duncan, ought to be extended to all cases of mere irregularities committed by the Sheriff in the execution of process. A want of conformity in the description of the land, as between the levy and the Sheriff's deed, was held to be such an irregularity as did not affect the purchaser's title.

*Two grounds are stated by Judge Glover for this conclusion: First. That the Sheriff, after levy, has a right to correct error or uncertainty in the description set forth in the endorsement of his levy, although it would appear that this right did not extend to selling a distinct and separate piece of land from that described in the levy; and, Second, That the Sheriff's deed having recited the fact of a levy, the judgment debtor ought not to be allowed to aver against such recitals

It is a reasonable inference from the opinion, that unless the Sheriff's deed contained a recital of a levy, it would be necessary for the purchaser to prove the fact of such levy as is essential to his title. On this point the case does not appear to be decisive, but it clearly affirms the principle under consideration.

upon the principle stated in O'Neall v. Dun-

In Stuckey v. Crosswell, 12 Rich., 273, the Court refused to allow the recitals in the Sheriff's deed to be contradicted to the prejudice of a purchaser, as by showing inconsistency in certain dates, although records made by the Sheriff were resorted to for such proof. It is noticeable that in this case there was no dissent.

The objection, in the present case, to the purchaser's right of recovery, lay in the description of the land sold in the advertisement, and not to the terms of the levy as endorsed on the execution, and as a case of a defect in the advertisement, it is clearly covered by the cases already cited, where it is held to be of a class unimportant as affecting the purchaser.

In other words, it is altogether an irregularity in form and procedure, under an execution, conferring on the Sheriff full authority to sell and convey, and if of a nature requiring correction, should have been corrected in the case in which the proceedings were had. The present action is based upon these proceedings, and all matters of irregularity in matters of form and procedure, if they enter it at all, enter merely incidentally and collaterally.

The judgment and decision of the Circuit Court should be set aside, and a new trial awarded.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. *347

*TRENHOLM v. CHARLESTON

(November Term, 1871.)

[Taxation \$\sim 527.]

Under an ordinance to raise supplies, taxes were assessed upon plaintiff's property by a municipal corporation, and the Treasurer of the corporation being about to enforce payment under the provisions of a general ordinance, requiring all taxes to be "paid in specie or in the notes of specie-paying banks," plaintiff offered as payment a debt, of equal amount with the taxes, due him by the corporation: held, that the plaintiff had no right, legal or equitable, to compel the corporation to receive the debt as payment or satisfaction of the taxes, or as a counter claim under the Code of Procedure, or as a set-off or discount.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 972; Dec. Dig. & 527.]

[Municipal Corporations \$\infty\$976.]

Taxes of a municipal corporation are assessed under its political powers, and where its ordinance directs the medium of payment, such ordinance must be complied with.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2093; Dec. Dig. 976.]

Before Graham, J., at Charleston, April Term, 1871.

On March 12th, 1844, the City Council of Charleston passed a general ordinance "to regulate the collection of City taxes," &c., which provides "that taxes and assessments for the use and service of the City shall be paid in specie or the notes of specie-paying banks."

On October 14th, 1848, the same Council passed an ordinance directing the issue of City six per cent. stock, to the amount of \$200,000, redeemable in twenty years, and the stock was accordingly issued.

In pursuance of an ordinance of the same Council, passed March 22d, 1870, entitled "An Ordinance to raise supplies for the fiscal year ending December 31, 1870," taxes were assessed upon the property of George A. Trenholm, to the amount of \$1,614.85. By an ordinance passed February 24th, 1870, the taxes to be raised for 1870 were all appropriated to certain specific purposes therein named, the payment of the stock issued under the 'ordinance of October 14th, 1848, not being one of them.

George A. Trenholm was the owner and holder of stock issued under the ordinance of October 14th, 1840, to the amount of \$1,614.85, which was due and unpaid, and the City Treasurer being about to enforce payment of the taxes assessed upon his property

as aforesaid, he offered the stock owned and held by him, as payment or satisfaction thereof. The City Treasurer refused to receive the stock in payment of the taxes, and thereupon the said George A. Trenholm commenced this action against the corporation and two of its officers, the City Treasurer and the City Sheriff, to compel the former to receive the stock as a satisfaction of, or counter-claim to, the taxes, and to enjoin the latter from collecting the taxes.

*348

*His Honor, the presiding Judge, made a decree, dismissing the complaint with costs, and the plaintiff appealed.

Magrath & Lowndes, for appellant.

Corbin, City Attorney, contra.

[The points made in the argument are stated in the opinion of the Court. The following authorities were cited: For appellant—City Charter, Act 1783, 7 Stat., 98; Waterm. on Set-off, 41; Gray v. Burnett, 3 Metc., 522; Concord v. Pittsburgh, 33 N. H., 310; 33 N. H., 522; Wilson v. Lewiston, Watts & Serg., 428; 4 Stat. 624; State v. Gaillard, 1 Bay, 500; State v. Gordon, 1 Bay, 492; Treasurers v. Cleary, 3 Rich., 372; Cooley, 492; Code, § 173. For appellees-State v. Hunt and Pinckney, 3 Strob., 400; Britton v. Mayor, &c., of New York, 21 How. Pr. R., 251; Presbyterian Church v. Mayor, &c., of New York, 5 Cow., 538; Goszler v. Georgetown, 6 Wheat., 593; Graniteville Manfg. Co. v. Roper, 15 Rich., 156; Vassear v. Livingstone, 13 N. Y., 257; 3 Bl. Com., 395; Pierce v. Boston, 3 Metc., 521; 1 Pars. on Con., 5; Wat. on Set-off, § 37; 2 Kent Com., 450, 477; Greene v. Darling, 5 Mason, 201; Dade v. Irwin's Exors., 2 How., 390; Howe v. Sheppard, 2 Sumner, 409; Greene v. Darling, 2 Sumner, 214; Darlington v. Mayor, &c., of New York, 31 N. Y., 193; Hayne v. Hood, 1 S. C., 16; 1 Bl. Com., 91; 1 Kent Com., 448; Lindsay v. Commissioners, 2 Bay, 38.]

April 22, 1872. The opinion of the Court was delivered by

MOSES, C. J. The general power of the City Council of Charleston to impose taxes is not controverted on the part of the appellant. Neither is any question made in regard to the character of the tax demanded. It is therefore to be assumed as rightly assessed.

An injunction, however, is claimed to restrain the enforcement of the execution for taxes against the plaintiff, and the penalty for nonpayment thereof, and for a decree to compel the defendants to receive in satisfaction certain past due city stock.

The ordinance of the City Council entitled "An ordinance to regulate the collection of city taxes," &c., ratified on March 12, 1844—Eckhard's Comp., 270—provides "that taxes and assessments for the use and

service of the city shall be paid in specie or the notes of specie-paying banks." While this restriction on the means through which the taxpayer may meet the contribution *349

*which the city exacts of him for its use and purposes, is conceded to be within the legitimate power, either expressly granted, or by necessary implication conferred by the charter, it is claimed that a past due debt of the corporation, held by the plaintiff, may be set off against the taxes now about to be enforced against him.

In the imposition of taxes by a municipal corporation, it exercises a legislative function derived from the grant of powers which the State has devolved upon it for the purposes contemplated by its charter. Many of these powers, as was said by Chief Justice Nelson, in a case to be hereinafter referred to, are of the kind and nature which appertain to a citizen in his individual character, and as to these, it is bound and controlled by the same rules which regulate private rights. Contracts which, through its charter and by-laws, it is permitted to make, bind it to the same extent as the like agreements between individuals would bind them. In the same manner would it be responsible for any breach of duty, or for a failure to observe the obligations imposed by its charter, where loss or damage is the consequence. There is a wide distinction, however, between the enforcement of rights against a State and a municipal corpora-Whatever obligations rest upon a State, as no process is effectual to make it a party to a judicial proceeding, the judgments of the Court cannot reach or control it. The security of claims against a sovereign State, rests upon its high sense of honor and moral obligation. The case of Pinckney, 3 Strob., 400, so much relied on in the argument of the counsel for the appellees, fails of application to the points made by the pleadings before us, because there the purpose of the mandamus indirectly, but virtually, sought to recover from the State a debt claimed against it. The exemption which thus prevails in favor of a State in no way can be extended to protect a municipal corporation from suit, or to prevent a citizen, when sued by it, from setting up any legitimate subject of discount.

The rights of the corporation to impose and collect taxes does not rest upon a contract. It is not founded on any agreement based on mutual assent. "Taxes are burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."—Cooley, 479. Their imposition is an exercise of political rights, and carries with it the privilege of determining the nature and character of the funds which shall be accepted for their payment.

The Ordinance of 1844 was dictated by

*350

proper views of policy, *and exhibits, on the part of those entrusted with the administration of the municipal affairs, a due regard to the confidence which was reposed in them. The means of sustaining the City Government were to be secured beyond the possibility of failure, for, on the certain collection of the funds necessary for that purpose, the very existence of the corporation depended. The good of the many must be preserved, even at the expense of individual loss and sacrifice. There was a necessity for some provision by law through which the medium in which taxes were to be paid should be fixed, for, otherwise, the very ob-This ject of taxation might be defeated. requisition was foreknown to the tax payer, and, therefore, cannot be the subject of surprise or complaint on his part. The idea of certainty is necessarily connected with taxation. It is called, in Tamlin's Law Dictionary, (Title "Tax,") "a tribute or imposition laid upon the subject, which, being certainly or duly rated, was wont to be yearly paid into the King's Exchequer. It differs from what is commonly called a subsidy, in this, that it is always certain."

The stock by which it was proposed to pay the tax was not issued until 1848, and when the plaintiff purchased it, he was admonished by the Ordinance of 1844, that he could not make it available for the purpose he now proposed. Doubtless it would have acquired additional value, if it had been recognized as a currency applicable to such use.

Is the corporation bound to accept it? If the imposition of taxes or the direction of the currency in which they are to be paid was the exercise of legislative authority by the Council, within the grant of their charter, they cannot be required to receive the stock offered in payment by the plaintiff.

In Britton v. The Mayor, &c., of N. Y., 21 Howard, 251, it was held that the Common Council cannot tie up or embarrass the exercise of their public duties by contract or otherwise, so as to disable them from enacting any law that may be deemed essential for the public good. That they cannot limit their legislative discretion by covenant, and are not estopped from giving that answer. This, too, was in a case where the Council had entered into a covenant for cleaning the streets, piers and wharves of the city.

It had been previously held, in Presbyterian Church v. City of New York, 5 Cowen, 538, that a corporation cannot, by contract, abridge their legislative power. How far we may be impressed with the principles applied in these cases to contracts entered into by municipal corporations, and their

performance not prevented by *the interference of State legislation, we are not prepared now to say. They, however, are in point to shew the extent to which such corporations are permitted to go, while in the exercise, under their charter, of what may be termed political power.

Taxes are raised to meet the current expenses of the city, and to pay claims which have been recognized, and for all of which appropriations are annually made.

The operation of the whole machinery of the city government depends on these appropriations, made with a corresponding regard to the amount of supplies to be raised. If they are to be diverted to objects foreign to. and not contemplated by their enactment, there is not a department of the city which might not be affected even to destruction, to say nothing of the losses and disappointments of those whose claims may have been admitted and ordered for payment by the Council. There would be gross injustice in requiring the defendants to receive this stock in payment of the taxes for 1870, due by the plaintiff. The supplies to be raised by the tax for that year have all been set apart, by appropriations, to stated purposes. A specific application has been made of them, involving the direct and preferred rights of other parties, which, if not defeated, would at least be postponed, if the amount of money to be raised could be reduced by the reception of any other medium in payment of the taxes assessed.

It is further submitted by the complaint that the stock due by the city is a legitimate subject of set off, against the assessment and execution for taxes.

The provisions of the Code, Section 173, do not apply to the counter claim proposed. There is no connection between the tax assessed against the plaintiff and the debt in city stock, which he holds against the defendants. The right to tax rests on no contract, and, therefore, no cause of action arising on contract can be set off against it. The process for its collection does not rest in action, but on mandate.

Neither can relief be afforded to the plaintiff in the matter of his proposed counter claim through the rule which, in analogy to the doctrine of law in regard to set-off, prevails in equity.

The view that we have taken of the whole case precludes us from extending to the plaintiff's claim either the legal or equitable principles on which the rights of set-off depend.

The motion is dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *352

*BYRD v. CHARLES.

(November Term, 1871.)

[Set-Off and Counterclaim \$\infty\$=344, 54.]

In an action by A against B, a debt due to B by a partnership, of which A was a member, cannot be sustained as a counter claim, and the objection may be taken at the trial, though there was no demurrer to the counter claim, and the counter was released. claim as pleaded.

[Ed. Note.—Cited in Plyer v. Parker, 10 S. C. 466, 467; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 540, 33 S. E. 787.

For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 95, 125; Dec. Dig. \$\sim 44, 54.]

Befere Rutland, J., at Darlington, May Term, 1871.

Action by Evander Byrd, plaintiff, against William E. Charles, defendant.

The complaint alleged that on or about the 1st day of January, 1870, the plaintiff borrowed from defendant \$250, for which he gave his note, and also delivered to defendant, as collateral security, a certain other note made by Wm. J. Byrd, James P. Wilson and A. C. Byrd, payable to plaintiff, for \$480; that on March 11th, 1870, plaintiff made a payment on his note of \$65, and that defendant afterwards collected the note of Wm. J. Byrd and others, which satisfied plaintiff's note to defendant, leaving a balance in his hands of \$437.62. The action was brought to recover this balance, with interest, and to compel defendant to surrender the note for \$250.

The defendant, in his answer, denied that he had collected the note of Wm. J. Byrd and others, and stated that he had been compelled to transfer the same at a discount, and that the sum realized by the transfer, after satisfying plaintiff's note to defendant, left a balance in his hands of only \$338.18. Defendant then pleaded a counter claim as follows:

"And in counter claim to plaintiff's demand, defendant says that he is justly entitled to retain said balance, for, that on the day of June, A. D. 1870, plaintiff was a member of a certain mercantile firm, doing business in said County under the name and style of DeLorme & Byrd, and composed solely of plaintiff and one Charles H. DeLorme; that on said last mentioned day the aforesaid firm being indebted to the defendant in the sum of \$465.44, balance on mutual account, gave out and represented themselves, as well as each of the members thereof, as insolvent and unable to pay but 25 per cent. of their liabilities. That defendant was thereby induced to take that portion in full satisfaction of his claim against them, and gave his receipt as such.

"But this defendant alleges that in so far as relative to the insolvency of plaintiff, these reports were false, and fraudulently concocted by this plaintiff, in order to deceive ner utterly insolvent.

*353

and defraud this defend*ant and other creditors of their just demands, and induce them thereby to compromise the same. This defendant alleges that plaintiff is, and has heretofore been, and was at the time last aforesaid, amply responsible for, and able to pay all debts of the said firm, and of his own individually. Defendant alleges that said firm is now dissolved, and without assets, and that Charles H. DeLorme is insolvent, and cannot be made responsible for any portion of this claim by action.

"Wherefore defendant prays that the same may be adjudged an offset or counter claim against plaintiff's demand, that his, defendant's receipt, in satisfaction thereof, may be adjudged void and inoperative, for fraud and imposition, and that judgment be granted this defendant for the balance, to wit: Ten

dollars and ninety cents,"

To that part of the answer containing the counter claim, the plaintiff replied as follows:

"1. He denies, indignantly, the fraud, deceit and misrepresentation charged. The defendant made the compromise he complains of with his eyes open, and with a full knowledge of the facts of the case, as asked for or desired, and the plaintiff insists that he is bound by the compromise, and from its date has had no claim against the firm of De-Lorme & Byrd.

"2. The plaintiff insists, that even were the firm of DeLorme & Byrd still indebted to the defendant, such indebtedness would not be discountable against the individual claim of the plaintiff."

At the trial, plaintiff objected to evidence offered by defendant, for the purpose of establishing his counter claim, on the ground that, being a partnership debt, it was not admissible as set-off in an action by the plaintiff individually. His Honor sustained the objection, and a verdict was rendered for plaintiff for the full amount of his claim.

Defendant appealed on the following grounds:

1. His Honor erred in refusing to allow defendant to prove his counter claim, because plaintiff should have demurred to the answer if he desired to avail himself of the objection that the counter claim then set up was not a proper offset, and thereby made an issue of law. But having elected to make an issue of fact by his reply he could not at the trial object to the trial of that issue.

2. His Honor erred in ruling that the counter claim, pleaded in defendant's answer, was not an offset to plaintiff's suit, since said counter claim was an existing available *354

cause of action at the com*mencement of plaintiff's suit against plaintiff only, the firm to which he had belonged being dissolved. and without assets, and the only other partCharles, for appellant:

1. When it appears on the face of a pleading that there is a defect of parties, demurrer is the only manner of making the objection, and a failure to demur is a waiver of the objection.—Code, §§ 166 to 171 inclusive, §§ 176, 271, 274; Gasset v. Croker. 10 Abb. (N. Y.) Rep., 133; Gilbert v. Covell. 16 How., (N. Y.,) 34; Code, § 159, subdiv. 4; Exum v. Davis, 10 Rich., 357.

2. Although it is, as a general rule, the privilege of joint contractors, to compel a joinder in actions against them, yet when the gravamen of the action is the fraud of only one, which enures to his sole and separate benefit, the action is against such one alone. For there can be no contribution in fraud. For a like reason, an insolvent will be dispensed with.-Petrie v. Lamont, 41 Eng. C. L. R., 57; 3 Step. Nisi Prius, 2420; Kilby v. Wilson, 21 Eng. C. L. R., 726; White v. Smith, 12 Rich., 595; Hammer v. Barnes, 26 How., (N. Y..) 174; Adams' Eq., 319, 268; Cockburn v. Thompson, 16 Ves., 326; 1 Chit. Pl., 43; Story Eq. Pl., § 169; 1 Story Eq., § 676.

3. The cause of action, as set forth, in defendant's answer, is properly pleaded as a counter claim to plaintiff's suit, since both arise on contract, and a several judgment might be had between defendant and plaintiff. It is, furthermore, such as has been heretofore denominated an equitable set-off.—Code, § 173; 1 Chit. Pl., 137, 582; Boarman v. Brown, 43 Eng. C. L. R., 850; Adams' Eq., 223; 2 Story Eq., §§ 1437 and 1444; Biles on Bills, 295, 290, 287; Ex parte Stephens, 11 Ves., 24; Ex parte Hanson, 12 Ves., 346; Falconer v. Powe, Bail. Eq., 156; Schubart v. Harteau, 34 Barb. (N. Y.) Rep., 447; Beers v. Hearsey, 1 Bail., 168.

McIver. contra:

1st. A demurrer was not necessary or proper; it was not a mere objection for defect of parties, but the defect complained of was incurable, and no form of pleading will waive the right to take advantage of such a defect.—Code, § 167; Voorhees' Code, 10th Edit., 1870—Notes c and d, 210.

2d. The counter claim set up in defendant's answer cannot be set up against the plaintiff's claim, because it is a claim against a partnership, one of the members of which is

*355

not before the Court, and *such a claim, even if valid, is not discountable against the individual claim of the plaintiff.—Voorhees' Code. 226, note c: 1 Tif. & Smith, N. Y. Pr., 381: Act of 1759, (No. 877, old series,) 4 Stat., 76; Powrie & Dawson v. Fletcher & Phillips, 2 Bay, 146; Lovell & Paine v. Whitridge, 1 McC., 7: Beckham & Eccles v. Peay, 2 Bail., 133; Kennedy v. Cunningham & Childs Chev., 50.

In this connection the following cases were commented on:

McElhenny v. Stroup, Rice, 291; Saluda Manufac, Co. v. Pennington, 2 Sp., 735; Wilson v. Dargan, 4 Rich., 544.

April 23, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. On or about the first day of January, A. D. 1870, plaintiff borrowed from the defendant the sum of two hundred and fifty dollars, and, to secure the payment thereof, made and delivered to the defendant, as collateral security for the payment of said note, a certain other note, made by W. J. Byrd, James P. Wilson and A. C. Byrd, payable to the plaintiff, bearing date the sixth day of November, 1865, for four hundred and eighty dollars. On the eleventh day of March, 1870, plaintiff made a payment of sixty-five dollars on the note that was given for the two hundred and fifty dollars borrowed of the defendant. The defendant disposed of the note placed in his hands by the plaintiff as collateral security for the payment of the note given for the money borrowed.

This action was brought for the purpose of causing the defendant to surrender to the plaintiff the note which was given for the borrowed money, and to pay over to plaintiff a certain amount of money alleged to be in the hands of the defendant from the disposition of the note placed in his hands as collateral security.

At the trial the defendant offered to prove a certain claim, which was objected to by the plaintiff, on the ground that, even if valid, it was a debt due by the partnership firm to which plaintiff had once belonged, and could not be set off against a debt due the plaintiff individually, unless there had been an agreement to that effect between the parties.

This objection the Court sustained, and defendant excepted and made such ruling by the Court the grounds of appeal. It is clear, when it appears upon the face of the complaint that there is a defect of parties, that the objection is to be taken by demurrer.

The objection here was not for a defect of parties. It arose from the nature of the discount which was disclosed by the answer, as against the demand presented by the complaint.

*356

*That was the individual debt of the appellant, and he proposed, by his answer, to set off a supposed claim against the plaintiff and one DeLorme, who had, before that time, been copartners in merchandizing. It is not easy to perceive what form of pleading would amount to the waiver of the right to take advantage of the objection.

The claim, if valid, is not discountable against the demand of the plaintiff. It is against a copartnership, of which the ap-

pellant was one of the members, and in an made his last will and testament, whereby action seeking the enforcement of an individual right, cannot be permitted as a discount. Lovel & Paine v. Whitridge, 1 McC., 7; Beckham & Eckles v. Peay, 2 Bail., 133; Kenedy v. Cunningham & Childs, Chev., 50. The motion for a new trial is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

3 S. C. 356

McGOWAN v. LOWRANCE.

(November Term, 1871.)

[Appeal and Error \$\sim 997.]

Where the verdict is rendered by direction of the Court, a new trial will be granted if it appears that the right of the party, in whose favor it was rendered, did not depend wholly on the decision of a question of law, but involved the determination of some matter of fact upon disputed evidence, or upon some conclusion of fact to be drawn, or if it appears that some proposition of law, material to the question, proposition of law, may was erroneously solved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. &= 997.]

[Wills \$\infty 792.]

The Circuit Judge having erroneously instructed the jury that the decree and other proceedings under a certain bill in equity amounted to an election to take under a certain deed, new trial granted.

[Ed. Note.—Cited in Tutt v. Port Royal & A. Ry. Co., 16 S. C. 369.

For other cases, see Wills, Cent. Dig. § 2050; Dec. Dig. 5792.]

Before Melton, J., at Richland, February Term, 1871.

Action by Olivia McGowan, Henrietta Mc-Gowan, and six others, plaintiffs, against Rufus N. Lowrance, and two others, defendants, to recover possession of the lot on Richardson street, in the city of Columbia, hereinafter mentioned.

The case was as follows:

On the 15th of January, 1817, Sarah Benson and others executed a deed of release, herein called the Benson deed, whereby, in consideration of \$1,010 to them paid by John D. Brown, they conveyed to Brown, and his heirs, the lot in dispute in this action, in trust: (1.) for the use of Brown for life, with

*357

power to sell and convey the *same when he may think it best for the use of his wife and children; and, (2.) "after the death of the said John D. Brown, the said property to be equally divided between the said wife and children then living" of the said John D. Brown, the issue of a predeceased child to take the parents' share.

John D. Brown was the owner of considerable other property, both real and personal, and on the 25th of April, 1832, he turb the family arrangements contemplated

he devised the lot on Richardson street to his son, John H. Brown, and his daughter, Sarah P. Brown, in equal moities, with such limitations that if one should die without issue the other should take the whole for life, with remainder to his or her children in fee. The will contained separate devises and bequests to testator's wife, Sarah Brown, his daughter, Mary Ann Harvey, wife of William E. Harvey, and his daughter, Martha M. Pasmore, wife of Metcalf Pasmore, also bequests of personalty to John H. Brown, Sarah P. Brown and John Brown Pasmore, a grandson of testator. The devise to Mary Ann Harvey was of a house and lot on Assembly and Taylor streets, in Columbia, to have and to hold the same to her sole and separate use for life, with remainder to her children, should she leave any, if not, then to the "other children or issue" of testator. The residue was devised and bequeathed to testator's wife. All the other devises and bequests were specific. The testator died in 1832, leaving his said will of force, and his wife, children and grandson above named him surviving.

John H. Brown died in 1833, leaving no issue, and in the same year Sarah P. Brown intermarried with Henry N. McGowan.

In 1836 William E. Harvey and Mary Ann, his wife, filed a bill in the Court of Equity for Richland, against Henry N. McGowan and Sarah P., his wife, and Sarah Brown, wherein they stated that the house and lot on Assembly street, devised by the testator to the plaintiff, Mary Ann, and several slaves, were held by the testator on trusts similar to those on which he held the lot on Richardson street; that the plaintiff, William E. Harvey, had had possession of the house and lot on Assembly street for upwards of ten years, under an agreement to purchase the same from the testator, and that he had paid nearly the whole of the purchase money; that the testator died in June, 1832, leaving a considerable estate, real and personal, and also leaving his wife and children (above named) him surviving, and that he left his last will and testament (herein before mentioned) "by which he hath assumed to con-

*358

vev and dis*tribute to various devisees and legatees not only his own property, but that also which he held in trust as aforesaid for his wife and certain of his children, including the interest of your oratrix, Mary Ann Harvey. That by the dispositions of the said will, your oratrix is not put upon an equal footing of the rest of his family, and is, therefore, unwilling to take under the said will, but claims to have the benefit of the provisions of the said trust deed. Now, your orator and oratrix are unwilling to dis-

by the said John D. Brown, further than is | Court on the first Monday in February next necessary to secure their just rights; and in order to promote peace and harmony in the family, they have filed this bill, in order, in an amicable manner, to adjust the rights of the complainants in relation to those members of the family of the said John D. Brown with whom their rights may come in conflict. Complainants are desirous that the house and lot on Assembly street should be sold and the proceeds invested in slaves, to the same uses that are expressed in the will of the testator in relation to the said house and lot, to which your orator, William E. Harvey, though now holding the said house and lot in his own right, by an indefeasible title, hereby expresses his assent."

The prayer was "that your orator and oratrix may have such portion of the settled estate allotted to them, by sale or otherwise, as may equalize them with the other children of the said John D. Brown, and be a fair equivalent for the property secured by the said trust deed, which they thus agree to give up; that the house and lot on Assembly street may be sold and the proceeds invested in slaves, upon the like uses as are contained and set forth in the said will in relation to the said house and lot, and that your orator and oratrix may have such further and other relief in the premises as to your Honors may seem meet."

By the written consent of the parties, filed with the bill, the following decree, dated January 7th, 1837, was made in the case:

"By consent of parties, it is ordered and decreed that Henry N. McGowan and Sarah P. McGowan do pay to William E. Harvey, upon the trusts hereinafter mentioned, the sum of two thousand and fifty dollars; and that this sum, when paid, shall be a full discharge of the claims of William E. Harvey and Mary Ann Harvey upon Henry N. McGowan and Sarah P. McGowan, and upon the estate of John D. Brown, for their share of all the property held by said John D. Brown in his lifetime, in trust for his wife and Mary Ann Harvey and others of his children, except that the title of the said *359

*William E. Harvey and his wife to the house and lot in Columbia, wherein they now live, at the corner of Taylor and Assembly streets, shall be confirmed to them, as well as all other interests secured to them by the will of the said John D. Brown; and the same are hereby declared to be vested in the said William E. Harvey and his wife forever. It is further ordered and decreed that the three story brick building on Richardson street, and the lot whereon it is situate, claimed by the said Henry N. Mc-Gowan and his wife, under the will of the said John D. Brown, which house is now occupied by Wm. Barkley and Wm. Beard as dispute, described in the pleadings, in the tenants, be sold by the Commissioner of this plaintiffs in this action?"

for cash; and that out of the proceeds of said sale, the said sum of two thousand and fifty dollars be paid by the Commissioner to William E. Harvey, in trust for his wife, Mary Ann Harvey, and the present and future issue of the marriage, with power to the said William E. Harvey to dispose of the same, with the consent of his wife in writing. The costs of this suit to be paid out of the sales aforesaid, and the balance of the purchase money to be paid to Henry N. Mc-Gowan in trust for his wife, Sarah P. Mc-Gowan, and the present and future issue of the marriage, with power to the said Henry N. McGowan to dispose thereof, with the consent of his said wife in writing, and subject to the conditions and limitations annexed to the devise of the said brick house by the will of the said John D. Brown. It is further ordered and decreed that the house and lot at the corner of Taylor and Assembly streets, occupied by the said William E. Harvey, be sold by the Commissioner of this Court for cash, on the first Monday in February next, or some subsequent saleday; and that the proceeds of the said sales be paid over to the said William E. Harvey, to be invested in slaves, and that the said slaves shall be held by him subject to and upon the same trusts and limitations as are contained and expressed in the will of the said John D. Brown in relation to the said house and lot."

The lot on Richardson street was duly sold by the Commissioner in Equity under the above decree, and a conveyance executed to the purchasers. The defendants hold under the title conferred by that sale and conveyance.

Sarah P. McGowan died in 1862, leaving six children, who, with the husbands of two of them, are the plaintiffs in this action. They claimed under the limitations of John D. Brown's will, which, upon the death of John H. Brown, vested the estate in the prem-*360

i*ses in Sarah P. Brown for life, and after her death in her children. Olivia McGowan and Henrietta McGowan, two of the plaintiffs, were born before the bill in Equity, hereinbefore mentioned, was filed, but were not made parties thereto.

The plaintiffs gave some evidence tending to show that before the bill in equity was filed, all the devisees and legatees of John D. Brown had accepted the provisions of his will, and thereby, as was contended for plaintiffs, elected to take under the will and against the Benson deed.

The case was tried upon the following question, reduced to writing, and submitted to the jury as the only issue to be determined by them: "Is the title to the premises in His Honor the Circuit Judge ruled that the bill in equity, decree and other proceedings thereunder, amounted to an election by the parties to that bill, to take under the Benson deed and against the will of John D. Brown; and he instructed the jury that, as the plaintiffs had no estate under the limitations of the Benson deed, they had failed to show title in themselves, and the verdict should be for defendants. To this ruling, and other rulings unnecessary to mention, the plaintiffs excepted.

The jury found for the defendants, and judgment having been entered thereon, the plaintiffs appealed therefrom to this Court.

McMaster & LeConte, for appellants:

I. The proceeding in equity, under which the property was sold, did not establish an election by the parties concerned to take under the deeds of Benson and others, in derogation of the will:

(a.) Because the acceptance of the benefits, and acquiescence in the provisions, of the will by the parties, amounted to an election by them to take under that instrument. election was at law and in equity a satisfaction of their rights under the deed, and could only be retracted, if at all, upon grounds of equity, shown in proceedings had for the purpose. A consent decree, taken without the privity of the remaindermen, was wholly insufficient to effect such retraction of their original election.-Fearne on Cont. Rem., 28, 208; 2 Hill, 324; 4 Kent, 221; Van Lew v. Parr, 2 Rich. Eq., 328; 3 Rich. Eq., 359; 9 Rich. Eq., 56; Story Eq. Jur., §§ 1075, 1096; 2 Roper on Leg., 1566; 1 Swanston, 383 and note; Buist v. Dawes, 3 Rich. Eq., 301; Hall v. Hall, 2 McC. Ch., 306; Buttrick v. Broadhurst, 3 Bro. C. C., 88; 2 Vesey, Jr., 696.

*361

*(b.) Because the proceedings were not designed for any such purpose; but, on the contrary, it is manifest from the record that Mrs. McGowan and Mrs. Brown expressly continued their election under the will, and that the property was sold under the title of Mrs. McGowan, derived from the will, to satisfy the terms of an agreement by which Mr. and Mrs. Harvey had released all their claims upon the estates; and this construction alone is consistent with the interests of the parties, their good faith in the transaction, and the settled principles of the Court of Equity.-2 Phil. Ev., 303; Life Tables in Oliver on Conveyancing, 89; 2 Ves., Sr., 61; Ward v. Baugh, 4 Ves., 623; Bright on Husband and Wife, 474; 2 Story Eq. Jur., §§ 1083, 1084; Coke v. Turner, 14 Sim., 493; Hogeboom v. Hall, 24 Wend., 146; 1 Des., 498.

II. If the parties originally acquiesced in the provisions of the will with a full knowledge of their rights, their elections could not afterwards be retracted—and whether they so elected or not, was a question of fact for

the jury.—Roundel v. Currer, 1 Swans., 383, note; Coker v. Farewell, 1 Swans., 390, note; P. W., 563. Or if the question was one of mixed law and fact, it should still have been left to the jury.—Lowndes v. King, 1 S. C., 102; Code, §§ 284, 285.

III. Since a renewal of the original election of the parties could only be effected by the decree of the Court, and the validity of such decree depended upon the good faith of the parties, the question of fraud was most material, and should have been submitted to the jury.—Dutchess of Kingston's Case, 11 St. Tr., 262; 1 Starkie on Ev., 249.

IV. Even if the proceedings in equity had established a valid election of the parties under the Benson deed, still the plaintiffs had a clear interest in the property not affected by the decree:

(a.) Because, under the deed, the widow and children of J. D. Brown took only estates for life—representing each one-fifth shares of the life estate in the premises. The fee simple in the property was vested by the deed in Brown and his heirs. The plaintiffs, as the devisees of Brown, held the reversion in fee, and upon the death of the life tenant were entitled to the possession of the property.—2 N. & McC., 383; 4 McC., 442, 476; Sanders on Uses and Trusts, 122; 4 Kent, 354.

(b.) Because, even if the parties to the proceedings had taken absolute estates by said deed, still they could represent only three-fifths of the fee in the property, and the

*362

plaintiffs were entitled *to the remaining two-fifths; beneficially, as to the life estate therein; and legally, as to the remainder in fee. Their title was not barred by the decree; and whether legal or equitable, should have been enforced by the Court.—2 Story Eq. Jur., § 1084, and authorities cited above; 1 Story Eq. Jur., § 656; 4 Rich. Eq., 492; 7 Barb., 226; 1 Starkie on Ev., 217; Code. §§ 165, 166; Van Sanf. Eq. R., 107; 7 How., 423, and 2 Kern., 336.

V. If the parties made their election under the will, the life estate alone was conveyed to the purchaser at the sale, and the estates in remainder continued unaffected by the decree:

(a.) Because Mrs. McGowan's life interest in the property alone was ordered to be sold by the decree.

(b.) Because, even if the decree had been intended to carry an absolute estate, it was the act of the parties, and not the act of the Court, and could only pass such estate as the parties were capable of conveying by their own deed.—2 Rich. Eq., 328; 3 Rich. Eq., 359; 9 Rich. Eq., 56.

(c.) Because, even if the decree had the force of a solemn judgment of the Court, still it could not affect the remaindermen, who were not privies, as their estates were

vested.—7 Rich. Eq., 100; 1 Jarm. on Wills, 393, and note; Williman v. Holmes, 4 Rich. Eq., 492; nor, if contingent, as the remaindermen were in esse, and within the jurisdiction of the Court.—Story Eq. Jur., § 656; Story Eq. R., 144; Perk. Ch. R., 314; 1 Sch. and Lef., 210; 9 Vesey, 63; Cheves Eq., 33; 2 Rich. Eq., 333; 3 Rich. Eq., 1; 4 Rich. Eq., 492; Vail v. Vail, 7 Barb., 226. And in fact the Court of Equity looks not so much to the technical character, as to the value of the Interests.—8 Rich. Eq., 269.

(d.) Because the decree was wanting in all the formalities requisite to bind infants and remaindermen.—Bayly v. Boyce, 5 Rich. Eq., 192; Pearse v. Killian, McM. Eq., 231; 6 Rand., 594; 1 Perk. Ch. R., 218.

VI. The title of the plaintiffs, one of whom is still a minor, has in no way been affected by the lapse of time.—2 Phil. Ev., 321, 365; McC. Ch., 317; McM. Eq., 474.

Bachman & Waties, contra:

I. Plaintiffs had no interest in this property, save such as they may have acquired by the decree of 1837. That decree ordered the unconditional sale of the property. The property sold was not the property of John D.

*363

Brown, plaintiff's ancestor—he only held *a life estate in it. At his death, it became the absolute property of his wife and children, under the deed from Benson. He did, however, attempt to dispose of it under his will, and thereby raised among his devisees and legatees the question of election—whether they would take under the will, or under the deed. Until an election was made, any interest of these plaintiffs was wholly undetermined—was purely contingent.

II. This, then, was clearly a case for election; and the main question, as presented by the exceptions, is, was there an election? Of this there can be no doubt.

There was no election prior to the proceedings in Equity. If there was, plaintiffs must prove it. "The plaintiff who desires the Court to deprive defendant of his legal estate, is bound to establish an indisputable title: he must show that testator had power to devise the estate, or that defendant elected to abide by his will." Dillon v. Parker, 1 Swans., 385, text.

"It seems difficult to prove all the circumstances necessary to constitute an election." A party should be apprised of the necessity of electing. "A party bound to elect is entitled first to ascertain the value of the funds." Not bound to elect until all the circumstances are known.—Id. 379–381, note o.

An election under misconception is not conclusive.—Id., id.

To prove a will, and enter on the estate devised, is not sufficient. Id. 380, text.

Having suffered a recovery of an estate is not of itself to be considered an election.—Welby v. Welby, 2 Ves. & B., 199.

There is no evidence that these parties elected to take under the will of John D. Brown. All that has been proved is, that they went into possession, or remained in possession for a time, of what was given by the will. That they, or at least Harvey and his wife, did not then intend to elect, is proved by their subsequent acts.

III. What acts of acceptance or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are, whether the parties acting or acquiescing were cognizant of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether (on the principle, interest republicate ut sit finis litium,) these inquiries are precluded by lapse of time.—Id., note a, 382.

The unequivocal acts of the parties in the

*364

proceedings in equity, *establish conclusively an election then to take under the deed of Benson; and the "great lapse of time" since then should "preclude all enquiries."

IV. The doctrine of election is purely equitable.

The consequence of election is compensation, not forfeiture, being founded on principles of Equity.—1 Jarm., 375; 1 Swan., 442

"Compensation is made for that which the devisee retains of his own, contrary to the design of the will, but (if necessary) to the extent of that which he derives from the testator. The former is the subject for which compensation is given; the latter the fund from which it is taken.—Gretton v. Howard, 1 Swan, 430, note d.

"Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints." The surplus after compensation does not devolve as undisposed of, but is restored to the donee: the purpose being satisfied for which alone the Court restrained his legal right.—Id., 441, note.

Of course the consequence of election in this case was forfeiture, and not compensation; because the will prescribed forfeiture as the condition. But suppose the disappointed devisees had declared themselves satisfied with other conditions—was the Court bound to declare the benefit forfeited?

Suppose arrangements were made between the parties avoiding the forfeiture as to all, or waiving it as to the "refractory devisee," and this adjustment was sanctioned by the Court, would it not be binding?

This much at least is certain: That their legal rights were claimed by the parties to the proceedings in equity, or by some of them, and their claims were acquiesced in

have any rights or claims, they must look and bequeathed the whole to his wife and for compensation, not to this property, but to the "fund derived from the testator." Their right is of course denied.

V. The question of election is rather one of law than of fact; it is sometimes both. Questions of fact may be decided by the Judge or sent to a jury. The question of election, if doubtful, may be sent to a jury.-Roundell v. Currer, 1 Swan, 382, note; 3 Ves. & B., 42.

In Dillon v. Parker, 1 Swan., 359, and Gretton v. Howard, id., 409, the whole doctrine of election is elaborately discussed.

Mere inadequacy of price, however great, no ground to set aside sale by Sheriff or Commissioner.—Coleman v. Bank, 2 Strob., 285; Holmes v. Holmes, 3 Rich., 61.

*365

*In an action of trespass to try title, plaintiff must recover on strength of his own title. "He must connect himself with oldest grant of the locus in quo, or trace title to a common ancestor."-1 McM., 450; 5 Rich., 545; 1 Tr. Con. R., 90.

The purchaser at the Commissioner's sale took his estate by the decree and under the deed.

There was no question of fraud in the case, either as to the election, or proceedings in equity, or as to the sale.

As to power of Court of Equity to sell estates of infant remaindermen, &c.-Bofil v. Fisher, 3 Rich. Eq., 1.

April 24, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The verdict below having been rendered by direction of the Court, if it shall appear that the right of the defendants to such verdict did not depend, wholly, on the decision of a question of law, but involved the determination of some matter of fact, upon disputed evidence, or upon some conclusion of fact to be drawn, or, if it appears that some proposition of law, material to the question, has been erroneously solved, then there must be a new trial.

John D. Brown, in his life time, held the land in question, under a deed from Sarah Benson and others, by which he took an estate in fee, in trust, for the use of himself for life, and after his death, "the said property to be equally divided between his wife and children then living, the child of a deceased child to take his parent's share." He took, also, by the same deed, power to sell, at discretion, for the use of his wife and children, but as this power was not exercised during his life time, it has no important bearing on the present question.

John D. Brown, by his will, assumed to dispose of this property, as if held discharged from all trusts whatever, and, placing it

by all. If these present plaintiffs had or with his real and personal estate, devised children, with the exception of a bequest to a grandchild. The devises of the real estate were all specific, except the residuary devise, each child taking a designated portion of the realty, and Sarah, his widow, in addition to a specific devise, the undevised residue of the realty. Under these devises, the land in suit went in equal moieties to his son John H. and his daughter Sarah P., for life, with remainders to their children, surviving their parents, and cross remainders, in the event

*366

of either dying without issue living. *The other devisees, including Mary A., the wife of Wm. E. Harvey, took other portions of his real estate, about which there is no dispute.

It is evident that a failure of the devise to John H. and Sarah P., in consequence of want of power to devise, must, as affecting their children, the present plaintiffs, defeat the scheme of equal division intended by the will.

There is evidence tending to show that all of the devisees accepted the provisions made by the will, and, prior to the filing of the Harvey bill, were severally in the enjoyment of the property devised. How far such acceptance and occupation may have been decisive upon the question of an election to take, according to the provisions of the will, complete and binding previous to the filing of the Harvey bill, depends upon a state of facts not yet ascertained, for the reason that the direction given to the case, by the ruling of the Circuit Court, precluded an inquiry into these facts as bearing on the question of an election antecedent to the filing of the Harvey bill.

Two questions arise at this stage of the inquiry-had the children of Sarah P. any rights at the time of the filing of the Harvey bill, and if so, were these rights cut off by the proceedings and decree under that bill.

If they had any rights, they were derived under the will, and consisted in the right of issue living at the death of Sarah P. to take, on that event, a fee by way of remain-

It is not necessary, now, to adjudicate, finally, the question of the possession of such rights, for, as far as the present verdict is concerned, unless we can, as matter of law, negate their existence, the verdict must be set aside, and the question of right determined upon a new trial.

It may, however, be observed that there are two grounds on which it may be contended that such rights rest: first, that J. D. Brown held, though as trustee, the fee of the land; and, second, that the parties entitled as beneficiaries, under the trusts, had accepted the provisions of the will, and thereby lost the right to subject the legal estate to the uses and trusts originally impressed upon it. As the present plaintiffs were not parties to the Harvey bill, they cannot be affected by it, as regards any right they may have had at the filing of that bill.

The claim of the defendants, in respect to the operation and effect of the decree in that case is, that it operated as an election to take

*367

*under the Benson deed, by which all persons are bound, whether parties or otherwise.

If that decree could have such operation and effect there would still be an insuperable objection to allowing to the defendants the benefit of that effect as mere matter of law, for the question would still remain, whether at the filing of that bill the parties to it were in a position to make such an election, and the determination of this question would involve a question of fact, whether they had already made an opposite election and become bound by it.

The most serious objection to the ruling has relation to the conclusion, that the decree and proceedings under the Harvey bill were in themselves an election to take under the Benson deed as against the will. This conclusion cannot be sustained. The frame of the bill, the character of the parties, and the terms of the decree and consent on which it was founded, do not conform to what is essential to constitute either a formal or substantial act of election under the Benson deed, but, on the contrary, exhibit a clear intent to perpetuate the provisions made by the will, so far as the rights of objecting parties would permit.

The bill seeks nothing further than compensation to Harvey and wife, for an alleged inequality in the dispositions under the will as compared with the rights intended to be conferred by the Benson deed. It alleges that the complainants were "unwilling to disturb the family arrangements contemplated by the said John D. Brown, further than is necessary to secure their just rights; and in order to promote peace and harmony in the family they had filed this bill, in order, in an amicable manner, to adjust the rights of the complainants in relation to those members of the family of the said John D. Brown with whom they might come in conflict." They ask that the house and lot in Assembly street may be sold, and the proceeds of sale invested in accordance with the will of J. D. Brown, and that they may have "such portion of the settled estate allotted to them, by sale or otherwise, as may equalize them with the other children of the said John D. Brown, and be a fair equivalent for the property secured by the said trust deed, which they thus agree to give up."

Considering the bill in connection with the fact that the only parties defendant to it were the widow of J. D. Brown, and Sarah P. and her husband, and with the additional fact that the decree was based upon a consent of such defendants, it is clear that the proceeding is to be regarded as an applica-

*368

tion to the Court to sanction, by *its decree, a compromise made between these parties, by which marvey and wife were to receive a pecuniary compensation, in lieu of the interest intended under the Benson deed, the provisions of the will to stand in all other respects.

Certain facts bear strongly on this conclusion. The bill sets up the existence of a claim based on the will. The house and lot in Assembly street, as appears by the bill, was held by J. D. Brown on like trusts as those affecting the land in suit, yet the decree assures to Harvey and wife this house and lot, as their individual property, in the precise manner in which, according to the will, they were to hold it. They could not hold it under any other title as their several estate; not under the original deed of trust to Brown, because all the children of Brown were entitled under that trust; nor under the decree considered as a proceeding based upon such trust, for all the children of Brown are not parties to the bill. The very clause of the decree that attempts to secure the house and lot in Assembly street to Harvey and wife, assumes in terms to confirm in them as well "all interest secured to them by the will of John D. Brown."

The presumption is that the value of the life estate of Sarah P. was the inducement to pay to Mrs. Harvey the amount agreed to be paid to the latter, by way of equalization and the payment of that sum, in order to a compromise of the claim of Harvey and wife, and to prevent the disturbance of the arrangements of the will, cannot prejudice the rights of the other parties entitled to claim under the will, who, on like grounds, must be presumed to have received only their fair and equal proportion of the estate.

The foregoing view disposes of all the questions material to the present aspect of the case. The conclusion of the Circuit Court, that the decree and proceedings in the Harvey case amounted to an election under the Benson deed, binding on all parties deriving their claims under the will, cannot be sustained; there should, therefore, be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. *369

*ROSE v. CHARLESTON.

(November Term, 1871.)

[Municipal Corporations \$\sim 958.]

So much of the "Act to extend the limits of the City of Charleston," passed December 19th, 1849, as exempted from city taxation all lands, horses &c., which may be exclusively employed in agriculture," was repealed by the "Act to enforce a uniform system of assessment and taxation by municipal bodies," approved March 1870 1, 1870.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023–2037; Dec. Dig. ⊕⇒958; Statutes, Cent. Dig. § 226.] see Municipal

[Taxation \sim 25.]

The subject of taxation is one over which the Legislature of the State has full sovereign power in all matters wherein such power is not limited or restricted by some Constitutional provision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. \$25.]

[Constitutional Law 5 138.]

The exemption contained in the Act of 1849 was not a contract, or in the nature of a con-tract with the owners of the exempted property, but a mere Legislative limitation or restriction upon the taxing power of the corporation, and was subject to repeal or modification at the will of the State.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 303; Dec. Dig. ⊗ 138.]

[Municipal Corporations \$\sim 957.]

The word "heretofore," in Sec. 8, of Art. IX of the Constitution of the State, was used in the sense of "hereinbefore."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2019; Dec. Dig. & 957.1

Before Graham, J., at Charleston, April Term, 1871.

This was a suggestion by Arthur B. Rose, relator, against the City Council of Charleston, respondent, for a writ of prohibition. Four other suggestions for the same writ and against the same respondent-one by Arthur G. Rose, relator, one by David Geiger, relator, one by John C. Cochran, relator, and the last by the South Carolina Jockey Club, relator-were heard at the same time with this one. They all raised the same points of law, and in other respects were substantially the same.

The suggestion in the case of Arthur B. Rose is as follows:

Arthur B. Rose, a citizen of the State of South Carolina, and of the United States of America, respectfully showeth, that he has been for several years previous to the first day of January, Anno Domini eighteen hundred and seventy, and has ever since then been and now is the owner of certain horses, mules, carts, wagons, and other articles of personal property, situate upon and used upon land within the municipal corporation created by the laws of South Carolina, under the corporate name of the City Council of Legislature of South Carolina, ratified the

Charleston, and known as the City of Charleston; that the said lands whereon the said articles of personal property are situate and used are in the limits of Charleston Neck. that is, in that part of the said city north of Calhoun Street, formerly Boundary Street, and south of a line drawn due west from Cooper to Ashley River, by the junction of King and Meeting Streets: that on and before the first day of January, Anno Domini eighteen hundred and seventy, the said articles of personal property were used, and have ever since, and now are exclusively and actually employed in agriculture upon the aforesaid lands.

*370

*And this relator further showeth, that the said articles were bought by this relator for the sole purpose of being employed in agriculture on Charleston Neck, because of, and upon the faith of the exemption of such articles so employed from taxation by the City of Charleston, which exemption is in the nature of a contract with the said owners of such articles.

This relator further showeth, that the said City Council of Charleston, by an Ordinance entitled "An Ordinance to raise supplies for the fiscal year ending on the thirty-first day of December, Anno Domini eighteen hundred and seventy," and enacted on the twenty-second day of March, Anno Domini eighteen hundred and seventy, has imposed a tax -dollars upon this relator's said articles of personal property, for the benefit of the said city; that the said tax is now due and payable; that, as this relator is informed and believes, the same is to be applied, amongst other things, not only in payment of debts contracted under authority of law, but also in payment of debts of the said city, contracted previous to the nineteenth day of December, Anno Domini eighteen hundred and forty-nine; and that the said City Council, through its proper officers, has or is about to issue execution against this relator for the said tax, and is threatening to levy the same upon this relator's property.

And this relator avers that his said personal property is exempt by law from taxation by the said City Council of Charleston; and that the said doings and actings of the said City Council of Charleston are contrary to law, and he prays that a rule may issue, directed to the said City Council of Charleston, commanding it, at a time and place to be therein specified, to show cause why a writ of prohibition should not issue, forbidding it to levy or in any way enforce the said tax against this relator.

The answer of the City Council is as follows:

I. The City Council of Charleston is a municipal corporation, created by an Act of the 13th day of August, 1783, entitled "An Act to incorporate Charleston." By the authority conferred on them by the said Act of incorporation, they have power, among other things, to "make such assessment on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the City of Charleston, as shall appear to them expedient; and they are also authoriz-

*371

ed to appoint a Treasurer and *all such other officers as shall appear to them requisite and necessary, to carry into effectual execution all by-laws, rules and ordinances they may make for the good order and government of said city," &c.

II. That by an Act of the Legislature of said State, ratified the 19th day of December, 1849, entitled "An Act to extend the limits of the City of Charleston," it is provided that "all that part of St. Philip's Parish, lying between the present limits of the city and a line to be drawn due west from Cooper River to Ashley River, by the junction of Meeting and King streets, be divided into four wards, * * * and the jurisdiction and authority of the City Council of Charleston shall be extended over all that part of St. Philip's Parish, and the same shall be, to all intents and purposes, incorporated with the City of Charleston." It is also provided by said Act, that "all lands, slaves, horses, carts, &c., which may be exclusively employed in agriculture, shall, while so employed be exempt from city taxation." It is also provided by the second Section of said Act that "all laws and regulations of force in the City of Charleston, shall extend and be binding over that part of St. Philip's Parish, hereby incorporated with the city; subject only to the foregoing conditions and restrictions, and to such modifications as may from time to time be made therein by future legislation, or by necessary implication."

III. By Section 8 of Article IX of the Constitution of the State of South Carolina, adopted April 16, 1868, it is provided that "the corporate authorities of counties, cities, &c., may be vested with power to assess and collect taxes for corporate purposes, and the General Assembly shall require that all property except that heretofore exempted within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law." By an Act of the General Assembly of said State, entitled "An Act to enforce a uniform system of assessment and taxation by municipal bodies," approved March 1st, 1870, it is provided, among other things, that "all corporations vested with power to lay and collect taxes, are hereby authorized and required to assess all property, real and personal, within their corporate limits at its actual value, and lay

13th day of August, 1783, entitled "An Act to all taxes thereon at a uniform and equal incorporate Charleston". By the authority rate. * * * "

IV. That the provisions of the said Section 8, Article IX, of said Constitution, and the provisions of the said Act of March 1st, 1870, have repealed so much of the said Act to ex*372

tend the limits of the *City of Charleston, as exempts all lands, slaves, horses, carts, &c., which may be exclusively employed in agriculture, from city taxation.

V. By an Act of the General Assembly of said State, entitled "An Act to regulate the assessment and taxation of personal property in the City of Charleston," approved March 1, 1870, it is provided that "the Act entitled 'An Act to provide for the assessment and taxation of property," approved September 15, 1868, shall be extended to the City of Charleston, for the purpose of assessment and taxation of personal property, so far as the same shall be applicable, &c. Under the authority of the said Constitution and Acts of General Assembly, hereinbefore recited, the City Council of Charleston ratified an Ordinance on the 22d day of March, 1870, entitled "An Ordinance to raise supplies for the fiscal year ending December 31st, 1870," the first and second Sections of which are as follows:

"Sec. 1. That the City Appraiser is hereby authorized to assess a tax of two cents upon the dollar of the value of all real and personal property in the City of Charleston, for the purpose of meeting the expenses of the city government for the current fiscal year.

"Sec. 2. The taxes assessed under this ordinance, except such as are otherwise directed, shall be payable in three equal parts; one part on or before the 10th day of April next; another part on or before the last day of June next; and the third part on or before the last day of September next." Pursuant to the said Ordinance the City Council of Charleston, through the City Appraiser, assessed the tax of two cents upon the dollar, of the value of all real and personal property of the said Arthur B. Rose, amounting to (211) two hundred and eleven dollars, notice of which tax was duly given to the said Rose, and payment thereof demanded; but neither the said tax or any part thereof was paid at the time or times required by the provisions of the Ordinance aforesaid. Said taxes not having been paid as required by law, the City Treasurer of said city added a penalty of 20 per cent. thereon, as required by the 43d Section of the Ordinance of the said City Council, entitled "An Ordinance to provide for the assessment and taxation of property," ratified the 10th day of February, 1870, which Section is in words as follows, to wit: "When the taxes, assessments and penalties charged against any parcel or lot of real or personal property, shall not be paid on or before the day prescribed by the ordinance, a penalty of 20 per

cent. thereon shall be added by the City
*373

*Treasurer; and if said taxes and penalty shall not be paid within thirty days next thereafter, or collected by distress or otherwise, the penalty and said taxes shall be treated as the delinquent taxes on such real or personal property to be collected in the manner that is or may be prescribed by law; and if the amount of such delinquent taxes, assessment and penalties shall not be paid within thirty days next thereafter, the delinquent taxes, assessments and penalties of the current year shall be due, and collected by the sale of such real or personal estate in the manner that is or may be required by law;" and certified the said tax and the penalty added by him thereto to George Addison, City Sheriff, who thereupon proceeded to collect the same as required by the 48th Section of the Ordinance last aforesaid, which Section is in words as follows, to wit: "When the taxes and assessments charged against any party or property on the Property Return, shall not be paid on or before the day prescribed by Ordinance, or where the remainder of such taxes and assessment shall not be paid, on or before the day prescribed by the Ordinance thereafter, together with the penalty on such remaining unpaid, the City Sheriff, to whom the same shall be certified by the City Treasurer, shall proceed to collect the same by distress or otherwise, as may at the time be prescribed by law, together with a penalty of five per cent. on the amount so delinquent, which penalty shall be for the City Sheriff as a compensation for making such collection."

VI. These defendants deny that the exemption from taxation provided for by the said Act, to extend the limits of the City of Charleston, is in the nature of a contract with the owners of articles enumerated therein, as exempt from such taxation, and they say that if such exemption were in the nature of a contract, it was for a limited period only, and to continue for so long a period as might seem proper to the Legislature of said State. The said period of exemption from taxation as aforesaid, expired at the time of the adoption of the Constitution of 1868, of said State, if not before; and from and since said day all property within the corporate limits of said city, except such as is exempted from taxation by said Constitution, is liable to municipal taxation by these defendants. And the actings and doings of these defendants under said Acts of the General Assembly, and said ordinances, are in strict conformity to law, and they ought not to be prohibited from collecting the taxes lawfully assessed by them as aforesaid.

Wherefore, these respondents, having fully

*374

answered, pray that *they may be hence dis-

charged with their reasonable costs and charges.

The Circuit Court Judge made the following order:

On reading and filing the suggestion and answer in the above entitled cause, and after hearing counsel for the relator and motion for writ of prohibition, and the counsel for the respondents in opposition thereto: Ordered, That the relator's suggestion in this action be dismissed and motion be denied with cost, and that an order be entered accordingly.

The same order was made in each of the other cases, and the relators, severally, appealed.

Magrath, Barker, for appellants, contended that the Act of 1849 was not repealed, either by Section 8, Art. IX, of the Constitution, or by the Act of March 1, 1870, and cited Cooley on Con. Lim., 191–2–4–5; Dunham v. Rochester, 5 Cow., 465; Rex v. Pugh, 1 Doug., 135; Dwar. on Stat., 530, 532–3. That the exemption claimed by relators under the Act of 1849, is a contract between the State and the owners of the lands which the State is prohibited from impairing by the Constitution of the United States.

Corbin, City Attorney, contra, filed a brief in which the several points involved in the case were discussed at considerable length and a number of authorities cited. It summed up the argument as follows:

1. The property of the relator is taxable by the State and by the City Council of Charleston, unless exempted by law, because "all subjects over which the sovereign power of the State extends, are objects of taxation."—McCullock v. The State of Maryland, 4 Wheat., 316; Weston v. The City Council of Charleston, 2 Pet., 462; Thompson v. Pacific Railroad, 9 Wall., 579; People v. Commissioners of Taxes, 21 H. Pr. R., 400; Bank of Chenango v. Brown, 26 N. Y., 467; Bulow and Potter v. City Council, 1 N. & McC., 528; Ang. and A. on Corp., § 437; Catlin v. Hull, 21 Vt., 152; Vestry v. Council, McM. Eq., 144.

2. The exemptions provided for by the Act of 1849 were not perpetual, but subject to modification by future legislation or by necessary implication, and, therefore, were not contracts, or if contracts were determinable at the will of the State.—In the matter of the Reciprocity Bank, 17 How. Pr. R., 332.

3. The rule of taxation imposed by the Act

of 1849 was not uni*form, inasmuch as it exempted certain kinds of property from taxation in one portion of the City of Charleston while it left the same kinds of property subject to taxation in other portions of the city.

4. The rule of taxation laid down by the Act of 1849 was unjust and oppressive, as it exempted persons holding certain kinds of property, in a certain portion of the city,

from a public burden, common to all citizens, December of the same year, (11 St., 579,) without exacting from them a bonus or an equivalent duty as the price of such exemp-

5. The unequal, unjust and oppressive rule laid down by the Act of 1849, has been abolished, and the just and equal rule of the Constitution and the Act of March 1st, 1870, has been substituted therefor.

6. The exemption of property situate on Charleston Neck, from the burden of taxation to pay the debts of the old city, was an exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised. See Gilman v. City of Sheboygan, 2 Black, 510.

7. The exercise of the power of State sovereignty, in providing for a uniform rate of taxation of all property within the City of Charleston, to pay such debts as well as others common to the city, is not in violation of the Constitution, as impairing the obligation of a contract, or as being an ex post facto law.-Satterlee v. Matthewson, 2 Pet., 380; Locke v. New Orleans, 4 Wall., 172; Carpenter v. Pennsylvania, 17 How., 461.

The power of taxation, or the exemption therefrom, is not secured by contract between the State and its citizens. "Nor are taxes contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required."-Pierce v. City of Boston, 3 Met., 520.

8. The Ordinance of March 22, 1870, being in conformity to the Constitution and the Act of March 1st, 1870, and the property of the relator not being exempt from taxation, by any law of force at that time, was properly taxed.—Bulow & Potter v. City Council, 1 N. & McC., 528.

May 1, 1872. The opinion of the Court was delivered by

MOSES, C. J. These cases all present the same issue, and were heard together.

They seek, by prohibition, to restrain the *376

City Council of Charles*ton from the collection of taxes imposed by it on certain real and personal property, which the relators aver, by an Act of the Legislature to be presently referred to, is exempt from taxation.

It appears that in 1849 it was deemed proper and expedient, from "the growing importance and increasing population of that part of the Parish of St. Philip which lies north and west of Boundary street, to unite the same with the city of Charleston." Accordingly, the Legislature, on the 19th of

passed an Act in the preamble of which the words above quoted are found, incorporating the said territory with the city of Charleston, "to all intents and purposes, subject, however, to the following conditions and restrictions, that is to say:

"1st. That all the debts of the city, now in existence, shall be charged on the property now possessed by the city, and paid by those now liable for the same.

"2d. That all taxes to be levied upon that part of St. Philip's Parish hereby incorporated with the city, within ten years next succeeding such incorporation, shall be applied exclusively in manner following, that is to say, first to pay a proportionable part of the general expenses of the corporation, and next to the special and proper benefit and improvement of that part of St. Philip's Parish hereby incorporated with the city.

"3d, That all lands, slaves, horses, carts, &c., which may be exclusively employed in agriculture, shall, while so employed, be exempt from taxation."

The fourth condition is in respect to the erection of wooden buildings, and has no bearing on the question raised by the suggestion.

The second Section of the Act provides "that all the property belonging to the city of Charleston shall be vested in the corporate body to be formed by the annexation herein provided for, subject only to the claim of the present creditors of the city for payment of their demands out of the coffers or revenues of the same, and that all the laws and regulations of force in the city of Charleston shall stand, and be binding over that part of St. Philip's Parish hereby incorporated with the city, subject only to the foregoing considerations and restrictions, and to such modifications as may, from time to time, be made therein by future legislation, or by necessary implication.'

The relators severally allege that they are owners, either of real or personal property, exclusively employed in agriculture, and *377

ex*empt from city taxation, which the Council is about to enforce under its Ordinance of March 22, 1870, entitled "An Ordinance to raise supplies for the fiscal year ending December 31, 1870."-City Ordinances, 1870, p. 706.

Unless the Act of 1849 can be construed to confer a perpetual exemption, founded on contract, it is subject to repeal or modification, by the Legislature, as its judgment may best direct. Where that department of the government, within the sphere of its constitutional limits, exercises the functions which properly belong to it, either to the imposition of restrictions upon the people of the State, or discharging them from exactions it had the right to demand, its action is to be referred to its inherent sovereignty, and not them altogether in the legislative discreto any compact in the nature of a contract. What single element, necessary to the constitution of a contract, is embraced in the Act? What is to be found in it, or in the history of its enactment, to show that the inclusion of the new territory in the corporation was with the express consent of the residents, who were to be brought within the operation of the city charter, on the condition that "their property, employed in agriculture," was to be exempt from taxation? What was the consideration moving the State to the contract? The assent of those who were to be made corporators was not necessary to its passage, or to its validity. No power within their means could have prevented the execution of the intention of the Legislature. If the General Assembly did not desire, suddenly and unexpectedly, to impose a burthen on the agricultural industry of the Parish about to be annexed to the city, from which it had, heretofore, been free, and, therefore, exempted it from taxation, to what consideration will the relators refer for their claim to its perpetual enjoy-The "conditions and restrictions," ment? which the Act imposed as limitations on the power of the corporation over the enlarged boundaries to which its jurisdiction was to extend, are set up as a surrender of a sovereign right on the part of the State. The Legislature was dealing with the corporation in the extension of the city boundaries, and prohibited it from taxing those in the condition of these relators. It was a restriction on a right which they otherwise legitimately could have exercised. What excluded the Legislature from now releasing the corporation from the imposed restrictions? Legislature was dealing with the corporation, which certainly makes no complaint of the violation of the supposed contract. The main distinction between public and private

*378 corporations is that, over the former, *the Legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy as public exigency requires or recommends, or as the public interest "will be the best subserved."-Angell & A. on Corp., § 31.

Mr. Cooley, in his work on Constitutional Limitations, p. 192, says: "The creation of municipal corporations, and the conferring upon them of certain powers, and subjecting them to corresponding duties, does not deprive the Legislature of the State of that complete control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their actions whenever it is deemed un-

tion."

The principles upon which the decision in the case of The Rector, &c., of Christ Church, &c., v. County of Philadelphia, 24 How., 300 [16 L. Ed. 602], rested, well apply here. In 1833 the Legislature of Pennsylvania exempted from taxation the real property and ground rents belonging and payable to Christ Church Hospital, so long as the same shall continue to belong to said hospital. In 1851 it required that all property, real and personal, belonging to any company or association which is now by law exempt from taxation, shall hereafter be subject to taxation as other property is now by law taxable. It was held that the last law was not in violation of the Constitution of the United States, as tending to impair a legislative contract; that it is in the nature of such a privilege as the Act of 1833 confers, that it exists bene placitum, and may be revoked at the pleasure of the sovereign.

The suggestion seeks a prohibition on the further ground that the tax raised under the Ordinance of March 1, 1870, is "to be applied, amongst other things, not only in payment of debts contracted under authority of law, but also in payment of debts of the said city contracted previously to the 19th December, 1849." This objection was not referred to in the argument on behalf of the relators. It proceeds upon the assumption that the Act of 1849 is a covenant on the part of the State with the owners of the land, and, therefore, not subject to repeal or modification. It involves the general principle on which the relators claim exemption from the tax now about to be enforced against them, and, as it cannot be sustained, this must fall with it. Holding that the restriction imposed by the said Act on the City Council, in the imposition of taxes on the *379

real *and personal property of the relators employed in agriculture, was subject to revocation at the pleasure of the Legislature, it only remains to enquire whether the prohibition has been repealed.

Unless the Constitution of 1868 qualified the power of the Legislature over municipal corporations, in the matter of taxation, it retained all the authority which it had in that respect up to the time of its adoption. The modification, too, is not to be presumed-it must be direct, apparent and undisputable. Speaking of the power of taxation, Ch. J. Marshall, in Providence Bank v. Pittman, 4 Pet., 561 [7 L. Ed. 939], says: "But as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." In Philadelphia and Wilmington wise, impolitic or unjust, and even abolish Railroad Co., v. Maryland, 10 How., 393 [13

L. Ed. 4611, Taney, C. J., said: "This Court, quires "an assessment of all property withon several occasions, has held that the taxing power of a State is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." As "the City Council is invested with the same powers to impose taxes on legitimate subjects of taxation as the State itself possesses," (Bulow and Potter v. the City Council of Charleston, 1 N. & McC., 527; Cruikshanks v. Same, 1 McC., 360.) the same rule must apply to the taxing power within the bounds conceded to it by the Legislature. So far from the Constitution laying any restraint on the powers of the Legislature over municipal corporations in the matter of taxation, the first Section of ninth Article requires that "the General Assembly shall provide by law for a uniform and equal rate of taxation." The eighth Section of the same Article provides that "the corporate authorities of Counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." It would be without avail to look to the Constitution of 1868, for any abatement of the power which the Legislature could before lawfully exercise over municipal corporations in the matter of taxation.

The only enquiry which remains, is whether the Legislature directly or by implication has repealed the Section of the Act of 1849, under which the exemption here is claimed? The Act of March 1, 1870, entitled "An Act to enforce a uniform system of assessment and taxation by municipal bodies," (14 Stat., 410,) declares "that all municipal corpora-

*380 tions chartered under, or by the *laws of this State, and vested with power to lay and collect taxes, are hereby authorized and required to assess all property, real and personal, within their corporate limits, at its actual value, and lay all taxes thereon at a uniform and equal rate: Provided, That all property, and no other, exempted from taxation by the third Section of the Act entitled 'An Act to provide for the assessment and taxation of property,' ratified the 15th day of September, A. D. 1868, shall be exempted from taxation by municipal corporations;" and the second Section declares "that all Acts or parts of Acts inconsistent with this Act be and the same are hereby repealed." The said Act certainly does not exempt any property from its operation, save that which is covered by the proviso. As to the property liable to taxation, it leaves nothing discretionary with the corporations, for it re-

in their corporate limits at its actual value,' and that they shall "lay all taxes thereon at a uniform and equal rate." The language is so full and comprehensive—the intent so apparent, and the repugnancy to the Act of 1849 so entire-that human ingenuity, exercised to its fullest capacity, must fail to reconcile them. If the property of these relators is within the corporate limits of the city of Charleston, it is by express enactment subject to taxation "at its actual value and at a uniform and equal rate." The intent of the Act of 1870 was to secure the "uniform" system of taxation required by the Constitution. If the Act of 1849 still continues of force, the system so contemplated could not be enforced in the municipal corporation of Charleston.

If there was a doubt remaining as to the utter inconsistency of the two Acts, it should be satisfied by the language of the proviso, which exempts from municipal taxation the property specified in the third Section of the Act of 1868, "and no other," and the property of the character of that held by these relators, as set forth in the suggestions, is not included in the said Section.

It is claimed that the said property of these relators is exempt from the tax sought to be enforced against them, by the effect of the words to be found in said 8th Section of Article IX, which are as follows: "And the General Assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under the authority of law." To construe the word "heretofore" in the connection with which it is found, as referring to all property before exempt, would be in disre-

*381

gard of the mani*fest purpose of the convention in the system of taxation which it was establishing for the State, and for those corporate bodies which, by its authority, exercised the power of imposing it. The State was required to enact laws to carry out certain directions as to exemptions. With this exception, it retained its discretionary right in the exercise of the taxing power. The word "heretofore" must be held to refer to the property exempted by that portion of the Constitution which precedes the Section in which it is found, and to be accepted in the sense of hereinbefore.

The motions in the several cases are refused, and the appeals dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 381

McCREA v. PORT ROYAL RAILROAD COMPANY.

· (November Term, 1871.)

[Eminent Domain \$= 167.]

The Port Royal Railroad Company was chartered in 1857, and its charter was renewed in 1870. The charter of 1857 prescribed the mode by which lands might be condemned to the use of the company, and by a general act, passed in 1868, a different mode of condemning lands to the use of all railroad corporations was prescribed: *Held*, That the company must proceed in the mode prescribed by the Act of 1868.

[Ed. Note,—Cited in Verdier v. Port Royal R. Co., 15 S. C. 481; Tutt v. Port Royal & A. Ry. Co., 28 S. C. 397, 5 S. E. 831.

For other cases, see Eminent Domain, Cent. Dig. § 454; Dec. Dig. &—167.]

Before Platt, J., at Chambers, December,

The case is stated in the judgment of the Court.

Verdier, for appellant. Bell & Barnwell, contra.

May 3, 1872. The opinion of the Court was delivered by

MOSES, C. J. The Port Royal Railroad Company was chartered on the 21st of December, 1857, (12 Stat., 660,) with all the powers, rights and privileges conferred on the Spartanburg and Union Railroad Company by its charter of December, 1847, (11 Stat., 479.) The right of way which it might require from owners of land through which the road was to pass, was to be determined in the manner prescribed by the sixth Sec-

tion of the "Act to authorize the for*mation of the Greenville and Columbia Railroad Company," which will be found in 11 Stat., 326.

On the 15th of September, 1870, application having been made by the Port Royal Railroad Company to his Honor Judge Platt, for the appointment of Commissioners to appraise the lands of the appellant, Mrs. Jane McCrea, through which the line of the railroad was to run, an order was issued in conformity with the mode prescribed by the said sixth Section of the charter of the Greenville and Columbia Railroad Company. The owner of the land then applied to the Judge to vacate the said order, on the ground that the manner directed for the assessment and condemnation of the land was not in conformity with the existing law under which the right of way over the lands of persons and corporations should be taken for the construction of railroads and other works of internal improvement, as declared by the

89.) His Honor refused to vacate the order. holding that the course to be pursued must be according to the mode directed by the charter, and an appeal is taken to this Court to reverse his judgment.

The Judge placed his decision on the assumption that the charter constituted a contract with the railroad company, as to the mode by which the lands required by it should be taken for its use, and that it was not, therefore, in the power of the State to prescribe any other, or change or modify that which it had permitted. It is not perceived how any contract resulted from the charter which tied the hands of the Legislature, in declaring the manner by which the land of the citizen should be taken for public use, for it is only on the principle of eminent domain, that the land owner could be compelled to yield any portion of her territory for the purpose of a railroad company. The right of the corporation is only in the nature of a qualified grant, to be enjoyed on due compensation being rendered, and the mode through which the land might be taken by the company remained subject to the pleasure and will of the State. It was, at most, but a change in the remedy, and did not at all conflict with the material right acceded by the charter, which was the power of subjecting private property to the use of the road. The Act of 1868 did not impair the obligation of any contract. At the date of its passage, no right to the land in question had vested in the company. It declared a general law upon the subject, applicable to all persons or corporations "authorized by charter to construct a railway, canal, turnpike

*383

or other public highway in the *State." There are no words restricting the particular mode therein directed to charters thereafter to be obtained. On the contrary, the provision refers generally to all charters, whether existing, or afterwards to be conferred. The words "that when any person or corporation shall be authorized," &c., clearly include the Port Royal Railroad Company, for they come directly within the description. (See Balt. & Susq. R. R. Co. v. Nesbit et al., 10 How., 395 [13 L. Ed. 469].

If, however, it should be concluded that the mode to be followed by this company, for the assessment of the lands which may be necessary for its use, must be according to the form prevailing at the time of the grant of its charter, even then it is not free from the operation of the provisions of the Act of 1868. Its charter being identical with that of the Spartanburg and Union Railroad Company, while the latter is exempt from the operation of the forty-first Section of the Act of 1841, (11 Stat., 168,) "to incorporate certain villages, societies," &c., it is expressly Act approved December 22, 1868, (14 Stat., declared that "nothing herein contained shall

be construed to exempt the said company from the provisions of the said forty-first Section, upon any future grant, renewal or modification of their charter." The said Section is in the language following: "That it shall become part of the charter of every corporation which shall 'at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment or modification thereof, (unless the Act granting such charter, renewal, amendment or modification, shall in express terms exempt it,) that every charter of incorporation granted, renewed or modified, as aforesaid, shall at all times remain subject to amendment, alteration or repeal, by the Legislative authority."

The Port Royal Railroad Company, by reason of its failure to comply with certain conditions of its charter, found it necessary to obtain an extension and renewal of it by the Act of 1870, (14 Stat., 379.) and its charter must be construed and exercised in accordance with the laws in force at the time of such renewal, in respect to corporations of the said character, even if inconsistent with those which prevailed at the date of the original charter, which is to be considered as amended so as to conform to the then existing laws.

The motion is granted, and the order referred to, of 15th Sep., 1870, is set aside.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *384

*CAMPBELL V. BANK OF CHARLESTON.

(November Term, 1871.)

[Corporations =134.]

Under a bill in Equity, to which C., executor of F., and others were parties, an order was made that C. do deliver and transfer to a Master of the Court, the cash in his hands, and certain named securities of the estate, and "that thereupon he be discharged from all further accountability and liability whatever, as executor of F. C., as executor, held at the time certain shares of bank stock, the certificates of which stood in his name, which were transferable only on the books of the bank, and which were not amongst the securities named in the order. The shares were afterwards transferred on the books of the bank to bona fide purchasers of the certificates thereof, on a certificate of the Judge of Probate, that C. had leave to sell and transfer the same. A. was then appointed receiver of F.'s estate in place of the Master, and he brought this action against the bank to compel it to issue to the plaintiff, as receiver, certificates of the stock, in F.'s name, or to pay its value: Held, That the bank was not liable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 523; Dec. Dig. €⇒134.]

[Executors and Administrators \$\sim 513.]

A Court of Equity has no power to discharge an executor from his office as executor, or even from liability to account, except so far cis, deceased."

as the parties, and the subject-matter of the suit in which the order is made, are concerned.

[Ed. Note.—Cited in Chapman v. City Council of Charleston, 30 S. C. 564, 9 S. E. 591, 3 L. R. A. 311.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2267-2291; Dec. Dig. ©=513; Equity, Cent. Dig. § 51.]

Before Graham, J., at Charleston, April Term, 1871.

Action by Lawrence F. Campbell, Receiver, against the Bank of Charleston, to recover certain shares of capital stock of the bank, or their value.

The appeal was heard on a case and exceptions containing the following statement of the facts established by the testimony.

John L. Francis was possessed of fifty whole and fifty half shares of the capital stock of the Bank of Charleston, the original certificates of which, dated in January, 1848, certified "that John L. Francis is entitled to" (stating the number) "shares in the capital stock of the Bank of Charleston, South Carolina, transferable only on the books of the said bank by John L. Francis, or his attorney."

John L. Francis died in 1865. By his will, he appointed C. R. Carroll his executor.

C. R. Carroll duly qualified. In 1866, Carroll came to Charleston, and in presence of G. L. Buist, as witness, endorsed the stock as executor in blank. The stock thus endorsed was delivered to Messrs. Buist & Buist, who were the attorneys of the executor.

On the 17th June, 1868, the following decretal order was made in the cause of Carroll, Executor, v. Grace Allston et al.: (1 S. C., 7.)

"After hearing read the report of Master Gray, it is ordered and decreed that the same be confirmed.

"It is further ordered that the said complainant do forthwith transfer and deliver to the said Master, the amount in cash re-*385

main*ing in his hands, and also the following assets and securities remaining in his hands, to wit: Three thousand (3,000) dollars six (6) per cent, coupon bonds of the State of South Carolina; four thousand three hundred and ten (4,310) dollars of City of Charleston six (6) per cent. stock; seventeen (17) half shares of the Southwestern Railroad and Bank Stock; one hundred (100) shares of Gas Light Company Stock; bond of Berith Shalom Congregation for nine hundred (900) dollars; bond of Francis B. Fishburne for five hundred (500) dollars; and bond of Francis F. Carroll for three hundred (300) dollars; and that thereupon he be discharged from all further accountability and liability whatever as executor of John L. FranSubsequently the plaintiff was substituted as Receiver in the place of Master Gray.

In June, 1869, the stock of the Bank of Charleston was delivered by Messrs. Buist & Buist to Messrs. Whaley, Mitchell & Clancy, who were the attorneys of legatees under the will of Francis.

In October, 1869, the stock was brought to the Bank of Charleston to be transferred; part to H. H. DeLeon, Esq., and part to Messrs. G. A. Trenholm & Son.

The bank declined to make the transfer until certificate from the Judge of Probate was obtained that the executor was authorized to transfer. The following certificate was presented:

"The State of South Carolina, Charleston County—In the Court of Probate.

"By George Buist, Esq., Probate Judge.

"On due consideration of the petition of Charles R. Carroll, of Barnwell County, tanner, qualified executor of the last will and testament of John L. Francis, late of Charleston, barber, deceased, it is hereby ordered that he have leave to sell and transfer, personally or by attorney, in the proper books of the institution, to and in the name of any person designated, fifty-three whole and fifty-three half shares in capital stock of the Bank of Charleston, contained in certificates issued in the name of said John L. Francis, and belonging to said estate, as set forth in proceedings to effect settlement by petition filed, and file the account sales thereof for record in this Court. Terms of sale, cash.

"Given under my hand and seal of office, at Charleston, this twenty-eighth day of October, A. D. 1869.

[Signed]

"George Buist, [L. S.]
"Probate Judge."

*386

*And thereupon, in December, 1869, the bank transferred the stock.

It was further in evidence that, according to the custom of trade, certificates of stock thus endorsed in blank are transferable by delivery; that the bona fide holder of stock thus endorsed is regarded as the owner; that the sale of such stock, or the pledge of it by the holder as collateral, is of daily occurrence; and that stock thus endorsed in blank may pass from owner to owner for years before it is brought to the bank to be transferred to the name of the then holder.

Certified copies of the accounts of Carroll, executor, and Gray, trustee, were put in evidence, showing that the stock was never accounted for by either of them.

There was no evidence of any notice to the Judge of Probate that the power of the executor had ceased, and no notice to the bank not to transfer.

It was admitted that Messrs. H. H. De Leon and G. A. Trenholm & Son were bona fide holders for value without notice.

G. L. Buist, a witness for plaintiff, was then sworn, and testified:

That he is of the firm of Buist & Buist, who were Attorneys for the executor, Carthat Mr. Carroll came to Charleston early in 1866, and, in the presence of witnesses, endorsed in blank all the securities belonging to the estate of Francis, and among them these certificates of Charleston Bank Stock; that this was done merely for the convenience of Mr. Carroll, who was old and feeble, and lived out of Charleston County, and intended leaving all the business of the estate to Messrs. Buist & Buist, and leaving the securities in their hands; that he endorsed the certificates as witnesses of Mr. Carroll's signature at this time; that these certificates, and certificates of other banks, were not mentioned in the decree transferring assets to Mr. Gray, because they were esteemed, at that time, utterly worthless; that these certificates remained in their office for one year after the discharge of Mr. Carroll by the Court; that, as a matter of fact, they never were transferred by Mr. Carroll to any one; that on the 9th day of June, A. D. 1869, the firm of Messrs. Buist & Buist, at the request of Messrs. Whaley, Mitchell & Clancy, delivered these certificates to these gentlemen, and took their receipt therefor, as they represented the residuary legatees.

Upon these facts the Court instructed the Jury that the certificate of the Judge of Probate was illegal, and therefore void, and was

*387

no *protection to the Bank of Charleston in the transfer of the stock; that the Bank of Charleston had constructive notice of the illegality; that, when the transfer was first applied for, without the certificate of the Judge of Probate, and the bank requiring such a certificate before they would make the transfer, they were put upon their guard; that there never was any sale of stock by Carroll, the executor; that he had ceased to be the executor for more than twelve months when the order of the Judge of Probate was obtained for the sale of the stock. The Jury were instructed to find their verdict for the plaintiff; to which instructions the defendant excepted, on the following grounds, viz.:

1. That the scrip was on its face legal, and properly endorsed, and that the bank was not affected with notice of any equities, and was bound to transfer to the party holding the scrip properly endorsed.

2. That the order of the Court of Probate was authority to the bank to transfer.

3. That the transfer by the bank was legal, and the remedy of the plaintiff is against other parties, and not the bank.

Porter and Conner, for appellant:

On the death of Francis, all his personal estate vested in Carroll, the executor.—1

3 McC., 371.

The endorsement by the executor, as legal owner, was essential to the transfer of the stock by the bank.

The scrip was endorsed regularly by the executor, at a time when he was in full exercise of his powers, as executor.

Was delivered by the executor to his attorneys; by them delivered to the attorneys of the legatees; by them sold, &c.

A bona fide holder presents the stock to the bank for transfer. Could the bank refuse to transfer?

A corporation is bound to transfer stock to an assignee duly authorized, unless they hold some claim against it or are restrained by the injunction of a competent Court. Purchase v. N. Y. Exchange Bank, 3 Rob., 164, cited Abbot's Digest-Stock, § 194.

The company are "but instruments and conduit pipes."-2 P. W., 77.

When the required evidence is produced, the corporation is bound to permit the transfer, and is liable in damages to the full

*388

*value of the stock, for refusing .-- Commercial Bank v. Kortright, 22 Wend., 348.

"To restrict directly or indirectly the right of having a transfer on the books, to those who, in addition to the prima facie proof of property, can show an undisputed ownership in themselves, and not merely a qualified right or interest, would be contrary to the intent of the charter, the necessities of business, and even to reason and justice. Τt would cut off trustees and assignees, as well as prevent the common and very convenient practice of bona fide stock loans." 22 Wend., 363; Smith v. Northampton Bank, 4 Cush., 1; Morse on Banking, 166.

The provision of charter, that stock is transferable only on books of bank, is for the benefit of the bank, and its protection.-Angell on Corporations, § 575; Union Bank v. Laird, 2 Wheat., 390; Black v. Zacharie, 3 How., 513; State Bank v. Cox, 11 Rich. Eq., 348.

The bank cannot look behind the legal title. It must recognize the holder who comes with the muniments of title.-Davis v. Bank of England, 2 Bing., 403, (19 E. C. L.); Franklin v. Bank of England, 9 B. & C., 156; Bank of England v. Parsons, 5 Ves., 669; Hartga v. Bank of England, 3 Ves., 58.

"All that could be required of the person demanding a transfer on the books, would be to prove to the corporation his right to the property. In this case, one of the joint assignees, produced the assignments, with the original certificate of the former owners, and claimed for himself and his partner to be the purchasers for valuable consideration. We think that was a sufficient notice of the assignment, and request to have the transfer made upon the books of the corporation."— of the estate.

Wil. on Ex'ors, 546; Seabrook v. Williams, Sargent v. Franklin Ins. Co., 8 Pick., 96; Angell on Corporations, § 581: State Bank v. Cox, 11 Rich. Eq., 344, 348, 350.

> As between vendor and vendee, the title passes by delivery of the scrip properly endorsed.—Angell on Corporations, §§ 564, 565; Commercial Bank v. Kortright, 22 Wend.,

> "The delivery of the certificate with an endorsement upon it, for a valuable consideration, was a sufficient transfer of the right to become a stockholder to the amount specified in the certificate."-Quiner v. Marblehead Ins. Co., 10 Mass., 482.

> A transfer, though not upon the books of the bank, is sufficient to divest the title of vendor.-Ibid.; N. Y. and N. H. R. R. Co. v. *389

> *Schuyler, 34 N. Y., 80; Sargent v. Franklin Ins. Co., 8 Pick., 90; 11 Wend., 628; 2 Cowen, 777; Black v. Zacharie, 3 How., 513.

> But it is claimed that, when the transfer was made, the executor's right to transfer had ceased.

> Reply, 1st. The disposal of the stock, by the executor, was before his power over the estate ceased.

> 2nd. That quoad this stock, his powers never were revoked.

> In addition to the legal right, growing out of the relation of parties, the bank acted under order of Court of competent jurisdiction.

Chamberlain & Seabrook, contra:

It is contended that the order of the Judge of Probate, being directed to Carroll, fifteen months after his discharge, was directed to a stranger; that the Court of Probate has no jurisdiction to confer power to sell, upon a stranger, but only upon an executor, or administrator; that this order therefore was void; that the order being void, the transfer was illegal; that, the transfer being illegal, no change of property took place, and the bank was liable to the plaintiff.

I. Carroll was a stranger.

It may be contended that the decree of the Court of Chancery, discharging the executor, was contrary to the policy of our law. still it is a decree, and stands until assailed by appeal, or bill of review.

"A decree cannot be incidentally assailed, but is conclusive as to the rights and liabilities of the parties, until reversed by the Appellate Court, or impeached by an original bill for fraud in obtaining it, or attacked for palpable error by bill of review."-2 Dan. Ch. Pl. and Pr., 1000, note; Sanders v. Gatewood, 5 J. J. Marsh, 328; Watson v. Williams, 8 Ired. Eq., 232; Gardiner v. Niles, 5 Gill., 94; Hunter v. Huttan, 4 Gill., 115; Kidd v. Cheyne, 23 Eng. L. and Eq. Rep., 501; Attorney General v. Croft, 7 Eng. L. and Eq. Rep., 292.

II. The Court of Probate had no jurisdiction to order a stranger to sell the property No authority need be advanced on this point. It is sufficient to say that no such power is given in any of the various statutes of the State, relating to Courts of Ordinary or Courts of Probate. No such practice has ever prevailed.—See 6 Stat., 238; Jones v. McNeill, 1 Hill, 84.

*390

*III. "The proceedings of a Court of limited jurisdiction, in a case clearly without its jurisdiction, are absolutely void, and may be so declared, whenever the question is presented, whether directly or collaterally."—Hill v. Robertson, 1 Strob., 1.

Observe that in this case a decree of a Court of Ordinary was in question. The Court disposes of the question with brevity

almost contemptuous.

"It would be a waste of words to attempt to prove that the proceedings of a Court of limited jurisdiction, and in a case clearly without its jurisdiction, are absolutely void, and may be so declared, whenever the question is presented, whether directly or collaterally."—Also, McCormick v. Sullivan, 10 W., 192; Kempe's Lessee v. Kennedy, 5 C., 173.

IV. If the order of the Court of Probate is void, the transfer made under it is illegal.

V. If the transfer is illegal, no property passed by it, and the bank is liable to the owners.—Ang. and Ames on Corp., § 582.

"A forged letter of attorney is, as to the owner, the same as no letter of attorney; consequently his stock, which has been transferred from him without any authority at all, ought to be restored to him."-Hildyard v. South Sea Company and Keate, 2 P. Wms., 76. In this case the company was decreed to restore his stock to the plaintiff. "I (Lord Chancellor) am of opinion that the company must sustain the loss. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner, the Act is a nullity, and in consideration of law and equity, the rights remain as before."-Ashby v. Blackwell, 2 Eden. Ch. R., 299.

The only question in this case was who should be liable, and it was decreed that the company should restore to plaintiff her stock, and pay to Blackwell the amount he had paid for the stock.

"It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder, who is to suffer, if, for want of inquiring they are imposed upon, and allow a transfer

No authority need be advanced on this to be entered in their books, made without a proper authority. We cannot do justice to wer is given in any of the various statutes

this plaintiff, unless we *hold that the stocks are still his."—Davis v. the Bank of England, 2 Bing., 393.

"If a bank permit an executor to make a transfer of its stock, in violation of his trust, it is affected with notice of the breach of trust, and liable for the stock to the person entitled under the will." Lowry v. Commercial and Farmers' Bank, 3 Am. L. J., 3; Brightly's Fed. Dig., 93.

"A bank which has permitted a transfer of stock, owned by a stockholder, upon a forged power of attorney, and has cancelled the original certificates, may be compelled to issue new certificates, and if it has no shares which it can so issue, to pay them the value thereof."—Pollock v. The National Bank, 7 N. Y. Rep., being 3 Selden, 274.

VI. It cannot be contended that these certificates were put upon the market by Mr. Carroll, executor, by his blank endorsement.

Blank endorsement does not make certificates of stock negotiable.

"It is clear that a certificate of stock transferred in blank is not a negotiable instrument."—Sewall v. Boston Water Power Company, 4 Allen, 282.

Each of these certificates is expressed on its face to "be transferable only on the books of the company," &c. "No commercial usage can give to such an instrument the attributes of negotiability." "The fact that it is usual for dealers in stock to take certificates with blank transfers upon them, and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable, and the purchaser whose name is written into the transfer must always derive his title immediately and solely from the stockholder of record."—Shaw v. Spencer, 8 Am. Law Reg., 222.

(2.) Because, according to Mr. Buist's testimony, no transfer of these certificates were made by Mr. Carroll to any one. They were in Mr. Buist's hands as attorney for Carroll, and Buist's possession was Carroll's. They were given by Buist to Messrs. Whaley, Mitchell & Clancy, one year after Carroll's discharge.

1. In answer to the position that the executor, Carroll, disposed of this stock before his power over the estate, as executor, ceased, we say: That the executor merely endorsed the certificates for convenience, and not with the intention to transfer. He never did transfer them to any one, but left them in the hands of his attorneys, with blank endorsement ready for transfer, but he still

*392
re*tained possession of them, for the possession of his attorneys was his possession.

2. In answer to the position that quoad

revoked, we say: That the decree of June transferred the same to the purchasers, 17, 1868, discharges him absolutely as executor, and this would revoke his power over all the stock, though none had been specifically named.

3. In reference to the testimony to the effect that, "according to the custom of trade, certificates of stock endorsed in blank are transferable by delivery," we have only to say: That all the authorities agree that only an equitable interest passes, good as between vendor and vendee, but no more-a simple right to complete the legal transfer.

May 6, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. It appears that John L. Francis, at the time of his death, in 1865, was possessed of the shares referred to in the complaint, which stood on the books of the defendant in his name. He left a will, of which Charles R. Carroll qualified as executor, and as such executor, in 1866, endorsed in blank the certificates of said stock, with other stocks which he held in right of the testator, and delivered the same to his attornevs. Buist & Buist, who were to manage the business of the whole estate. In June, 1868, under a bill in which the said executor was plaintiff, and Grace Alston and others were defendants, the prayer of which does not appear in the brief with which we have been furnished, an order was passed directing the plaintiff to transfer and deliver to the Master the cash and certain enumerated securities in his hands. Amongst these, the stock of the Bank of Charleston was not named. The order concludes with the following words: "And that thereupon he be discharged from all further accountability and liability whatsoever as executor of John L. Francis, deceased." In June, 1869, Whaley, Mitchell & Clancy, representing the residuary legatees of Francis, receipted to Buist & Buist for certificates for fifty old shares of Bank of Charleston, S. C., for fifty new shares of said bank, and for fifty shares of Charleston Insurance and Trust Company, all belonging to estate of John L. Francis. In October, 1869, the certificates of bank stock were brought to the bank by bona fide purchasers, without notice of any defect or objection, to be transferred. The certificates bearing on their face that the shares "were transferable only on the books of the said

*393

bank, by John L. Francis or *his attorney." the bank declined to make the transfer until the authority of the Probate Judge to the executor to transfer, was produced. In December, 1869, the bank, on the presentment of the certificates of Robert Buist, Esq., Proexecutor, Carroll, had leave to sell and trans- in which he desires it to be regarded, if it

this stock, the executor's powers never were; fer the said stock in person or by attorney.

On the 18th day of March, 1870, on a petition in the equity suit already referred to, of Carroll, Executor, v. Grace Alston and others, by this plaintiff and certain residuary legatees of John L. Francis, he, the said plaintiff, was appointed Receiver of the estate of the said testator. We have not been furnished with a copy of this order, and must therefore assume that it simply appointed him Receiver without reference to any particular fund, and without any conditions or limitations. The plaintiff by his complaint in the Court below demanded judgment against the defendant: "First, for fifty whole shares and fifty half shares of capital stock of the said bank, to be issued in the name of John L. Francis, to the plaintiff, as Receiver of the estate of the said John L. Francis; or, second, for the sum of \$7,500, the value of the said shares owned by the said John L. Francis, and the costs of the suit." The Court instructed the jury "that the certificate of the Judge of Probate was illegal, and therefore void, and was no protection to the bank in the transfer of the stock; that the Bank of Charleston had constructive notice of the illegality. when the transfer was first applied for without the certificate of the Judge of Probate. and the bank requiring such a certificate before they would make the transfer, they were put upon their guard. That there was never any sale of stock by Carroll, the executor; that he had ceased to be the executor for more than twelve months when the order of the Judge of Probate was obtained for the sale of the stock." The jury were instructed to find a verdict for the plaintiff, which they accordingly did, in the sum of \$1,500, besides costs. The exceptions by the defendant to the charge of the Judge constitute the grounds of appeal here. The argument on the part of the plaintiff resisting the motion to set aside the judgment, and for a new trial, proceeds upon the illegality of the transfer of the stock. That, therefore, no property passed. That he is to be considered, by his complaint, as simply asking that the bank be compelled to recognize him as owner thereof. This is not consistent with the nature of his complaint, which demands judgment for the fifty shares and fifty half shares to be

*394

delivered to him as *such Receiver, or for the value of the said shares owned by the said Francis. The first seeks a new issue of such stock, and the second is in the nature of a separate action for a breach of duty in permitting the transfer. In what view of the case, as understood from the complaint, the particular verdict was rendered, we are at a loss to perceive. Viewing the case in the bate Judge for Charleston County, that the light most favorable to the plaintiff, and that

can be made to appear that the transfer was closs; or even if the order had succeeded lilegal, the parties to whom the certificates were passed acquired no title, and the bank would be bound to recognize this plaintiff as the lawful owner.

The illegality of the transfer by the bank is referred to the want of title in Carroll as executor at the time it was made, and this is claimed by virtue of the order of June 17th. 1868, "discharging him from all further accountability and liability whatever as executor of John L. Francis, deceased." Did this operate in effect as a revocation of his letters testamentary, or discharge Carroll from his office as executor? Doubtless the Court of Equity has the power to enjoin an executor from interfering with assets of his testator; to appoint a receiver to take charge of the property of the estate where there is danger of its being lost or wasted; confide this trust to more than one, and divide amongst several the discharge of the duties which appertain to an executor. But it never undertakes to discharge him from his office, for it is without power to appoint his successor; and although it may regulate his action in regard to the estate, it never acts directly on the office. In Osborn et al. v. Black et al., Sp. Eq., 435, Ch. Johnson, delivering the opinion of the Court, says, in relation to a discharge by an Ordinary, on the renouncement of an executor, "Neither the Ordinary nor any other tribunal has any such power. The Courts of Equity do exercise the power of taking the assets out of the hands of any executor where they are in danger of being wasted, but it has no power to discharge him from liabilities incurred, or to deprive him of rights which he has acquired in the discharge of the duties of an executor." The order referred to must have proceeded upon the ground that no assets. save those named in it, had ever come to his hands in the course of administration. No matter how comprehensive the words, or their purposes, as to a discharge of all further accountability whatsoever as executor of Francis, the order never could be effective to shield him from a liability outside of the assets which he was by it directed to transfer to the Master of the Court. Was it to *395

discharge him from the *creditors of Francis, none of whom were parties to the bill? If the existence of the stock now in dispute had not been known to the legatees of Francis, until brought to their notice by the transfer by the bank after the order, with the facts of its loss or depreciation by the negligence of Carroll, would the order be held to discharge him from the consequence of such

his accounting, could it bar the demand for an account of funds retained by him without the knowledge of the parties entitled to the estate? If the order is to be held as a conclusive discharge of Carroll, divesting him of all title to the property of the estate, and as no Receiver was appointed until 1870, in whom was the legal title of the stock in the meantime? It must have rested in some one, and if not in Carroll, in whom? While a mere equitable interest in bank stock may pass by a transfer of certificate from hand to hand, the legal interest in the stock in question could only be transferred on the books of the bank by Francis himself, in his lifetime, or his attorney, and since his death by his legal representative. There is no proof of any notice by the bank of any equity by which the legal title to the stock was affected. It exercised all the care and caution demanded by a due regard to its own interest and that of the stockholders, in whose name the certificate had issued. When it was presented, in October, 1869, with the transfer, by the executor, to the parties who exhibited it, the bank, as we are obliged to suppose, in view of the Act of 1824, 6 Stat., 238, which required the order of the Court of Ordinary to give validity to a sale by an administrator or executor, unless directed by the will, declined to make the transfer until the evidence of the authority of the executor was furnished, and on such evidence being furnished in writing, it made the transfer. The assignment was by the executor having the legal title, and with no imputation against the bank of fraud, complicity, or knowledge of any design on the part of the executor, to convert the proceeds to a use inconsistent with the will; it is, nevertheless, asked that the bank should be compelled to recognize the plaintiff as the owner of the stock. In that event, what becomes of the stock owned, as appears by the books of the bank, by the parties to whom the executor transferred? Are the plaintiff and purchasers all stockholders of this bank through the same stock, and to receive a double dividend? The purchasers are not parties here, and no judgment in this case can reach them. If the plaintiff, as to this stock, has any

**rights on behalf of the legatees or creditors of Francis, against others than the bank, he must pursue them as he may be advised.

It is ordered that the judgment be set aside, and a new trial granted.

MOSES, C. J., and WILLARD, A. J., concurred.

3 S. C. 396

DETHERIDGE V. EARLE.

(November Term, 1871.)

[Bills and Notes \$529.]

Action on a promissory note dated April 5th, 1861, and due at one day. There was no defense, and the presiding Judge charged the jury that in strict law the plaintiff was entitled to recover the whole debt, principal and interest, "but that the jury might exercise a discretion as other juries had done, by giving only one half" the debt: Iteld, Error, and the verdict being for one half the debt a new trial was ordered.

[Ed. Note.—Cited in Earle v. Stokes, 4 S. C. 310.

For other cases, see Bills and Notes, Cent. Dig. §\$ 1934, 1935, 1936; Dec. Dig. \$\sime_529.\$]

[Appeal and Error \$\infty 284.]

For error of law a new trial may be granted on appeal from the judgment, though no motion for a new trial was made before the Circuit Judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1669–1672; Dec. Dig. 284.]

Before Orr, J., at Greenville, September Term, 1871.

The appeal was heard upon a statement made by plaintiff's attorney, and served upon defendant's attorneys, and a notice of appeal, containing the grounds upon which the motion would be made. The statement contains the whole case, and is as follows:

"This was an action brought by the plaintiff, A. Detheridge, a citizen of Kentucky, against R. H. Earle, defendant, a citizen of South Carolina, in the Common Pleas for Greenville County, South Carolina, and tried before His Honor James L. Orr, September Term, 1871, on a promissory note, dated 5th day of April, 1861, for two hundred dollars, due at one day. The case came on for trial on the 14th of September, 1871, and was submitted to the Court and jury for investigation. The note upon which the action was brought was admitted by the defendant, R. H. Earle, and no discount or payment pleaded or claimed. The amount of the note, principal and interest, on day of trial, was three hundred and forty-six dollars and eighteen And this the plaintiff claimed and asked from the Court and jury. After argument of plaintiff's and defendant's counsel, his Honor the Judge charged the jury that

in conformity *to strict law, the plaintiff was entitled to recover the whole amount of the debt, principal, and interest as was claimed by the plaintiff, but that the jury might exercise a discretion as other juries had done, by giving only one-half or the amount offered plaintiff, to wit: (\$170.72.) one hundred and seventy dollars and seventy-two cents. His Honor the Judge also charged the jury that in those cases which were tried in Edgefield, South Carolina, and appealed from, and new

trials granted, because the juries had not found the full amount, that he had tried the same cases since under the orders for new trials, and that the juries found the same verdicts as those appealed from, or verdicts for only one-half of the debt and interest. After this charge of the Judge, Hon, James L. Orr, the jury retired and brought in and rendered a verdict for one hundred and seventy dollars and seventy-two cents, (\$170.72.) From this verdict the plaintiff appeals to the Supreme Court, because the verdict is not supported by the facts in evidence as above stated, and because of the erroneous charge of the Judge: This statement of facts the plaintiff, through his attorney, proposes to the defendant's attorney for settlement, and upon this statement the plaintiff bases his appeal."

[For subsequent opinion, see 4 S. C. 310.]

Stokes, for appellant, filed a brief containing the following points and authorities:

1. That the jury scaled the plaintiff's demand, finding for him only one hundred and seventy dollars and seventy-two cents, when they should have found three hundred and forty-six dollars and eighteen cents, (\$346.-18,) the aggregate amount of principal and interest, and which was substantially directed and recommended by his Honor the Judge, contrary to law.—Carwile v. Harvey, 15 Rich., 314.

In an action on bond, where no evidence is given by the defendant, a verdict for only one-fourth of the debt is in violation of law, and a new trial will be ordered.—Workman et al., v. Bolling, 2 S. C., 458.

2. The Supreme Court may give final judgment for whole debt and interest, without ordering new trial.—See Sec. 356 of Title 11 of Code, Part II.

Upon an appeal from a judgment or order, the appellate Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or *398

modified, the appellate *Court may make restitution of all property and rights lost by the erroneous judgment.—Sec. 12, Title 2 of Code, Part I.

The Supreme Court may reverse, affirm or modify the judgment, decree or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the Court below, to be enforced according to law.

Earle & Blythe, for appellee, filed a brief containing their points and authorities, as follows:

I. Motion for a new trial must be made to the Circuit Court.—Ch. III, Title VIII, of Code. by motion for new trial.—Benedict v. N. Y. this power appertains to Courts of original and Harlem R. R. Co., 8 N. Y. Leg. Obs., 168.

An appeal to the General Term from a judgment brings up only question of law. The Court cannot inquire whether the verdict was against evidence.—Buckley v. Keteltas, 4 Sanford, 450, N. Y. Sup. Crt., 1851.

The merits cannot be reviewed upon the evidence, on an appeal from a judgment on a verdict, if there is no appeal from any order denying a new trial.-N. Y. Sup. Crt., 1857; Brown v, Richardson, 1 Bosw., 402.

II. The appellant's other proposition is: "To modify the finding of the jury."

This is not within the province of the Court.

"On appeal to the General Term from a judgment, the question whether the verdict was not against the weight of evidence cannot properly be raised. By Section 348 of the Code, an appeal upon the law only lies from a judgment entered at a special term, unless the trial be had before the Court or Referees. When the trial is by jury, their finding can only be reviewed by a motion for a new trial under Section 349; and if the moving party is not satisfied with the decision of the special term on the motion, he should appeal from the order. An appeal from the judgment does not bring such an order under review, except so far as the consideration of the questions of law raised at the trial, and the appellant's exceptions there taken may have that effect. Upon appeal from the judgment, the finding of the jury must be deemed final and conclusive as to the facts."-N. Y. Sup. Court, 1856; Marquart v. LaFarge, 5 Duer., 559; N. Y. Com. Pl., 1854; Keys v. Devlin, 3; E. D. Smith, 518; and see Stelliner v. The Granite Ins. Co., 5 Duer., 594.

*399

*"Generally, the question in a Court of review is whether the judgment of the subordinate tribunal was erroneous when pronounced on the law as it then stood. On an appeal from a judgment on a verdict by a jury, the appellant cannot be heard upon the question whether the verdict is contrary to evidence. That question can only be raised on a motion for a new trial, or on an appeal from an order on such motion."-Anthony v. Smith, 4 Boswell, 503.

"On an appeal nothing can be examined except what might have been considered on a writ of error formerly."-N. Y. Com. Pl., 1850; Hastings v. McKinlay, 3 Code R., 10.

And "the writ or error only lies upon matter of law arising from the face of the proceedings, (3 Blackstone's Com., 406,) and this Court is a Court for the correction of error of law in this sense, (Code, Part I, Title II,) and the General Assembly has given to another tribunal, to wit, the Circuit Court, original jurisdiction of motion for new trial; (Ch. III, Title VIII,) and if this 1852; Coolie v. Brown, Code R., N. S., 416.

Objection to the verdict should be raised were only a "partition of jurisdiction," as jurisdiction, it is denied to one exercising appellate jurisdiction.—State v. Bailey, 1 S.

> This decision, it is true, was made before writs of error were abolished and appeal substituted by the Code, but the Code does not change the jurisdiction in this particular. -Craven v. Rose, (ante, 72.)

> III. The appellant has filed no case or exceptions.

> This is specifically required by law, and by rule of Court. "The questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the Court."-Code, Section 358; and LV, LVI, LVII, LVIII and LIX, Rules of Court. The brief fails to show such statement.

> A copy of the case, as settled, must be filed. -Parker v. Link, 26 Howard, 375.

> "An appeal to the general term from a judgment can properly only be heard on the record containing a bill of exceptions, except where the grounds of appeal appear upon the record alone."-N. Y. Com. Pl., 1850; Hastings v. McKinlay, 3 Code R., 10.

> "It seems that to entitle a party appellant to review any questions, either of fact or of law, arising upon the trial, or upon the decision, where the action is tried by the Court without a jury, or by a Referee, a case or exceptions, which is the same thing under the Code, regularly settled and filed,

and made a part of the paper pre*sented to the Court, is indispensable."—Supreme Court, 1858; Conoly v. Conoly, 16 How. Pr. 224.

IV. The brief does not exhibit any final judgment entered up, which is necessary .-Vide Rule of Supreme Court, and Section 11, Title II, of Code.

To review, then, we find that the appellant has filed no case, and has taken no exceptions; that no statement of facts has been settled; that no final judgment has been entered, and he relies solely upon a motion to modify the verdict on the ground of an uncertified charge, or failing in that, then for a new trial, without the refusal of a motion therefor in the Court below; therefore defendant's attorney respectfully moves that the appeal be dismissed, with costs, and cites the following authority:

"On appeal from a judgment on a report of Referees, there not being in the record any statement of facts, as found by the Court below, nor any bill of exceptions, but simply a case setting forth all the evidence given on the trial, a motion to dismiss the appeal was granted with costs."-Court of Appeals,

May 6, 1872. The opinion of the Court tanburg v. Spartanburg, C. & G. R. Co., 51 S. as delivered by was delivered by

WRIGHT, A. J. This was an action on a promissory note, dated April 5, 1861, payable one day after date. The case comes to this Court on appeal, because of the unjust, erroneous and unwarranted charge of the presiding Judge, which led the jury to bring in a verdict contrary to the law and the evidence. I cannot see any reason why a solemn contract with a good and sufficient consideration should be interfered with, because it was made previous to, or during the progress of the late rebellion, unless it was made with reference to "Confederate States notes, or their equivalent." It is not claimed, or attempted to be shown, that the note in question was so made. Therefore, it was the duty of the jury, according to the law and evidence in this case, to bring in a verdict for the whole amount found to be due. All persons have rights which all Courts of justice will respect. Under our system of jurisprudence, no State has the right to impair the obligation of a contract, much less has a Court the right to destroy or partially destroy solemn obligations made between citizens. To permit persons to get rid of paying one-half of their just, honest and equitable debts, because there has been a rebellion in the State, is no more nor less than offering

*401 a premium for such rebellion. It is *urged by respondent that, in order to give this Court jurisdiction to review on appeal, a motion for a new trial should have been made to the Court below. When an appeal is taken in due time, after judgment entered by the Court below, and it is found, as in this case, such judgment is contrary to the law, a new trial will be granted.

The motion is granted, and a new trial ordered to proceed, according to the rule laid down in this opinion.

WILLARD, A. J., concurred, MOSES, C. J., absent at hearing, but concurred.

____ 3 S. C. 401

AHRENS V. STATE BANK.

(November Term, 1871.)

[Banks and Banking \$= 77.]

The appointment of a Receiver, under the Act "to enable the banks of the State, to resume business, or to place them in liquidation, business, or to place them in liquidation, pass-ed March 13th, 1869, and turning over to him the assets and property of the bank, was not a repeal of the bank charter, nor did it work such a dissolution of the charter as terminated the bank's corporate existence, and enable it to plead the fact in bar of an action by a creditor rending when the Becciver was experited. pending when the Receiver was appointed.

For other cases, see Banks and Banking, Cent. Dig. § 169; Dec. Dig. ←77.]

[Pleading \$\sim 230.]

The rules of the Code of Procedure, in reference to amendments at the trial, and the right to disregard immaterial variances between the pleadings and the proofs, apply to actions pending when the Code was adopted, and in which issue had been joined.

[Ed. Note.—Cited in Chichester & Co. v. Hastie, 9 S. C. 334.

For other cases, see Pleading, Cent. Dig. § 592; Dec. Dig. \$230.]

[Husband and Wife =208.]

A husband may maintain an action as holder upon a bill of exchange, payable to his wife or order, and endorsed by her and others—the last endorsement being in blank.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 761; Dec. Dig. ⊕ 208.]

[Pleading \iff 387.]

Under the Code, non-suit cannot be granted for a variance between the allegations and the proofs. The only remedy is by amendment "upon such terms as shall be just," as provided in § 192, and, to entitle himself to this remedy, the party prejudiced by the variance must satisfy the Court immediately, by affidavit, that he has been misled, and in what respect he has been misled.

misied.
[Ed. Note.—Cited in Hammond v. Northeastern R. Co., 6 S. C. 138, 24 Am. Rep. 467; Zimmerman v. Amaker, 10 S. C. 101; Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 114; State v. Scheper, 33 S. C. 576, 11 S. E. 623, 12 S. E. 564, 816; Booth v. Langley Mfg. Co., 51 S. C. 418, 29 S. E. 204; Roundtree v. Charleston & W. C. Ry. Co., 72 S. C. 476, 52 S. E. 231; Citizens Savings Bank v. Efird, 96 S. C. 21, 79 S. F. 627 S. E. 637.

For other cases, see Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. \$\sim 387.]

[Pleading \$\sim 387.]

In all other cases of variance the Court may, as directed by § 193, either disregard the variance and direct a verdict according to the evidence, or order an immediate amendment without costs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. ©-387.]

[Pleading =237.]

It is only where, as mentioned in § 194, the allegation is not proved "not in some particular or particulars only, but in its entire scope and meaning," that the Court may, it seems, or-der a non-suit; and this is not deemed a case of variance, but one of failure of proof.

[Ed. Note.—Cited in Davis v. Columbia & G. R. Co., 21 S. C. 102.

For other cases, see Pleading, Cent. Dig. § 607; Dec. Dig. € 237.]

Before Carpenter, J., at Charleston, March Term, 1870.

Assumpsit by Charles D. Ahrens, plaintiff, against the President, Directors and Company of the State Bank, defendant.

The causes of action were two bills of ex-*402

change drawn by de*fendant on a bank in [Ed. Note,—Cited in Shand v. Gage, 9 S. C. Liverpool, and protested for non-acceptance. 196, 197; State ex rel. City Council of Spar- The declaration, filed 17th September, 1869, Liverpool, and protested for non-acceptance.

able "to M. F. Ahrens, the wife of the said plaintiff, or order," "and then and there delivered" the same "to the said plaintiff." There was no other allegation of title.

The pleas were non-assumpsit and the statute of limitations, and upon these issues were joined 8th November, 1869.

The case was docketed for trial at November Term, 1869, and on 5th March, 1870, defendant pleaded a special plea, as follows:

"And now, at this day that is to say, on the second Monday of February, in the year of our Lord one thousand eight hundred and seventy, came the said defendants, by Wilmot G. DeSaussure, their attorney, and say that the said plaintiff ought not further to maintain this action against the said defendants, because they say that, after the second Monday in November, in the year of our Lord one thousand eight hundred and sixty-nine, from which day until the second Monday of February, in the year of our Lord one thousand eight hundred and seventy, the action aforesaid is continued, to wit: On the eighth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, by an order made on the equity side of the Court of Common Pleas for Charleston County, in a cause therein pending, wherein George Garvin was plaintiff, and the President, Directors and Company of the State Bank were defendants, on the motion of D. H. Chamberlain, Attorney General, and signed by the Hon. R. B. Carpenter, Judge of the First Circuit, it was ordered as follows, to wit: 'It appearing by the official notice of the Comptroller General of the State that the above-named defendants have failed to comply with the requirements of an Act of the General Assembly of the State, passed March the 13th, 1869. entitled "An Act to enable the banks of the State to resume business or to place them in liquidation," it is now ordered, on motion of D. H. Chamberlain, Attorney General, that the above-named defendants do turn over to James B. Betts, who is hereby appointed Receiver of the same, all the assets and property of the said State Bank, upon his filing with the Clerk of this Court his bond, with sureties to be approved by me, in the sum of ten thousand dollars, for the faithful discharge of his duties as said Receiver;' and that, in compliance with the aforesaid order, the said James B. Betts, having filed with the Clerk of the said Court the bond required of him, and approved as therein re-- day of December, one quired, on the thousand eight hundred and sixty-nine, the *403

defendants did *thereupon turn over to him all their assets and property, and by reason of such failure to comply with the provisions of the Act aforesaid, and by the order aforesaid, the defendants forfeited all corporate

alleged that defendant made the bills pay-1 rights and privileges under the terms of the Act aforesaid, and, inter alia, the right to sue and be sued. And this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought further to have or maintain his said action against him."

This plea was verified by the President of the bank.

Plaintiff filed a general demurrer to the special plea.

At the hearing plaintiff proved the two bills of exchange alleged in his declaration. They were drawn payable "to M. F. Ahrens, in London, or order," and were specially indorsed by her to third persons, who also indorsed them. The last indorsement was in blank. The payee was the wife of plaintiff, and had been dead about five years before the case was tried. The bills were dated in November, 1861.

The Circuit Judge sustained the demurrer to the special plea, and overruled a motion for non-suit founded thereon. He also overruled a motion for non-suit made on the ground that the mere possession of the bills by the plaintiff was not a reduction into possession, and that the action should have been by the personal representative of M. F. Ahrens.

The verdict was for the plaintiff, and the defendant appealed on the following grounds:

1st. That his Honor the presiding Judge should have granted a non-suit upon the plea puis darrein continuance filed in this case. because from such plea it appeared that the defendants, one of the banks incorporated by authority of this State, failed to come in and renew business under the provisions of an Act of the General Assembly of this State, approved 13th March, 1869, and entitled "An Act to enable the banks of the State to renew business, or to place them in liquidation," and thereby forfeited "all corporate rights and privileges," and, inter alia, the corporate right to sue and be sued, and thereupon a Receiver was appointed, under the terms of the said Act, to take charge of the property and assets of the bank, and to proceed to a final settlement.

2. That his Honor the presiding Judge should have granted a non-suit, because the suit was brought by Charles D. Ahrens, the husband of the drawee, Mary F. Ahrens, and

*404

after her death, and *not by the personal representative of the said drawee, Mary F. Ahrens, as such suit should have been brought after her death.

W. G. DeSaussure contended, upon the first ground, that the Act of March 13th, 1869, and the proceedings which had been had thereunder, amounted to a dissolution of the charter of the bank, and terminated its corporate existence; that the effect upon the action was the same as the death of a natural person upon an action pending against him; that the facts were pleadable in bar of the action, and were in this case properly pleaded. He cited 2 Kent. Com., 305; 1 Bl. Com., 484-5; Ang. & A. on Corp., 667; Abbott on Corp., Tit. "Dissolution;" Edwards on Receivers, 3, and many other authorities.

On the second ground he contended that the choses in action evidenced by the bills of exchange had not been reduced into possession by the plaintiff during the life of his wife, and that he could not maintain the action except as the executor or administrator of his wife. He cited Story on Prom. Notes, § 88; 1 Roper on Husb. & W., 202; Broom's Parties to Actions, 7; Nash v. Nash, 2 Mad., 133; Pitts v. Wicker, 3 Hill, 197, and other authorities.

Phillips, contra:

As to first ground: A cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer.—Angell & A. on Cor., Sec. 777, p. 785. But where the terms of a charter are, that the corporation shall be dissolved on non-performance of a condition, the mere failure to perform is not ipso facto a dissolution, but judicial proceedings and a judgment of ouster must be had in order to effect a dissolution.-Id., p. 787; 5, J. C. R., 381, Kee v. Bloom; 2 J. C. R., 389, Attorney General v. The Utica Insurance Company.

All questions concerning the possession or forfeiture of chartered rights belong exclusively to Courts of Law; and the Courts of Chancery will not sustain a bill in aid of an information, in the nature of a quo warranto.—Clin. Di., 1, 729, Attorney General v. Bank of Niagara; Hop., 354.

The Legislature could amend or repeal the bank's charter, but could not violate the obligation of the contract subsisting between the plaintiff and the defendant.—6 Cranch, 135, 136, Fletcher v. Peck; 7 Id., 164, New Jersey v. Wilson.

*405

*A State can no more impair by legislation the obligation of its own contracts, than it can impair the obligation of the contracts of individuals.—10 How., 187, Woodruff v. Trapnal.

As to second ground: The husband and wife being one person in law, the former cannot after marriage, by any conveyance of common law, give an estate to the wife, nor the wife to the husband.—Co. Litt., 112, A. 187; 3 Shars., Black's Com., 442; 2 Vern., 385; 3 Atk., 72; 1 Ld. Ray., 515.

A husband who survives his wife is entitled to all her choses in action, whether reduced into his possession in her life time or not.—6 Johns. R., 112, Whittaker v. Whittaker; 3 Kent. Com., 113, 115.

Such a thing as a grant of a personal estate to the wife by the husband is unknown at law. The wife's legal existence is merged in that of the husband, and she can have no separate legal estate.—3 Strob., 461, Frierson v. Frierson.

A note made payable to the wife or bearer on which the husband brought suit as bearer, alleging a transfer to himself by delivery from his wife is recoverable. Where a note is made payable to a feme covert, and by her endorsed or transferred to a stranger, such endorsement or transfer gives no title, the legal interest being in the wife.—2 Spears, 554, Fort v. Brunson.

Upon marriage, the chattels of the woman become the husband's, and he alone can sue for their conversion. If she is joined, it is error.—Blanchard v. Blood, 2 Barb., 352.

May 5, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The questions arising on the plea puis darrein, are: first, does the appointment of a Receiver for a banking corporation, under the provisions of the Act entitled "An Act to enable the banks of this State to renew business, or to place them in liquidation," (approved March 13th, 1869, 14 Stat., 212,) operate as a dissolution of such corporation? and, second, can such fact be pleaded, in an action against such corporation, in behalf of the corporation?

The first Section of the Act in question provides as follows: "That all the banks incorporated by authority of the State, and which have by said authority issued bills of credit, known as bank bills, and have failed to comply with said corporate privileges, by refusing to pay their bills of credit, and are now thus failing to comply with the provisions of said Act of incorporation in this particular, and shall so continue to violate said Act, un-

*406

til the first *day of December, 1869, shall forfeit all corporate rights and privileges, and are forbidden to transact any business as banking institutions: Provided, That the redemption of their bills in United States currency shall be deemed the fulfillment of their obligations to the holders of said bills."

The second Section requires the Comptroller General to "notify the Judge of the Circuit in which such bank or banks may be situated, of each and every bank failing to comply with the requirements of the first Section of this Act, whose duty it shall be to appoint a suitable person as Receiver of each of the aforesaid banks, who shall, after having filed a bond, with good and sufficient security, to be approved by the said Judge, take charge of the property and assets of the bank."

Under the provisions of the Act in question, a Receiver has been appointed to take charge of the assets of the State Bank, the present defendants.

effect of this Act, as bearing upon the corporate character of the defendants, is the same as if the Legislature had in terms repealed their charter, consequently that they have no existence as a corporation, and cannot be sued as such. This view cannot be maintained.

It is not questioned but that the Legislature had full authority to repeal the charter under a reservation of authority for that purpose, to which their franchise was subject. The only question is whether such power of repeal has been completely exercised.

The power and function incident to the franchise of incorporation being derived from the Legislative grant may, independently of constitutional limitations of the Legislative power, be resumed at any moment, independent of the extent or duration of the original grant.

In an enlarged sense the term repeal may be regarded as including all modes of terminating the existence of a corporation, whether direct or indirect, absolute or conditional. In its ordinary sense that term includes only such Legislative action as assumed to terminate the powers of a corporation on grounds of public policy without being conditioned on any future act or neglect of the corporate body, in violation of the provisions of its charter, or of its obligations, either imposed by law or voluntarily assumed.

A Statute imposing a duty upon a corporation, and declaring as a consequence of the violation of such duty that its franchises shall cease, is not, in the technical sense, a

*407

repealing Statute, but the loss *of corporate powers being intended as a penalty, the Statute must be construed as penal in its nature.

The Statute in question belongs to the last named class. It recites the fact that certain banking corporations had failed to comply with their corporate privileges, by refusing to pay their bills of credit. It does not simply revoke the charters of such corporations on the grounds of such past deliquency.

The forfeiture was not to take effect except in a case of a corporation continuing to neglect a corporate duty for a specified time after the passage of the Act, namely, until the first day of December next thereafter. The direct and intended effect of the Act was to impose an imperative duty on such corporations to comply with their obligations of the designated class, by the time fixed, coupled with a penalty of the loss of its franchises if such duty was not performed. It was therefore to be regarded as amendatory of the law by which the corporation was bound, rather than as a repeal in the technical sense. This view is strengthened by the use, in the Act, of such words as "shall so continue to violate said Act," and "shall forfeit all

It has been argued that the operation and of an intention to divest them of their privileges on the ground of a wrong committed in their exercise, rather than in virtue of the arbitrary power of the Legislature to resume at will such grants of corporate franchise.

> The question then arises, whether the fact of a forfeiture under the terms of the Act can be taken advantage of by way of plea interposed in an action at law, by a creditor, against such corporation.

> The general rule of law applicable to the case is laid down by Angell and Ames on Corporations, (Sec. 777,) as follows: "A cause of forfeiture cannot be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the Government creating the corporation can alone institute such proceeding; since it may waive a broken condition of a compact made with it, as well as an individual." Ch. Kent advances the same idea in Kee v. Bloom, 5 Johns. Ch., 366.

> The authority just quoted recognizes two elements in the question whether a judgment establishing a forfeiture under such an Act, is essential for the dissolution of the corporation. One is the nature of the liability to which the corporation is subject, and the other is the character of the corresponding

*408

right to enforce such forfeiture, *vested exclusively in the State. That these considerations are properly involved, will clearly appear from the examination of the character of the Statutes of the class under consideration.

Such Statutes are not self-executing. They do not profess, as their direct object, to work changes in rights of property or per-They are, in their operation, condisons. They either prescribe a rule of tional. conduct for all persons, including corporations, or for some specified class, or forbid certain actions, attaching a penalty to a violation of such requirements. In the case of corporations, the penalty is frequently a loss of corporate rights. This penalty, although peculiar to corporate bodies, does not differ in principle from any other of the customary classes. Such laws are not selfexecuting, for it cannot be affirmed, upon the ground of the legal construction of the Statute alone, that such a specific corporation has become dissolved. Before such a result can be reached, a state of facts must be ascertained to exist; the corporation to be affected by the Statute must be brought within its terms, by the proof of facts showing it to have come within the case contemplated by the Statute as ground of dissolution. A judgment upon such proof is essential to concorporate rights and privileges," expressive nect it with the Statute. The judgment excludes the corporation from the benefit of the condition, and subjects it to the penalty.

Therefore, it follows, that before any Act creating a duty, either affecting individuals or corporations, and prescribing the loss of property or right as the consequence of the violation of such duty, can operate to produce such effect, there must be a direct judicial act ascertaining the grounds of such forfeiture.

The reason given by the authority quoted why a judicial proceeding is requisite—that the corporation has a right to answer—shows that the proceeding must be an ordinary judicial proceeding as contradistinguished from an informal or ex parte proceeding.

The State alone has a right to enforce this penalty. It may waive the forfeiture if public policy would be better subserved. The corporation cannot take advantage of its own wrong, nor claim to have been dissolved in virtue of its own illegal misconduct. If it possessed such a right, it might retain its corporate privileges long enough to reap some particular benefit for its stockholders, and then, by a wrong committed by itself, lay claim to escape its duties to the public, by a self-assumed dissolution.

From the foregoing remarks, it will readily

*409

be perceived that the *appointment of a Receiver, under the statute in question, is not such a judicial proceeding as can operate to dissolve the corporation.

It is an ex parte application, based wholly on a state of facts, certified by an executive officer, the Comptroller General. It is made the duty of the Circuit Judge to appoint a Receiver on such certificate alone. No intention to repeal the provision of the general laws ascertaining the rights of parties charged with violations of the laws to a regular proceeding before conviction or loss of right is manifested by this statute. Nor can such an intention be presumed as against common right.

In the remedy given by the statute no provision is made for any judicial act or determination intended to operate as a dissolution of the corporation, but it is confined to providing means for administering the assets of the corporation. The fair and reasonable construction of the statute is that it does not dispense with the necessity of a judgment of dissolution before the corporate character is lost, nor with the necessity for a regular proceeding, based upon proof of the facts bringing the corporation within the statute, before the Receiver can be placed in possession of the assets, as against the will of the corporation. It does not, however, follow that such an application to place the Receiver in possession of the assets, cannot be made before a judgment of dissolution, for the two acts are not necessarily connected by the statute.

The present action is clearly a collateral proceeding, as it regards the liability of the corporation to dissolution. Although the fact of dissolution might become important in an action at law, as bearing on the question whether proper parties are before the Court. yet the fact that the defendants have subjected themselves to liability to be dissolved under the statute, is, in no respect, an issuable fact in such an action, unless brought for the purpose of dissolving such corpora-Had the action been brought by the corporation against one indebted to it, it would not be doubted that the defendant could not plead the fact of forfeiture. It would, in that case, have been manifestly a collateral attempt to make the fact of a forfeiture available.

It is equally so, when the corporation is the defendant. In either case the action would involve the relations of debtor and creditor, and the question of forfeiture under the statute would be foreign to any proper issue joined under it.

The demurrer to the plea puis darrein, was

*410

properly sustained. *The only other exception taken is based upon the refusal of a nonsuit. This motion was properly denied.

The plaintiff proved two drafts, drawn by the defendants in favor of Mary F. Ahrens, and endorsed by her. The last endorsement is in blank, entitling any lawful holder to recover against the drawer. The productions of the drafts, thus endorsed, was sufficient, prima facie, to establish the plaintiff's title to the draft. If he was not the lawful holder of the drafts, nor entitled to sue upon them, that was a fact to be shown by way of defence. The plaintiff was entitled to recover, as holder of the drafts, in his own right, and was not compelled to deduce his rights by any proof of succession to his wife's personal estate, notwithstanding his wife was the payee of the drafts.

It is said that the plaintiff is not entitled to recover as holder of the draft alone, inasmuch as he has declared upon them as derived in the right of his wife as payee. It will not be necessary to look into the pleadings to ascertain whether ground exists there for this objection, as the Code provides a different remedy applicable to the case from that sought by the appellant.

Under Section 465 the provisions of the Code are applicable to future proceedings in suits theretofore pending, where issue has been joined, and governs the proceedings upon the trial and all subsequent proceedings in such cases. Without assuming to say that the force or effect of the pleadings, or the character of the issue joined, is changed by subjecting such issues to the provisions of the Code respecting the trial and its incidents, it is clear that a question of variance between the proofs introduced at the trial, and the

allegations of the pleadings, so far as it involves the right of the Court to direct an amendment of the pleadings, or to disregard the variance as immaterial, must be regarded as controlled by the rules and regulations governing the trial and its incidents. The Code furnishes the remedy in case of such a variance.

Under Section 192, no variance is to be regarded as material unless it has actually misled the party, and in that case his remedy is to satisfy the Court immediately, by proof by affidavit, that he has been so misled. The effect of such proof is not to prevent the Court from allowing an amendment to such case, but to entitle the party prejudiced by such amendment either time or such other compensatory terms and conditions as may be reasonable.

The object of the Code is to secure to parties, acting in good faith, the fullest right to rectify, by amendment, any defect in pleading the result of misapprehension, inad-*411

vertence or accident, *but at the same time to protect, as far as possible, the substantial rights of the party prejudiced by such amendment.

If the party prejudiced by such variance does not take advantage of the remedy afforded by Section 192, then, under Section 193, it is the duty of the Court to disregard the variance as immaterial, and either to order an immediate amendment, or to direct the fact to be found according to the evidence.

Section 194 was intended to guard against the application of Sections 192 and 193 to cases which are not, properly speaking, cases of variance, but where the party has proved, on the trial, a state of facts foreign to the allegations of the pleadings, and having the effect to leave the facts alleged in the pleadings unproved in their "entire scope and meaning." It is obvious that variances, involving nothing more than technical differences between the allegations and proofs, can only be made material in the mode pointed out in Section 192. If there is the want of an averment in the pleadings sufficient to entitle the plaintiff to recover on the drafts as holder, it must be regarded as a technical, and not a substantial defect. It certainly cannot be said that the declaration is improved in its entire scope and meaning.

Under the foregoing provisions of the Code, a motion for a nonsuit is not the proper mode of taking advantage of any variance that might have occurred; nor can this Court set aside the judgment, if sustained by the proofs, on the ground of any such variance

allegations of the pleadings, so far as it in- in view of the provisions of the Code in volves the right of the Court to direct an question.

The judgment should be affirmed.

WRIGHT, A. J., concurred.

MOSES, C. J. I propose, in a very brief manner, to state the reasons of my dissent from the views expressed in the opinion of the Court in this case.

The Legislature may, beyond doubt, reserve to itself the power to change, modify or repeal a charter which it grants, because its acceptance, subject to such retained right. binds the corporation. The charter of this bank was last renewed in 1853, (12 Stat., 243,) and therefore subject to the operation of the 41st Section of the Act of 1841, (11 Stat., 168,) which subjects it to "amendment, alteration or repeal by the Legislature." I regard the Act of March, 1869, as by its terms working a repeal of the charter, to take effect on the refusal of the defendant to comply with the conditions prescribed by it, and the want of objection or opposition to *412

the appoint*ment of a Receiver, an admission that on the 1st day of December, 1869, it had failed to resume specie payments. The words of the Act, "shall forfeit all corporate rights and privileges," and "are forbidden to transact any business as banking institutions," operate, in my judgment, as a direct repeal.

Nor do I think the action maintainable by the husband, the plaintiff, in the character of payee of the bills of exchange sued on, which were payable to his wife, who died before action brought. There was no proof that the husband, in her life time, had done any act "to shew an election to take them to himself," or "any expression of dissent by him to his wife's having any interest in them." The rule of law applicable is fully laid down in Smith's Law of Contracts, 299—where the cases of Richards v. Richards, 2 B. & Adolph., 447, and Gaters v. Madley, 6 M. & W., 423, are referred to.

I cannot regard the provisions of the Code as in any way aiding to cure the defect. The issue was joined before its passage. The 465th Section declares "that the provisions of this Act apply to future proceedings in actions or suits heretofore commenced and now pending, as follows: 1st. If there have been no pleading therein, to the pleadings and all subsequent proceedings. 2d. When there is an issue of law or of fact, or any question of fact to be tried, to the trial and all subsequent proceedings." The Section cannot aid the variance.

3 S. C. 412

ALLEN V. HARLEY.

(April Term, 1872.)

[Homestead \$\sim 97.]

The exception in the Constitution of 1868, and Acts of Assembly since passed, that the family homestead shall not be exempt from levy and sale for debts contracted in the erection of improvements thereon, applies to a debt con-tracted for that purpose before the Constitution was adopted.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 154; Dec. Dig. \$ 97.]

Before Farmer, J., at Barnwell, December Term, 1871.

On the 27th October, 1869, William Allen, the plaintiff, recovered and entered judgment, in the Court of Common Pleas, for Barnwell County, against John H. Harley, *413

the defendant, for *\$104.08. The action was upon a promissory note, dated 16th November, 1867, given by defendant to plaintiff for improvements put by the latter, in the fall of 1867, upon the mill-house of defendant.

On the 4th September, 1866, Lewis M. Ayer entered a judgment against Harley for \$1 .-124.90, and on the same day lodged execution thereon with the Sheriff of Barnwell County. On the 8th July, 1869, the execution of Ayer was levied upon a tract of land containing 800 acres, on which were the residence and mill-house of Harley, and the Sheriff caused to be set off to the defendant his family homestead, which embraced 600 acres of the tract, including the mill and mill house on which the improvements had been put by plaintiff.

This was an application by Allen to the Circuit Judge, to certify on his execution against Harley, that it was issued to "enforce an obligation contracted for the erection of improvements on his (defendant's) homestead, and for no other purpose."

Notice of the application, with a copy of an affidavit by Allen, stating the facts, was served upon Harley, and the case was heard upon the moving papers. His Honor denied the motion, and assigned his reasons as follows:

Farmer, J. The plaintiff, Allen, in the fall of the year 1867, as a mechanic, worked on the defendant's mill; took his note for the same, which he sued and obtained judgment on in October, 1869, and this motion is had under the 3d Section of the A. A. 1868, for the certification by this Court, "that said process is issued to secure or enforce an obligation contracted for the erection of improvements on his homestead, and for no other purpose." The question presented is, what homestead is here meant; that is, whether it be the family residence before the estate of homestead is set over, or this "estate" when so set over to the use of the family? It ap- the Act of the General Assembly of 1868 enti-

pears to the Court that the Act of 1868 refers to this "estate of homestead," and for the reason that the first Section thereof designates the particular tract from which this estate is to be carved, and the manner of carving it out; the 2d Section is as to the "personal estate;" and the 3d, expressly referring to this estate "as the said homestead," by its proviso then authorizes the certification, that it is for "erection of improvements thereon." Until this Court, therefore, is satisfied that such improvements were erected on the estate of homestead, it has no warrant of authority for the certificate prayed for. The argument, if true, as pressed, that improvements put upon the family residence be-*414

fore this estate is in esse, is likewise *protected through the right of homestead guaranteed by the Constitution, gives no authority to this Court to enforce such protection. The remedy under the A. A., 1868, applies to such cases only as come within its provisions; that is, improvements erected on the estate of homestead. The construction thus given to the constitutional exemption by this statute, controls this Court, and is deemed both wise and proper. By the exemption no reasonable doubt can be entertained, but that the law makers designed munificence to the ruined debtor's family, and the estate of homestead was to be a substantive contribution from creditors for such purpose only, otherwise the exemption is but "keeping the word of promise to the ear and breaking it to the hope," as to the ruined family, and to contributing creditors not merely the preferring of one creditor to another, but taking the goods of one and giving it to another. In this instance it is the releasing of property covered by Ayer's senior judgment for the benefit of Allen's junior judgment, when, too, the law at the period the mechanic, Allen, did his work, not only recognized the lien of Ayer's judgment, but as expressly denied the right to the mechanic of interfering with it. Entertaining the view that this case does not come within the purview of the A. A., 1868, the motion for the certification therein authorized is dismissed.

The plaintiff appealed.

Mayer, for appellant. A. P. & Robert Aldrich, contra.

June 10, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. In this case the plaintiff obtained a judgment against the defendant for one hundred and four dollars and eight cents on a promissory note given for the erection of improvements on the homestead of the defendant in the fall of 1867. On the 5th of February, 1872, under the third Section of

tled "An Act to determine and perpetuate the the homestead," in which it is said "whenhomestead," a motion was made to the Court for a certificate, which was refused, and from the order refusing a certificate an appeal has been taken to this Court. The question to be determined is, did the Constitution of 1868, from its ratification, exempt from attachment, levy or sale the family homestead, or is the "head of every family residing in this State" not entitled to the homestead until it shall have been "set off by the Sheriff

*415 or other officer exe*cuting the process" as provided by the Act of the General Assembly of 1868. Relative to the family homestead the Constitution of 1868 is very expressive, Section 20, Article 1, clear and precise. declares that "a reasonable amount of property as a homestead shall be exempted from seizure or sale for the payment of any debts or liabilities, except for the payment of such obligations as are provided in this Constitution."

The obligations or exceptions are mentioned or enumerated in Section 32, Article II. The Section is as follows: "The family homestead of the head of each family residing in this State, such homestead consisting of dwelling house, out buildings and lands appurtenant, not to exceed the value of one thousand dollars, and yearly products thereof, shall be exempt from attachment, levy or sale on any mesne or final process, issued from any Court." This Section proceeds further, and after giving the character of the property to be exempt, says: "Provided, That no property shall be exempt from attachment, levy or sale for taxes or payment of obligations contracted for the purchase of said homestead, or the erection of improvements thereon: Provided, further, That the yearly products of said homestead shall not be exempt from attachment, levy or sale for the payment of obligations contracted in the production of the same. It shall be the duty of the General Assembly, at their first session, to enforce the provisions of this Section by suitable legislation."

The homestead means simply the place of residence of the family, and the act of the "Sheriff or other officer," in setting off a certain portion of land about the residence is only determining the value of what shall be exempt "from attachment, levy or sale on any mesne or final process issuing from any Court," and does not contribute anything to the making of the homestead. To carry out the requirements of Section 32 of Article II of the Constitution of 1868, the General Assembly, at its first session after the ratification of the said Constitution, passed an Act entitled "An Act to determine and perpetuate

ever the real estate of the head of a family, residing in this State, shall be levied upon by virtue of any mesne or final process issued from any Court upon any judgment obtained upon any right of action, whether arising previous or subsequent to the ratification of the Constitution of the State of South Carolina, if the same be the family homestead of such person, the Sheriff or other officer executing said process shall cause a homestead, such as said person may select, not to *416

ex*ceed the value of one thousand dollars, to be set off to said person in the manner following, to wit:" [Here the manner in which the "Sheriff or other officer" is to proceed in laying off the homestead is clearly and specifically set forth. It appears that the General Assembly, by the use of the words, "if the same be the family homestead," considered that the right of homestead existed and should be protected by the Constitution of 1868, and the laws thereunder.

Section 3 of the same Act says: "The exemption of Sections 1 and 2 of this Act shall not extend to any attachment, levy or sale on any mesne or final process issuing to secure or enforce the payment of taxes or obligations contracted for the purchase of said homestead, or obligations contracted for the erection of improvements thereon: Provided, The Court, or authority issuing said process, shall certify thereon that the same is issued for some one or more, and no other, of said purposes: Provided, further, The yearly products of said homestead shall be subject to attachment, levy and sale to secure or enforce the payment of obligations contracted in the production of the same; but the Court issuing the process therefor shall certify thereon that the same is issued for said purpose and no other." It is perceived that there are three classes of obligations or claims that are specially excepted, and these stand good against the homestead, viz: Taxes, purchase money, and improvements made upon the homestead; therefore, the right of the homestead existing, and that right being recognized and sanctioned by the Constitution of 1868, and the right to make the homestead liable for certain obligations that existed at the ratification of the said Constitution, or that might exist thereafter, and the right to enforce payment of such obligations against the homestead not being interfered with, but specially protected by the Constitution and the laws thereunder, the motion asked for should have been granted.

WILLARD, A. J., concurred.

3 S. C. *417

*ALLEN v. PARTLOW.

(November Term, 1871.)

[Appeal and Error \$\sim 99, 103.]

An order, made by the Circuit Court, in April, 1871, in a proceeding by foreign attach-ment, commenced in 1868, allowing defendant to put in special bail, under the Acts of force when the writ issued, and thereupon dissolving the attachment, is not appealable under the Code of Procedure.

[Ed. Note.—For other cases, see Appeal and rror, Cent. Dig. §§ 665, 699; Dec. Dig. &— 99, 103.]

[Appeal and Error \$\simes 83.]
[An attachment is a form of process incident to an action, and not a special proceed-ing, within the provisions of the Code relative to appeals from the final orders in special proceedings.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 523-527; Dec. Dig. \$3; Action, Cent. Dig. § 113.]

Before Orr, J., at Abbeville, April Term, 1871.

On September 1st, 1866, Bannister Allen, plaintiff, sued out a writ of foreign attachment against J. Y. L. Partlow, defendant. It was entered in the Sheriff's office, and on the 14th day of the same month and year, was served by the Sheriff on a tract of land of the defendant. Declaration was duly filed, and judgment by default entered; and, the case being on the enquiry docket, the defendant, on the 5th January, 1869, tendered to the Clerk of the Court a recognizance of special bail, and asked to have the same entered and the attachment dissolved. The Clerk referred the matter to the Court, and after some necessary delay, it came up for consideration on the 19th day of April, 1871, when his Honor the presiding Judge made an order that the recognizance be accepted by the Clerk, and the attachment dissolved.

The plaintiff appealed, on several grounds, none of which was considered by the Court.

Thomson & Fair, for appellant. Perrin & Cothran, for respondent.

Aug. 7, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The order appealed from was made on the 19th of April, 1871, subsequent to the adoption of the Code of Procedure, (Merch 1, 1870,) and the appeal is governed by its provisions. The order allowed the defendant in a foreign attachment, commenced prior to the Act of 1868 "to regulate attachments," (14 Stat., 102,) to put in special bail.

The order having been made subsequent to January 1, 1871, the right of appeal, as limited by Section 11 of the Code, is not to be enlarged under the provisions of Section 463, relating to suits existing at the adoption

of the Code. Unless this is an appeal allowed to be taken under the provisions of Section 11, it is not entitled to be heard.

*418

*If the order is to be regarded as "involving the merits and necessarily affecting the judgment," (a proposition we are not now called upon to pass upon,) then, under Section 11, subdivision 1, of the Code, it can only be reviewed after judgment, and on appeal from such judgment.

The order appealed from is not appealable, within the provisions of Section 11 of the Code of Procedure. The second subdivision of that Section is the one to be considered in its relation to the case in hand.

In order to come within the third subdivision, it would have to appear that it was a final order, affecting a substantial right made in a special proceeding, for it is not made upon a summary application in an action after judgment. The term "special proceeding" must be taken in the sense of the Code. It is there defined, under Sections 2 and 3, as any remedy other than an action or ordinary proceeding in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Under the Code, an attachment is a form of process incident to an action against certain persons, (§ 250.) —Campbell v. Ins. Co., 1 S. C., 158.

As an incident of an action it is not to be regarded as a special proceeding; such proceedings being in their nature independent remedies, that cannot be taken by an action.

The proceeding by foreign attachment under the statutes as they existed prior to 1868, by assimilation to that of an attachment under the Code, must be regarded as falling within the term "action," as that term is employed by the Code.

The fruit of such an attachment was a judgment, and the attachment itself filled the office of process to obtain security for any judgment that might be obtained in an ordinary course of proceeding.

To bring the case within this second subdivision of Section 11, it must appear to be an order affecting a substantial right, made in an action when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial. It must therefore appear that the order in question is such as to prevent a judgment in an action.

The present order is not of that character. At most it affects the security of the plaintiff for the satisfaction of any judgment he

*419

may *obtain, but does not preclude him from proceeding to judgment against the defendant. It was attempted, in argument, to show

of the plaintiff's entire proceeding, but as an order allowing special bail, it cannot be regarded in that light.

The order not being appealable, we are not at liberty to consider whether the taking of special bail was erroneous, in view of the provisions of the Constitution abolishing imprisonment for debt, nor whether an undertaking should have been demanded, either under the Code or the Act of 1868. The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred. ____

3 S. C. 419

CLAWSON v. SUTTON GOLD MINING COMPANY.

(April Term, 1872.)

[Attachment \$\infty\$=250.]

A Circuit Judge has no jurisdiction, at Chambers, to dissolve an attachment under the former foreign attachment law, on the ground of irregularity in the proceedings.

[Ed. Note.—Cited in Gordon v. Sutton Gold Min. Co., 4 S. C. 53; Lyles v. Bolles, 8 S. C.

262.

For other cases, see Attachment, Cent. Dig. §§ 877-889, 893, 895, 897; Dec. Dig. \$250; Judges, Cent. Dig. § 132.]

[Attachment &== 154.]
[Where an attachment is original process, if the writ is void when issued, the defect cannot be cured by any subsequent amendment.] [Ed. Note.—For other cases, see Attachment, Cent. Dig. § 432; Dec. Dig. \$\infty\$=154.]

Before Thomas, J., at Chambers, Jan. 11th,

Motion to dissolve an attachment under a writ in foreign attachment, issued on the 28th August, 1867, by Charles L. Clawson, plaintiff, against the Sutton Gold Mining The motion was Company, defendant. granted, and the plaintiff appealed.

The facts upon which the motion to dissolve the attachment was founded, and the grounds of appeal, as also the points made in the arguments on the appeal, sufficiently appear in the judgment of the Court.

Clawson, Thomson & Clawson, for appellants.

Wilson, Hart, contra.

Aug. 7, 1872. The opinion of the Court was delivered by

MOSES, C. J. We do not regret that, according to the understanding of the counsel, as expressed at the hearing in this Court, we are relieved from a consideration of the various questions which appear to be presented in this most complicated brief. They are *420

that the effect of the order was a dismissal | 1868, and so intermingled and confused. that much time and endurance would be necessary for their solution.

> Among the cases named, by various plaintiffs against the defendant, included in the one brief, our consideration is to be confined to the points made by the appeal of C. L. Clawson, in regard to the bond of August 28, 1868

We have no hesitation in affirming that the bond was not in conformity with the requirements of the Act .- 11 Stat., 76; 7 Stat., 294. It was not made payable to the defendant; it was not in double the amount set forth in the suit.—Brown & Stone v. Whiteford, 4 Rich., 327; Jennings & Co. v. The Same, Ib. The Act permits the bond to be executed by "the plaintiff, or his or her agent," but here it was made by neither. J. J. Miller and W. J. Clawson, who signed it, acknowledged themselves "bound unto A. J. Wright and others." Then they with Charles L. Clawson, (whose name never before appears,) are referred to as "the above bound," about to issue and sue out the "writ against the said A. J. Wright and others," and the condition is "that if the above bound Charles L. Clawson, J. J. Miller, and W. J. Clawson, their heirs, etc.;" and it is signed by "J. J. Miller" and "W. J. Clawson." It is not the bond of the plaintiff, for he never executed it, nor of his agents, so far as appears by the instrument itself. It is very clear that it was prepared with the view to its signature by the said C. L. Clawson, and the other obligors were to be the sureties. He, however, failed to execute it, and indeed if he had done so, its utter want of compliance with the provisions of the Act would have rendered it insufficient for the required purpose.

The right of the defendant, the Sutton Gold Mining Company, to make the motion to dissolve the attachment, without filing a power of attorney, duly authorizing the appearance of counsel, is denied. The object proposed by the Act of 1843, (11 Stat., 256,) was to allow the absent debtor to plead to, and defend, the action without putting in special bail, on filing a warrant of attorney with the Clerk. It did not deprive him of any right which he had before its passage, and which he might enforce without pleading to the action. The motion made did not involve a defence to the action to be determined on its merits. It was an exception to the writ itself, treating it as void, because issued in violation of the Act.

The defendant had not plead to the merits

of the action; if he *had, it would have been too late to move to set aside the writ because the bond did not conform to the Act.-Gray ads. Young, Harp., 38. It has been long since *arrayed in a long succession, beginning in ruled that there is nothing in the attachment law which precludes a defendant from judicial mind as adding anything to its vaavailing himself by motion, of any defect or irregularity in the process which has issued against him.—Harper v. Scuddy, 1 McM., 265. In Wigfall v. Byne, 1 Rich., 412, it was said by the Judge delivering the opinion of the Court, "that the omission to give the bond required by the Attachment Act was an irregularity to which only the absent debtor could take exception, is too well established to require that any authority should be cited." If nothing is legally attached, the defendant can not be required to put in special bail before he is allowed to dissolve the attachment, as was held in Burrill v. Lettson, 2 Sp., 392. If the bond is necessary as the condition on which the writ is to issue, and if, without it, there is no foundation on which the action can rest, the defendant should be allowed to bring the exception to the notice of the Court by motion, without even a formal appearance.

Although the bond was irregular and insufficient, the attachment could not be dissolved by the order of January 11, 1870, because the Judge was without authority to make the order at Chambers. Whatever may be the powers of a Judge in Court, no matter how general its jurisdiction, he is limited at Chambers to what, by Statute, he is authorized to do when so sitting. The Act of 1818, 7 Stat., 321, allowed the Judges at Chambers 'to grant writs of prohibition, mandamus, quo warranto, and to hear and determine motions to set aside or stay executions, in the same manner, in every respect, as if the Court was actually sitting." It is a clear legislative declaration of the previous want of such authority, and, by necessary implication, a denial of it, except when expressly conferred.

It is claimed that the Judge below should have granted the motion to amend, made on the 8th November, 1870. This proceeds upon the assumption "that all proceedings subsequent to the Code are to be in accordance therewith." This, however, is error-for the 465th Section, (General Statutes, 626.) applies the provisions of the Code "to future proceedings in actions or suits heretofore commenced, or now pending, as follows: 1st. If there have been no pleading therein, to the pleadings and all subsequent proceedings. 2d. Where there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent pro-*422

ceedings." If, *however, the said Section did include the subject-matter of the motion, under what provision of it could the amendment be ordered? No substitution of a bond was proposed, but an amendment of that already executed, by striking out some words and inserting others, changing the instrument, and thereby to make it a new To amend a bond does not strike a lidity.

Where a statute requires a bond as the condition on which the remedy it affords may be applied, the character of the bond becomes a jurisdictional question. If defective in a material requisite, it is as no bond. and is not sufficient to sustain the writ.

Where, as in New York, "an attachment under the Act is not an original process commencing a suit, but a provisional remedy adopted in a suit already commenced," an undertaking given thereon, but insufficient in amount, may be substituted by filing a new undertaking.-Kissam v. Marshall, 10 Abb., 424. The writ which issued under our Attachment Act is an original process, and although a proceeding in rem., its purpose and effect are to make the absent debtor a party to the cause in Court, and, through it, to subject the property attached to the payment of the debt demanded. If void when it issued, the defect cannot be cured by any subsequent amendment.

The motion to set aside the order to dissolve the attachment must be granted. In view of arresting the unprofitable litigation which may follow, it may not be improper to repeat that it is only granted because the Judge, at Chambers, did not have the power to make the order, which is sought here to be reversed. Whether, with this premonition, the plaintiff will further proceed, rests with himself and his counsel.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *423

*GUERY, TRUSTEE, v. KINSLER.

(April Term, 1872.)

[Witnesses == 140.]

In an action by a trustee, appointed by the Court in place of a former deceased trustee, against a surety in a bond, it is competent for the defendant to prove by the principal obligor, payment of the bond to the deceased trustee. The general rule being that interested persons are competent witnesses, and the plaintiff not being a party against whom such evidence is excluded by the terms of Section 415 of the Code of Procedure.

[Ed. Note.—Cited in Jones v. Plunckett, 9 S. C. 398; Coleman v. Chester, 14 S. C. 290; Colvin v. Phillips, 25 S. C. 231; Huff v. Latimer, 33 S. C. 258, 11 S. E. 758; Rapley v. Klugh, 40 S. C. 142, 18 S. E. 680.

[Statutes @= 190.]

Where the terms of a Statute are clear and unambiguous, there is no room for con-struction, and Courts must apply them according to their literal meaning.

[Ed. Note.—Cited in Jones v. Plunckett. 9 S. C. 399; Cantey v. Whitaker, 17 S. C. 530.

For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. \$\infty\$190.]

Before Melton, J., at Lexington, Oct. Term, ture."-Parker, J., in Lobdell v. Lobdell, 33

Action by Peter C. Guery, trustee, plaintiff, against John H. Kinsler, defendant, on a joint and several bond for \$600, dated October 10th, 1857, given by D. D. Fenley, as principal, and defendant and two others, as sureties, to Sarah Brown, deceased.

Sarah Brown left a will by which she bequeathed the bond and other property to John H. Pearson, in trust for Sarah Ann Haight and others, and appointed him executor. Pearson proved the will and accepted the trust. He then died, and one John Ferguson was appointed trustee in his stead. Ferguson also died, and the plaintiff was then duly appointed by the Court trustee in his stead. The defence was payment by Fenley to Pearson.

At the trial Fenley was sworn as a witness for the defendant, who offered to prove by him that he paid the bond to Pearson. This evidence was excluded by the Circuit Judge, and the defendant excepted.

The verdict was for the plaintiff, and judgment having been entered thereon the defendant appealed.

Meetze, for appellant:

1. The policy of the law, prior to the adoption of the Code, was to exclude no witness on account of interest in the event of the action.—A. A. 1866, 13 Stat., 377. This policy is recognized and asserted by the provisions of the Code.—See §§ 414, 415.

2. The proviso contained in Section 415 is restrictive of this general policy, and restrictive of the general law declared by Section 414, and should be strictly construed in favor of the general policy and in favor of the general law.

3. This proviso creates an exception to the general law declared by Section 414, and excludes the testimony of an interested wit-

*424

ness *as to transactions with a person deceased, in cases where such deceased person is represented in the action by an executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor.

4. The testimony of Fenley as to payments made to Pearson, deceased, was not within the exclusion, for the reason that the action is not one to which the exclusion appliesit is not an action prosecuted or defended by a party acting as Pearson's executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor.

5. These terms have a distinctive, technical meaning, and the plaintiff, in his relation to Pearson, deceased, stands in neither of the representative characters indicated in the exception.

6. "The Legislature having undertaken to specify the exceptions, the Courts cannot alHoward's Pr. Rep., 372.

7. Authorities showing the construction by the Courts of New York of the like provision in the N. Y. Code.-Hight v. Sacket, 34 N. Y., 447; Wildey v. Whitney, 25 Howard Pr. R., 77; Buckingham v. Andrews, 12 Abbott's Pr. R., 322; McCray v. McCray, 12 Abbott's Pr. R., 1; Coller v. Wenner, 45 Barbour, 397.

Rice, contra.

Fenley was incompetent.—Section

- 1. He was interested in the event of the action.
- 2. Payment (proposed to be proved) is a "transaction."
- 3. The other party to the transaction was deceased.
- 4. The plaintiffs, in relation to Pearson, fall within the enumerated exceptions, "executor, administrator, heir-at-law, next-ofkin, assignee, legatee, devisee, or survivor."

Should the construction be strict? Affirmatively, see McCreary v. McCreary, 12 Ab., 1, where "representatives" interpreted not to include a guardian in socage, a dowress, or an heir. In Spalding v. Hallenbeck, 39 Barb., 79, it means "executors or administrators."

In Lobdell v. Lobdell, 33 How., 347, the evidence was ruled in, the transaction being between deceased and another in presence of witness, the decision turning upon the word "personally." So in Simmons v. Sisson, 26 N. Y., 265. In Wildey v. Whitney, 25 How., 75, "assignee" was construed not to include

*425

"legatee," and *right did not accrue "immediately" from deceased. So Hight v. Sackett, 34 N. Y., 447, as to assignee and legatee; and Coller v. Wenner, 45 Barb., 397, as to "immediately."

Even if the construction should be strict, Guery, the trustee, is within the word "assignee," by operation of law.-Hight v. Sackett as above; Hill on Trustees, Section 190, note, Statute 1796; McNish v. Guerard, 4 Strob. Eq., 66. No difference in principle between relations of trustee, appointed by Court, to deceased testamentary trustee, and those administrator sustain to intestate; nor of executor to testator. The transfer of estate in each case is by operation of law.

But the construction should be liberal. Legislation in England and this country first enlarged, and then abridged rule as to competency.—1 Ph. Ev., 24, 68, 69, (4th edition); Act of this State, 1866, 377, and present provision; in N. Y. Code of 1849, and amendments up to present; Hight v. Sackett, 34 N. Y., 477, 448, etc.; Voorhees, Appendix, Sec., 399; Waits' Code, 746. Object in all to extend exceptions to competency. object shown by rulings.—Lee v. Dill, 16 low any that are not specified by the Legisla- Ab., 92; 39 Barb., 516; 41 N. Y., (2 Hand.,)

619; note that "heir" is included in "rep- Act is explicit, there is great danger in de-

Intention of Legislature, Dyer v. Dyer, 48 Barb., 190, declared to be to close mouth of the living in all cases when the other party is deceased; and in Hight v. Sackett, 34 N. Y., 447, it is said that the Legislature then supposed they had embraced all parties against whom testimony could be given.

Aug. 7, 1872. The opinion of the Court was delivered by

MOSES, C. J. The intention of the Legislature in the adoption of the 415th Section of the Code. (15 Stat., 516,) is apparent. It was to guard against a mischief which, but for its enactment, would have been the consequence of the Section which precedes it, providing "that no person offered as a witness shall be excluded by reason of his interest in the event of the action." While the living, of sane mind, were able to answer for themselves, there was no one to protect the estate of the dead, the insane or the lunatic, from the effect of testimony derived from their alleged declarations, without fear of direct contradiction. The mischief it was intended to prevent exists in all its force in the evidence sought to be offered in this case, and if we could give further effect to the intention of the Legislature, by adding to the parties enumerated in the Section as those in whose favor it was to operate, without *426

violating the rule which we *feel bound to apply in the construction of Statutes, we would not hesitate to extend the provision to the relation in which this plaintiff stands to the bond in suit. In principle he is entitled to the protection which the Legislature has offered to those in terms included, and, if in its construction we could permit what is the apparent intention to supersede the other canons prescribed for the construction of Statutes, we would sustain the judgment of the Circuit Judge, and dismiss the motion.

The Section is in restriction of a general right, and we are not at liberty to extend it beyond its clearly expressed design. there is doubt arising from any ambiguity of expression, it would be proper, if possible, to reconcile it with the intention of the Legislature, if that could be ascertained by the means through which Courts are permitted to reach it. Where, however, an exception is made by words of description, including only persons referred to as occupying particular relations, it would be transcending our authority and usurping the functions of another department, to include others who, though they may be within the mischief, have not been so recognized, and protected by the enactment.

In Denn v. Reid, 10 Pet., 526 [9 L. Ed. 519], McLean, J., delivering the opinion of the Court, says: "But where the language of the

parting from the words used, to give an effect to the law, which may be supposed to have been designed by the Legislature. Where the language of the Act is not clear, and is of doubtful construction, a Court may well look at every part of the Statute; at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the Court to say, where the language of the Statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." whole law of construction in regard to the Section which it is contended must be enlarged to exclude the evidence sought to be introduced, is contained in the language above quoted, and it is useless to multiply authorities to the same end.

The party against whom the testimony is prohibited, in the language of the clause, must be "prosecuting or defending the action as executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic." The plaintiff here sues in the character of a trustee, succeeding, by appointment, the original trustee, Pearson, now dead, and *427

does not answer the descrip*tion employed in the Act. He is in no way the representative of Pearson. It is claimed, in the argument for the appellee, that Guery, the plaintiff, is "by operation of law within the word assignee;" but it is not perceived how he can be so comprehended. He does not claim by, under, or through him. He could not maintain an action on the bond by virtue of the Act of 1798, 5 Stat., 330, for that requires the plaintiff "to style himself, in the writ to be issued, the assignee of the obligee in said bond," and on the trial he would be obliged to shew and prove his assignment. Guery, by his appointment, stood in the place of Pearson, holding the bond, not by reason of any transfer from him or his representatives, but as trustee under the will of Mrs. Brown, with all the rights which attached to the trust at its original creation .- See Davant v. Guerard, 1 Speers, 242.

The New York Code contains a provision of the same character, though less extensive in the relations to which it applies. It has been held by the Courts of that State that its operation must be restricted to the parties named in it, and cannot be extended to embrace those who, though within its spirit, are not within its letter.—Hight v. Sacket, 34 N. Y., 7 Tiff., 447; Wildey v. Whitney, 25 How, 75; Buckingham v. Andrews, 34 Barb., 434; McCray v. McCray, 12 Abb., 1.

The motion is granted, and a new trial ordered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 427

FURMAN v. THE GREENVILLE AND CO-LUMBIA RAILROAD COMPANY.

(April Term, 1871.)

[Motions \$\sim 59.]

It is not correct practice to move in one Circuit an order which, in effect, disregards or treats as null and void a previous order made in the same cause in another Circuit—the last mentioned order having been made, as alleged, upon a misapprehension of fact, and upon the motion being denied bring the matter by appeal before the Supreme Court. The matter complained of should, in some way, be made the subject of consideration by the Court which made the previous order.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 76; Dec. Dig. € 59.]

Before Graham, J., at Chambers, Charleston, March, 1871.

This case came before the Circuit Judge on a rule to shew cause—entitled in all three of the causes hereinafter mentioned, and the return thereto. The rule, dated March 6, 1871, is as follows:

*428

*"On motion of Campbell & Seabrook, for Charles M. Furman, trustee, and on reference to the decrees and orders heretofore made in these cases, which appear to have been consolidated upon the last named case, and on hearing the statement of Isaac W. Hayne, Esq., it is ordered, that the Greenville and Columbia Railroad Company do shew cause, if any they have and can shew, at the Court House, before me, at Chambers, at 10 o'clock A. M., on Saturday, the eleventh day of March instant, why the costs of Charles M. Furman, trustee, shall not be taxed, not only as costs in the cause between party and party, but also as costs between solicitor and client, against the Greenville and Columbia Railroad Company, together with any just allowances the said Charles M. Furman, as trustee, may be entitled to have.

"And why the same shall not be referred to a special Referee to tax and assess the same, and report to this Court."

The rule was granted upon the following affidavit:

"I. W. Hayne, being sworn, makes oath, that not long after the filing in Richland District of the bill of complaint in the name of C. M. Furman, trustee, in behalf of certain bondholders, against the Greenville and Columbia Railroad Company, he was requested by Governor Orr to give his attention, as Attorney General, (which office affiant then filled) to the case, for the protection of the interests of the State. Affiant was instructed to co-operate with Mr. C. D. Melton, Solicitor of the Greenville and Columbia Railroad Company, and to advise with him, as the interest of the road and the State coincided, and when, in the discretion of affiant, it was proper to do so, to intervene in behalf of the State.

"Governor Orr had the matter much at heart, and was urgent that affiant's best efforts should be made to defeat the purposes of the bill. After being put in full possession of the case, affiant was of opinion that the allegations of the bill, its prayer and purpose, placed Mr. Furman, the trustee, in a false position—a position inconsistent with his duties as President of the Bank of the State, selected as agent of the State, to protect the interests of the State—the very interests which Governor Orr had called on affiant to sustain. As a friend of Mr. Furman, affiant desired that he should put himself right, and, as counsel in the cause, affiant thought it important that the interest represented by him should not have the weight of Mr. Furman's name and authority against it. After one of affiant's visits to Columbia upon this business, but before the Attorney General became a party to the record, affiant sought

*429

Mr. *Furman, and explained the whole matter to him. Mr. Furman said that he had never read the bill or given it a thought. He had simply allowed the use of his name, as he supposed he was bound to do under the provisions of the trust deed, but was then fully aware that it was necessary that he should explain his position. Affiant told him that it was in contemplation to file two cross bills, and that he, Mr. Furman, would be a necessary party to each, and that this would afford the opportunity he desired for explanation. Affiant advised him to employ a lawyer of his own to represent him to the end of the controversy, and to avoid any further complications. He assented, and named James B. Campbell as his solicitor. immediately saw Mr. Campbell, explained the case to him, and subsequently, throughout the conduct of the three cases, to wit: C. M. Furman, Trustee, v. the Greenville and Columbia Railroad Company; Huger & Phillips v. the Greenville and Columbia Railroad Company, C. M. Furman et al.; and I. W. Hayne, Attorney General v. Greenville and Columbia Railroad Company, C. M. Furman et al.; Mr. Campbell, on the part of the Trustee, affiant in behalf of the State, and Mr. Melton, representing the Greenville and Columbia Railroad Company, acted in harmony. Affiant is of opinion that this harmony aided greatly in obtaining from Chancellor Lesesne the order of injunction which brought about the final adjustment.

"Affiant will add that before Governor Orr went out of office, he sent to "Hayne & Son," (not the Attorney General,) as "a retainer and on account of fee" in this case. \$250. "Hayne & Son" were continued as solicitors, representing the same interests, after the accession of Governor Scott, by his authority and by the assent of the Attorney General; but up to this time have received no further remuneration. They have never consented

to the order of Judge Boozer, and were never, first named case, which is compromised, it is consulted as to the discontinuance of the

"Affiant, who is senior partner in the firm of "Hayne & Son," further states, that the consent order by which the two cases originating in Charleston were to be heard in Columbia, "at the next term of the Court," along with the case originating there, was not at the time considered as a permanent removal of these causes. On the contrary, Mr. Magrath, who represented complainants in one case, and affiant, who was complainant in the other, after consultation together, decided to oppose every attempt at a permanent removal of the causes, and, if there was to

*430

be a consolidation, *determined to claim that the Columbia case should be sent to Charleston.

"It was never intended to remove the records, except for the purpose of the trial at that term, and they were accordingly brought back, and are now here."

So much of the return to the rule as relates to the only point considered by the Court is recited in the order and statement below given, and need not be here repeated. The case having been heard by his Honor the Circuit Judge, he filed the following order and statement, dated April 4, 1871:

Graham, J. This was a hearing on the return to a rule to show cause why the costs of Mr. Furman, Trustee, should not be taxed against "The Greenville & Columbia Railroad Company," as between solicitor and client.

The return sets forth the following order. and shews for cause why the rule ought to be discharged, "that said order stands unimpeached and undischarged;" "that no appeal therefrom, nor exception thereto, has been taken by the relator;" "that said order, unless modified or set aside, or otherwise changed, operates as a discontinuance of all these cases, and that the relator, Mr. Furman, has no longer any standing in this Court in connection with the above mentioned cases."

The Order is as follows:

"The State of South Carolina, Richland County. In Equity.

Charles M. Furman, Trustee, v. Greenville & Columbia R. R. Co.

Bill to Foreclose Mortgage.

Benj. F. Huger & John E. Phillips, v. J. P. Southern, T. J. Robertson, Greenville & Columbia R. R. Co. et al.

Bill to set up Bonds guaranteed by the State, under the Mortgage of G. & C. R. R. Co.

Isaac W. Hayne, Attorney General, v. J. P. Southern, T. J. Robertson, et al.

Information in the nature of a Cross Bill for Injunction.

ordered:

"First. That the Clerk of this Court tax *431

the costs in the above *stated cases, and "The Greenville & Columbia R. R. Company" pay the same to the parties interested, getting credit for any sums which they can show has been paid towards the "tax costs" in the case first stated.

"Second. It is ordered that the said cases, and all proceedings connected therewith, be discontinued without prejudice.

(Signed) "L. Boozer.

"17 August, 1869."

The only question discussed before me was, whether the cases could be and were discontinued by this order, not upon the words, for they are clear enough, but whether there was any jurisdiction or authority in the Circuit Court for Richland County to discontinue all these cases, and make the order binding upon parties not consenting, and without notice.

The relator himself was absent from the County when the order was made, and his counsel denied (which was not disputed) any notice of it, till near a year after its entry, when he had procured an order for the taxation of costs as between solicitor and client before my predecessor, which was subsequently set aside by me for want of legal notice.

Various other irregularities and objections to this order were urged against its validity and force by the relator's counsel, which will be more fully stated below.

I thought the objection raised in the return well taken, that I could not disregard Judge Boozer's order, that the irregularities complained of must be corrected in the Court of Richland County, where the order was taken, and at once stated my opinion that the rule must be discharged.

I was therefore requested by counsel for relator to put on file, not merely my ruling, but with it a statement of the case, with a view to an appeal, or such further proceedings as he may desire. I cheerfully comply with this request.

The first named case was, commenced in Richland District, now County, in May, 1867. The Railroad Company answered 17 June, B. F. Huger and John E. Phillips, bondholders, answered about the same time, and on the 1st February, 1868, filed their bill, in the nature of a cross bill, in Charleston District, now County. It is the second entitled of the three cases.

On the 30th March, 1868, Isaac W. Hayne, Attorney General, as such, on behalf of the

*432

State, filed an information in the nature *of a cross bill and bill for injunction and relief, also, in Charleston County, then Dis-"By consent of the solicitor engaged in the trict, and on the 1st day of April; 1868, on motion of the Attorney General, the following order was made by Chanceller Lesesne:

"Isaac W. Hayne, Att'y Gen'l South Carolina,
v.

"The Greenville & Columbia Rail Road Company.

"Upon hearing the information filed by Isaac W. Hayne, Attorney General, on behalf of the State in the above case, on motion of the said Attorney General, It is ordered, that Thomas C. Perrin, of Abbeville District, the Executor of James M. Perrin, John B. Earle, of Greenville District, and George Sims, of Richland District, parties who are represented as having commenced suit at law in the Court of Common Pleas sitting for their Districts respectively, against the Greenville & Columbia Railroad Company, be, and they are hereby enjoined and restrained from the further prosecution of said suits at law, without leave had and obtained from this Court; and writs of injunction are hereby ordered to issue from the Register of this Court, against the said Thomas C. Perrin, John B. Earle and George Sims, requiring their observance of the above order.

"It is further ordered, That all separate proceedings in the cases in equity of Charles M. Furman, Trustee, against the Greenville and Columbia Railroad Company, instituted in the District of Richland, and of Benjamin F. Huger and John E. Phillips, Trustee, against the Greenville and Columbia Railroad Company, instituted in the District of Charleston, be stayed: that the said cases from the date of this order be considered as consolidated with the above case, and that all future orders and proceedings in any of these cases be taken as in the case of the 'Attorney General against the Greenville and Columbia Railroad Company, C. M. Furman, Trustee, et al.,' and that parties to the two first named cases be notified of this order.

"It is further ordered, that all persons whatever, having claims against the Greenville and Columbia Railroad Company, be, and they are hereby, stayed, restrained and enjoined from instituting and carrying on any suit or suits, or proceeding or proceedings, in any Court in this State, against the Greenville and Columbia Railroad Company, except by proceedings in this case, or by

*433 leave of *this Court first obtained, and that this order be pulished by James Tupper, Esquire, one of the Masters of this Court, in at least one paper each in Charleston, Columbia and Greenville.

"It is further ordered, that the above orders are without prejudice to the equities of the parties concerned, and that upon the coming in of the answers, and due notice given, application may be made to annul or modify the same.

(Signed) "Henry D. Lesesne.

"April 1, 1868.

"Filed April 1, 1868."

It was shown, and not denied, that none of the parties to the two last named cases had notice of the motion before Judge Boozer, or consented to his order. It appeared that on the 25th day of May, 1868, on motion of McGowan & Cothran, of counsel for some of the defendants, who appear to have been also solicitors for the complainants in the case instituted in Richland, Chancellor Lesesne made the following order:

"Isaac W. Hayne, Attorney General,

"The Greenville and Columbia Railroad Company, et al.

"By order granted in this case the 1st April, 1868, it was declared that the order was without prejudice to the equities of the parties concerned, and upon the coming in of the answers and notice given, application may be made to annul or modify the same.

"The answers of Thomas C. Perrin, executor, John P. Southern, Benjamin F. Huger, John E. Phillips, trustee, and others, having been filed and argument heard:

"On motion of McGowan & Cothran, of counsel for some of the defendants, it is ordered, that the information of Isaac Hayne, Attorney General of South Carolina, and the bill of complaint of Benjamin F. Huger and John E. Phillips, trustee, filed in this Court for the District of Charleston, considered in the nature of cross bills to the bill of Charles M. Furman, trustee, against The Greenville and Columbia Railroad Company, and the mortgage creditors of the same, filed in Richland District, together with all the answers and proceedings had in said cases in Charleston District, be heard in connection with the case of Charles M. Furman, trustee, at Columbia, during the ensuing term of the Court of Equity for Richland District.

*434

*It is further ordered, that this order is without prejudice to the equities of any of the parties concerned, and intended merely to bring the whole case before the Court at the same time.

"It is further ordered, as condition of the foregoing order, that John P. Southern and Thomas J. Robertson do file their answers, respectively, in the cases of Benjamin F. Huger and John E. Phillips, trustee; and that such answers be placed on the file of the Court within ten days from the date of this order.

"In Chambers.

(Signed) "Henry D. Lesesne.

"25th May, 1868.

"Filed 10th June, 1868."

The pleadings and records of all the causes were not removed, but remained where they were originally filed. The Charleston record was carried to Columbia for the hearing, by the Register of the Court in person, and by him brought back and restored to the file in Charleston, And again: on the 19th

day of June, 1868, on motion of Hayne & Son, motion of Magrath & Lowndes, Solicitors of the same Chancellor made the following order:

motion of Magrath & Lowndes, Solicitors of John C. Phillips, J. T. Welsman, B. F. Huger, Greenville & Columbia Railroad, et al., it is

"Isaac W. Hayne,

V.

"The Greenville and Columbia Railroad Company.

"On motion of Hayne & Son, Solicitors, it is ordered, that the former order directing the hearing of this cause, and also the cases of 'B. F. Huger v. The Greenville and Columbia Railroad Company,' and 'C. M. Furman, Trustee, v. The Greenville and Columbia Railroad Company,' be discharged, and the hearing continued.

"It is further ordered, that the information above stated be amended by making C. D. Melton, trustee, under the mortgage of the Greenville and Columbia Railroad to him, a

party defendant in the case.

"It is further ordered, that the order hereinbefore made, calling in a certain class of bond creditors, be enlarged, so that public notice be given to all persons claiming to be bond creditors of 'The Greenville and Columbia Railroad Company,' secured by any lien in the nature of a mortgage, whether such mortgage has been executed by the said Com-

*435

pany, or is in the nature of a statu*tory lien, to prove their several claims, designating the security claimed, as that claimed to be the security for the bonds as proved.

"And it is further ordered, that the time for making such proof be extended to the

first day of January next.

"It is further ordered, that D. B. DeSaussure, Commissioner in Equity for Richland District, be charged with the execution of the duties to be performed under this order, and that he have leave to report any special matters, all equities in the proceedings being reserved.

(Signed) "Henry D. Lesesne.

"We consent:

"Hayne & Son.

"Perrin & Cothran,

"Magrath & Lowndes.

"S. McGowan,

"Melton & Melton,

"W. F. DeSaussure."

And again, on the 26th day of December, 1868:

"Charles M. Furman, Trustee, v. The Greenville and Columbia R. R. Co.

"B. F. Huger, et al., v. The Greenville and Columbia R. R. Co.

"Isaac W. Hayne, Attorney General, v. The Greenville and Columbia R. R. Co., et al.

"It having been made to appear to the Court, that owing to the illness of the Commissioner in Equity for Richland District, the order in the said case, made on day of , 1868, could not be executed, on

motion of Magrath & Lowndes, Solicitors of John C. Phillips, J. T. Welsman, B. F. Huger, Greenville & Columbia Railroad, et al., it is ordered, that these parties, and others represented by the said Solicitors, have until the 1st February, 1869, to file their proof of claims in these causes.

(Signed) "Henry D. Lesesne. "26 December, 1868."

The next proceeding in the case is the order of Judge Boozer, of 17th August, 1869, recited above. My attention was not called

*436

to *any other proceeding in any of the causes bearing upon the question before me, or affecting in that respect the relator or the defendant. I did not consider the proceedings before my immediate predecessor, which had been set aside, as having any influence on the question before me, and they were not referred to by either party, so far as I can recollect.

It was alleged, and not denied, that the other parties, except the relator, had acquiesced in Judge Boozer's order, and accepted their costs under it. It was admitted that the relator had not been paid or acquiesced in that order.

It was urged upon me, in behalf of relator—

1st. That under the order of Chancellor Lesesne, of 1st April, 1868, all the cases were consolidated and pending in Charleston.

2d. That the order of 25th May, 1868, only appointed a hearing in Richland, and did not remove or transfer the cause from Charleston.

3d. That no hearing having been had "at Columbia, at the ensuing term of the Court of Equity for Richland District," the order for hearing there was at that term of the Richland Court, namely, 19th June, 1868, discharged and the hearing continued.

4th. That the discharge of the order necessarily worked a discharge of the hearing at Columbia; that the words, "and the hearing continued," could mean nothing less, because the discharge of the order took away the jurisdiction to hear two at least of the cases. To continue a case is to postpone it—to continue a hearing would usually mean to go on with it, which it clearly did not mean here, but to postpone; and in connection with a discharge of the order giving jurisdiction, it meant an indefinite postponement, and remitted two at least of the cases to their proper jurisdiction.

5th. That if there had been any transfer, it was a transfer of the Richland case to Charleston, by the order consolidating them taken, at Charleston, 1st April, 1868, which all the parties acquiesced in and acted on.

6th. That there having been no transfer of the records when the order of August, 1869, was made, and the law having been changed, the Circuit Judge of the Fifth Circuit had no; mentioned, and advances the proposition that jurisdiction of the causes in the Fifth Circuit; consent, even if there had been any, could not give jurisdiction.

The respondents insisted that the proper and only remedy, if any, for the rights, if any, of the relator, must be had under the order of Judge Boozer, or by some modification *437

or enlargement of it, or *by appeal from it, or by some new and independent suit, action or proceeding.

I sustain their view, and it is thereupon adjudged and ordered that the rule be discharged.

The relator, Charles M. Furman, appealed from the order of His Honor Judge Graham, and also from the order of His Honor Judge Boozer, filed at Columbia, August 17, 1869, upon which the first named order rests, for the reasons and grounds urged before His Honor Judge Graham, and restated in his statement of the case appended to his order:

- 1. Because His Honor Judge Graham erred in not deciding that the order of Judge Boozer, of August 17, 1869, was irregular for want of notice, want of consent, and want of jurisdiction in two, at least, of the cases, and, as he claims, in all of them, and that the same was therefore not of force to discontinue or dismiss the cases pending at Charleston, but in that respect null and void.
- 2. Because, if said order is in fact binding while standing of record and unchanged, it ought to be set aside for the reason that it was irregularly and unfairly taken, without notice, without consent, and without jurisdiction.

Campbell & Seabrook, for appellant. Chamberlain, contra.

Aug. 7, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The above entitled cases were discontinued under an order of the Circuit Court of the Fifth Circuit, made by Judge Boozer, August 17, 1869, in which a final disposition of all questions of costs was made.

On the 6th of March, 1871, a motion was made in the First Circuit in behalf of C. M. Furman, trustee, complainant in the suit first above named, for a taxation of his costs as against the Greenville and Columbia Railroad Company, and as between himself and his attorney, and for such allowance as he might be entitled to, and for the appointment of a special Referee to tax and assess the same. The motion was denied by an order made by Judge Graham on the 4th of April, 1871. This decision of Judge Graham is based on the ground that the order of Judge Boozer was final as affecting the application before him.

*438

the order of Judge Boozer should have *been disregarded as null and void, or, that it should have been set aside as irregular, unfairly taken, without notice, without consent. and without jurisdiction.

No ground whatever is presented, by the case before us, for holding that Judge Boozer's order was null and void. It professes to be based on the consent of the solicitors in the case of Furman v. The Greenville and Columbia Railroad Company.

If such consent was actually given, it bound the present appellant.

It was claimed, however, that no such consent had, in point of fact, been given. If such was the case, the course of the party was, in due time, to move the Circuit Court. where the order was made, to correct any misapprehension of the facts that may have misled the Court in making the order. It was not correct practice to ask the Circuit Court of a different Circuit from that which made the order, either to disregard it or to set it aside for irregularity, nor to bring the order, by appeal, into this Court, without making it the subject of consideration by the Court that passed it.

The conclusions of Judge Graham are unobjectionable upon the state of facts brought hefore us

The order should be affirmed, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 438

STATE v. RANKIN,

(April Term, 1872.)

[Criminal Law \$\sim 974.]

The Supreme Court cannot hear a motion in arrest of judgment, as an original motion. It must be made, in the first instance, in the Circuit Court.

[Ed. Note.—Cited in State v. Washington, 13
S. C. 455; Whitesides v. Barber, 22
S. C. 50;
State v. Lazarus, 83
S. C. 217, 65
S. E. 270.

For other cases, see Criminal Law, Cent. Dig. § 2470; Dec. Dig. ⇐=974.]

[Nuisance \$\infty 61.]

To cause a whole neighborhood to become sickly, by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, is a public nuisance, for which an indictment lies

[Ed. Note.—Cited in Hellams v. Switzer, 24 S. C. 44; Barksdale v. Charleston & W. C. Ry. Co., 83 S. C. 292, 64 S. E. 1013; Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 63 S. E. 556.

For other cases, see Nuisance, Cent. Dig. § 147; Dec. Dig. \$\infty\$61.]

[Nuisance \$\infty 62.]

The present appeal is from the order last able, if the pond, without causing sickness, pro-

joyment of life and property in the community uncomfortable.

[Ed. Note.—Cited in McMeekin v. Central Carolina Power Co., 80 S. C. 515, 61 S. E. 1020, 128 Am. St. Rep. 885.

For other cases, see Nuisance, Cent. Dig. §§ 153-157: Dec. Dig. © 62.]

[Nuisance \$=66.]

If a mill pond, which has existed for seventy years, becomes a public nuisance by corrupting the air, causing disagreeable smells and sickness, the owner may be indicted.

[Ed. Note.—For other cases, see Cent, Dig. § 139; Dec. Dig. € 66.]

[Nuisance \$3.]

One is not guilty of a public nuisance unless the injurious consequences complained of are the natural, direct and proximate cause of his own acts. If such consequences are caused by the acts of others so operating on his acts as to produce the injurious consequences, then he is not liable.

[Ed. Note.—Cited in Hill v. Railroad Co., 31

C. 398, 10 S. E. 91, 5 L. R. A. 349.

For other cases, see Nuisance, Cent. Dig. § 161; Dec. Dig. \$\sim 69.]

[Trial \$\ightharpoonup 105.] [Cited in Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 578, to the point that the competitions of the competition of tency of evidence is conceded when it is offered without objection at the time.]

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. —105.]

[This case is also cited in Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 63 S. E. 557, as to the admissibility of evidence of sickness caused by maintaining alleged nuisance, and in Exparte Duckett, 15 S. C. 213, 40 Am. Rep. 694, as to the question of arrest of judgments! ments.]

Before Orr, J., at Anderson, Jan. Term, 1872.

This was an indictment against George W. Rankin for a public nuisance.

*439

*The indictment contained three counts. The first charged that George W. Rankin, on the first day of January, in the year of our Lord one thousand eight hundred and seventy, at Anderson Court House, in the County and State aforesaid, injuriously and knowingly did erect, or cause to be erected, a certain dam across Three and Twenty Creek, a common and ancient water course at Anderson Court House, in the County and State aforesaid, by means of which the water flowing in the creek was stopped, dammed up and flowed back in and upon the surface of large tracts of adjoining lands by means whereof the mud, wood, leaves, brush, and the animal and vegetable substances and other filth, collected and brought down the channel of said water course, by the natural flowing of the waters, there became and were. during all the time aforesaid, collected and accumulated in large quantities in the channel of said water course, and on the lands overflowed, as aforesaid, and the said mud,

duces smells and stenches, which render the en-, wood, leaves, brush, and the animal and vegetable substance, so there collected, as aforesaid, became, and were, and still are, offensive, and the waters became, and are, corrupted; and by means whereof divers nauseous, unwholesome and deleterious smells and stenches did arise, so that the air was, and still is, corrupted and infected to the great damage and common nuisance of the good and worthy citizens of this State, there passing and repassing, dwelling and inhabiting, and against the peace and dignity of the same State aforesaid.

The second count charged that George W. Rankin, being possessed of a certain mill dam at Anderson Court House, in the County and State aforesaid, with their appurtenances, situate near and adjacent to the dwelling houses of divers of the good citizens of this State, did on the first day of January, in the year of our Lord one thousand eight hun-, and on divers days dred and seventybefore and since, unlawfully and injuriously permit the water of the mill pond to overflow the adjacent lands, as well of others as his own, by means whereof the land so overflowed was rendered and kept marshy, and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, to the great damage and common nuisance of the good and worthy citizens of this State, there dwelling and inhabiting, and against the peace and dignity of the same State aforesaid.

And the third count charged that George W. Rankin, on the first day of January, in the year of our Lord one thousand eight hun-, at Anderson Court dred and seventy-

House in *the County and State aforesaid, unlawfully and injuriously a certain and ancient water course, called Three and Twenty Creek, with earth, gravel and other materials, did obstruct, and stop up, by reason whereof the rains and waters that used to flow through the said water course, did overflow the adjacent lands and remain and became putrid, stagnant and noxious, and did send forth unwholesome and infectious damps, fogs and smells, whereby the air was greatly corrupted and infected, to the great damage of the health and the endangering the lives of the good citizens of the said State, there inhabiting and dwelling, and against the peace and dignity of the same State aforesaid.

The case on which the appeal was heard, is as follows:

The defendant was indicted for erecting and keeping a public nuisance, namely, a mill-dam and pond on Three and Twenty Creek, in Anderson County. The indictment contained three counts. The first charged that the defendant "did erect or cause to be erected a certain dam," &c.; the second charged that the defendant "being possessed

of a certain mill-dam, &c., did permit the waters of the mill-pond to overflow the adjacent land," &c.; and the third charged that the defendant "unlawfully, a certain ancient water course with earth, gravel and other materials, did obstruct and stop up," &c. The defendant pleaded not guilty. The testimony showed very clearly a successive and continuous ownership, possession and use of the mill-dam, and valuable mills, for a period of over seventy years by the defendant's grandfather, his father and himself; that the pond of water was wholly upon the defendant's own land, and the head of the mill-pond, or dammed water, was eighty rods distant from, and within, the defendant's line, crossing the stream above; the dam had always been of the same height, and located on the same site; it was renewed in 1859, and made a close dam; prior to the re-building it had become rotten and decayed, and leaked so that the water was wasted, and at times was insufficient to propel the machinery. It was urged before the jury, on this proof, that much of the sand and mud which came down the stream passed through the dam and escaped, prior to its being rebuilt, and that after the new dam was built there was no escape of the mud, gravel and sand coming down the stream, which caused an accumulation of debris at the head of the pond, and flooded and overflowed the bottom land above, and caused the "stenches, smells," and sickness above the head of the pond. In the

*441

opinion of witnesses, the quantity of *land covered by the water of the mill-pond was ten or fifteen acres, and had, probably, in the lapse of years, diminished; and that now, as heretofore, the water of the stream had a fall of about eighteen inches, and flowed in great part in the old channel, from the defendant's line above, to the head of his mill-pond. No dead timber immediately around the pond, but willows and swamp growth.

Three and Twenty Creek is formed by the junction of three streams, uniting at different points above the defendant's land, and varying in distance therefrom from a half to one mile. The creek is represented as creeping and sluggish below the dam, in its entire length, with few falls, and they of slight elevation. In A. D. 1860, the riparian proprietors, above the defendant's land, combining together, cut a ditch, beginning at a short distance above the defendant's line, and at a spot where a log for passing, known as the "foot log," crossed the creek. The ditch was commenced and sunk in the channel of the creek, to a depth of, perhaps, one foot below the old bed at the starting point; was ten feet in width, and extended in a straight line up the creek, without conforming to its windings, though occasionally sunk in the bed of the stream, for the distance of two miles or more, running up the different branches.

After the cutting of the ditch, the sand collected at its lower end, at the "foot log," which is now covered by sand, and, in time, accumulated so that the channel, at the end of the ditch, in which the water had formerly flowed, became choked, and higher than the adjacent Lanks. The water was thus forced over the edges of the ditch, or banks, permeated the adjacent low grounds, and collected in spots in small holes, or pools. The entire descent of the water, from Conner's Bridge to the forks of the creek (a half mile,) was nearly nine feet; from the forks of the creek to "foot-log" (one-fourth of a mile,) from six inches to one foot; and from the "foot-log" to pond (one-fourth of a mile,) one to one and a half feet.

The low grounds adjacent to the ditch became wet (sobbed,) and unfit for cultivation. Gradually they were covered with vegetation; the timber upon the uncleared bottoms, on both sides of the ditch, died, fell and rotted upon the low grounds, and, at some spots, lay in the ditch. This condition of the low grounds extended up the creek, and smaller streams, far above the defendant's land, for a distance of two and a half miles, and within one-half mile of the residence of a party (Dr. Earle) whose family, and tenants residing on his place, and several families in the same

*442

neighborhood, adjacent *to the said stream, increasing annually for several years, were alleged to have been afflicted with malarial disease.

The defendant had no agency in cutting this ditch, nor in any way consented thereto. He refused permission to the proprietors of the lands above to extend the ditch through his own land—the eighty rods lying between his line, and the eddy water of the pond—giving as his reason for the refusal, it would "fill his mill-pond with sand."

It was in proof that the proprietors above, before cutting the ditch, consulted men of scientific knowledge of such matters, and were informed the ditch would not accomplish their purpose, nor drain the low grounds. They acted, however, against this opinion, and cut the ditch.

The charge by the State against the defendant was, that the mill-dam had been a nuisance, inasmuch as it caused the flooding of the lands, the dying of the timber, and the accumulation of stagnant water, and putrid vegetable substances above, which caused malarial diseases.

There was much testimony upon the subject of malaria, and its qualities. The opinion of the physicians was uniform that its body or substance had never been detected by the senses; and that its existence was known and recognized only from effects and results. Some of the medical witnesses denied its existence, but the majority of them approved the theory of its existence, and those of them

condition of the low grounds testified they exhibited the elements that generate malaria.

Two or three of them testified that there was sufficient cause for malaria in the condition of the low grounds, near the house of Dr. Earle, three miles from the mill of defendant, where, it was alleged, much sickness had existed, and that the condition of the low grounds resulted indirectly from the obstruction of the stream by defendant's mill dam.

All agreed that the mill pond proper, being of long standing, with water covering the bed, would not produce disease, as would the low grounds, with their alterations of dryness and moisture, and decaying vegetable substances.

The physicians, generally, testified that the chills and fever, and bilious remittent fever, which prevailed around the mill pond and low grounds, and near the three streams forming the creek, might, according to theory, be attributed to the unhealthy condition of the low grounds.

*443

*Until 1860, disease, in that neighborhood, had not attracted notice; indeed, up to that time, the neighborhood, called "Slabtown," was famed for its health. After that time, occasional cases of chills and fever, and bilious remittent fever occurred, and, some witnesses believed, such cases had increased in numbers.

The large number of cases was in 1871, when a majority of persons in the vicinity of the low grounds were seized with diseases, alleged to be of malarial type. A number of families and persons, equally exposed to fever, escaped. And it was noticeable that the great amount of sickness was not near the pond, but in the locality of, and above, the low grounds, one or two miles up.

It was also in proof, as connected with the above, that disease of malarial character was more generally prevalent in 1871, than it had been ever known before, and was found to invade places which before had been wholly exempt from it, and where it could not be traced to any known local cause.

The State charged that the condition of the low grounds resulted directly or consequentially from the defendant's mill pond and dam below: that the mill dam was the cause of the dead timber, the wet and sobbed state of the land, and of the vegetation annually growing and decaying, which afforded the constituents by which malaria, producing disease, was generated. It was affirmed that this malaria affected the people with the various kinds of fever, and being, as alleged, traced to the mill dam, as primary cause, constituted the mill dam and pond a common or public nuisance.

condition of the low grounds was occasioned the ditch or dead timber above the dam was

who were acquainted with the locality and t by the conduct of the prosecutor, and his coactors in cutting the ditch; that until the ditch was dug, the lands adjacent to the creek was not wet and sobbed, nor had the timber thereon died: that the fall and flow of water between the lower end of the ditch and the head of the mill pond precluded the assumption that the mill dam, or water in the pond. had any agency in producing the condition of the low grounds above; that at the mostif there was any agency—it was very remote; and that if the prosecutor and his co-actors suffered damage, it resulted from the consequences of their own act, either alone or in connection with the natural filling of the stream above, from the cultivation of the country.

> On the part of the defendant, the following points were presented to the Court as questions of law:

1st. That no indictment will lie, as the of-*444

fence, if any, is a pri*vate, and not a public nuisance; and if there be parties injured, their remedy is by action of law.

2d. That the third count of the indictment is vague and indefinite as to time and locality, especially the latter, and should be stricken from the indictment,

3d. That the evidence of sickness and disease should not be considered by the jury, inasmuch as there are no such allegations in the indictment, nor allegations connecting disease and sickness with "noxious air, unwholesome smells," &c., and the only proof to be considered, should refer to the allegations of the indictment.

The Court refused to rule as requested, or to sustain any of the points made, and sent the case to the jury.

On the part of the defendant, the Court was then requested to charge the jury upon the following points:

1st. "That repairing the old dam, and erecting a new one on the same foundation, and continued use, was the same as if it had been one dam all the while, provided the new dam is no higher than the old, and the water level is not raised."

2d. That the defendant, besides being the owner of the land on which the pond rests, is entitled to the benefit of at least seventy years' user, which gives him all the rights relating to property that either the State or individuals can give.

3d. That this long possession and user, whilst it does not absolutely protect him from an indictment for nuisance at the suit of the State, entitles him to an acquittal, unless the jury should be clearly of opinion that the mill pond is the "natural and proximate cause of the smells and stenches" complained of.

4th. That the defendant should be acquit-The defendant, in reply, alleged that the ted, if the jury should be of opinion that

the cause of the "smells and stenches" com- | defendant, and merely keeping it up is all plained of.

5th. That under the terms of the indictment, the defendant should be acquitted, if the jury should be of opinion that the timber in the bottom, above the dam, was killed either by the ditch, or by the natural filling up from the cultivation of the lands above, or from both combined.

6th. That under the indictment, the defendant should be acquitted, if the jury should be in doubt as to whether the dam had any indirect, or consequential agency, either by itself, or in connection with the ditch and dead timber above, in producing the "smells and stenches" complained of.

These propositions were read to the jury,

*445

and the Court, sub*stantially, ruled the 1st, 2d, 4th and 5th points; but as to the 3d and 6th points, ruled them, in modified form, so as to make them conform to the points stated on behalf of the State below, which were approved.

On behalf of the State, the following propositions and principles were submitted:

"We ask the Court to charge that it is a fundamental principle of social, natural and municipal law, which prescribes to every one, in the use and enjoyment of his own property, the necessary limitation, that he shall not injuriously affect the rights of others; that if defendant's obstruction of Three and Twenty Creek, by a mill dam, has been the cause, either directly or indirectly, of producing such an effect upon the low grounds above, as to induce the engendering of malaria, humid atmosphere, or other poisonous quality in the atmosphere, whereby the people generally were made sick, and injured in the enjoyment of their lives and property, that then he has not so used his own property as to avoid injury to the rights of others, and he is guilty of "erecting and keeping up" a public nuisance; and the charges in the indictment are proved; and, concluding that they are so proved, it is no defense to say:

1st. That the dam and pond have been kept up in the same place for seventy years, or for any other length of time.

2d. Or to say that the people of the community remained healthy for 69 years of the 70 years, if during the last year it became, and is now a nuisance.

3d. Or to say that there are persons or families in the neighborhood who escaped the prevailing sickness. It is enough if they were generally sick.

4th. Nor is it a defense to say that the dam had been kept at the same height all the time, and defendant has done no physical act calculated or designed to injure the community; that if the mill pond had become, or caused a nuisance, every day the dam remained standing across the stream, was, in contemplation of law, an "erecting" by the miles above the dam, and the dam had any

the act that was necessary to render him "guilty.

5th. Nor is it an answer to say that the property is valuable to the defendant; that the testimony on that point is irrelevant: the value of the property of a citizen can not be weighed in the balance against the health and lives of a whole community.

In a Nut Shell.—If the defendant's mill pond, either directly or indirectly, was the exciting cause of the sickness that has pre-

*446

*vailed in the community, in greater or less degree, for several years, and particularly during the year 1871, and during the latter year the people generally were affected thereby, then he is guilty; and lapse of time, value of property, nor any other matter relied on, can avail the defendant."

The above propositions and principles, submitted on the part of the State, were read to the jury, and ruled as law.

Whereupon the defendant excepted.

Under the instructions the jury found the defendant "guilty."

The defendant appealed and gave notice that he would move the Supreme Court in arrest of judgment, upon the grounds taken on the Circuit, and also upon the grounds:

I. That in none of the counts is any disease, or any disease by name, alleged to exist, affecting the inhabitants of the vicinity, and specified as being the result of, or connected with the unwholesome or putrid air.

II. That, inasmuch as malarial disease was everywhere prevalent, there should have been allegations in the indictment, and corresponding proof, that any disease which affected the inhabitants, near the alleged nuisance, was the direct effect thereof.

III. That the description of the locality in the third count, to wit: "a certain and ancient water-course, called Three and Twenty Creek, with earth, gravel and material, did obstruct and stop up," is defective and insufficient to support a verdict.

IV. That no judgment or abatement can be enforced, because the indictment contains no averment as to the continuance of the alleged nuisance.

And failing in that motion, then for a new trial, on the grounds:

I. Because the presiding Judge charged the jury that no lapse of time or prescription could, in any way, help the defendant, as against an indictment for public nuisance; although he had only used his own property, according to his title and prescription right, for at least seventy years, and had done no physical act designed or calculated to injure any one.

II. Because his Honor charged the jury, that if the sickness was produced by the dead timber, in the low grounds of the creek,

agency by itself or in conjunction with other | youd that which the public has experienced, causes, such as the ditch, or the natural filling up from cultivation above, in deadening the timber, then the defendant was guilty of a nuisance.

*447

*III. Because his Honor charged the jury that, in an issue of nuisance, or no nuisance, there was no difference between natural or proximate, and indirect or remote causes; that if the dam had any agency, direct or indirect, proximate or remote, natural or consequential, in producing the sickness complained of, the defendant was guilty of a nuisance.

IV. Because the verdict rendered, under the charge of his Honor, is unsupported, either by the evidence, the justice, or the law of the case.

McGowan and Moore, Thomson, for appel-

Perry, Solicitor, Whitner, Reed and Brown,

Aug. 7, 1872. The opinion of the Court was delivered by

MOSES, C. J. So much of the appeal as seeks to arrest the judgment cannot be sustained. It does not appear from the brief that any application to that end was made in the Circuit Court. It therefore comes before us an original and independent motion, which we have not the power to entertain.—Const., Sec. 4, Art. IV. State v. Bailey, 1 S. C., 1; Floyd v. Abney, Ibid, 114; Elmore v. Scurry, Ib., 139.

We must, therefore, limit our enquiry to so much of the appeal as claims a new trial for the alleged errors of law by the presiding Judge of the Court below. So far as the points presented to him as questions of law, or asked to be submitted to the jury as grounds of defence, are identical, or of a like character with either of the causes urged in arrest of the judgment, the defendant will substantially have the benefit of their consideration.

It is denied that the indictment will lie, as the offence, if any, is a private and not a public nuisance. Whether it is the one or the other, depends upon the extent of its existence. If it annoys the community in general, and not merely some particular person, it is indictable and not actionable.-4 Blk. Com., 167; Rex v. White, 1 Burr., 337. Where the act is charged as in or near a highway, "per quod the air thereby is corrupted," it is punishable as a public nuisance. -Rex v. Papineau, 1 Str., 686; Carey v. Brooks, 1 Hill, 367. If it affects the highway, and extends its hurtful influence so as to comprehend whole neighborhoods, the only remedy is by indictment, though one who has suffered a particular damage, bemay, in respect thereof, maintain an action. -Bac. Ab., Title Nuisance, D., 2 Ld. Ray, 985. Here the charge is, that the defendant *448

"did erect, or caused to be erected, *a certain dam across Three and Twenty Creek. a common and ancient water-course, by means of which," &c.

The third count is not very artificially drawn, nor, in fact, is the indictment framed in exact conformity with the most approved precedents, and yet it may suffice. The statement in the said count may save it from the charge of vagueness as to time and locality. The date of the offence is not material, if it is before bill found, and there is enough to inform the defendant of the nature and character of the charge, and of the place which is an incident of it, to enable him advisedly to prepare his defence. If it is stricken out, it is not perceived, in view of the first count, how the defendant could be benefited.

The point taken no way resembles that which was sustained in State v. Graham, 15 Rich., 310. There the indictment was "for obstructing a public landing," and the proof was the obstruction of a public road leading to the landing at a place within one hundred yards of it.

If it was intended on the part of the defence to make any question as to the introduction of testimony to shew sickness and disease in the neighborhood, it should have been objected to at the time. Its admissibility depended on its competency, and this was conceded when no exception was taken at the time it was offered. It, however, can in no manner avail the defendant. To constitute a nuisance, as was said by Lord Mansfield, in Rex v. White and Ward, 1 Burr., 337, "it is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable."

In Rex v. Neill, 2 B. & C., 12 E. C. L., 226, it was held "that to support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health; it is sufficient if they be offensive to the senses." Independent, however, of the rule sustained by these authorities, it was competent, under the allegation in the several counts of damage, "to the persons there passing, repassing, dwelling and inhabiting," to introduce testimony to shew injury to health, as a consequence more prejudicial than any alone obnoxious to the senses, because of its unpleasant odor, and not productive of sickness.

The right to property from long possession, either directly from the operation of the Statute of Limitations, or arising from the presumption of an original cession by grant, cannot be applied to sanction or uphold its use or devotion to purposes not permitted by *the State, either as affecting its own sovereignty or the rights of third persons. Chitty, in his 1st Volume of Criminal Law, 160, says: "It has been repeatedly held that no length of time can legalize a public nuisance, although it may afford an answer to an action by a private individual;" and Ch. J. Parsons, in Town of Stoughton v. Baker et al., 4 Mass., 522, observes "that no laches can be imputed to the Government, and against it no time runs so as to bar its See also, Hall v. Richards, 9 Wen-

rights."

dell, 315.

While the long possession may confer a right to the land flowed, and all the proprietary incidents which follow the title to property, it can not be set up as a bar to the abatement of a nuisance on behalf of the public. A right to violate the law is not to be presumed as allowed by the State itself, for this would be inconsistent with the very purpose for which it was created, and would involve an absurdity too violent to be entertained even for a moment.

The points thus made for the appellant, which we are at liberty to consider, have been examined and determined; it remains only to enquire whether the charge of the presiding Judge, as to the acts of the defendant, on which his liability depended, was in conformity with the rules which are to be applied as the law of the case. It is recognized as a fundamental principle, necessary for the safety and protection of society, that no one, in the use of his property, shall injuriously affect the rights of others. While this is admitted, how far and to what extent the limitation is to operate on the consequences which may accrue to third persons from the lawful use of one's property, often presents an enquiry to be determined by nice and delicate discrimination. One is supposed to be capable of foresceing the consequences of his own action, and must, therefore, be responsible for any wrong or damage which results from it; hence there is no doubt as to his liability for the natural and proximate results of a legal act, which is the source of injury to another. A distinction is made between an act in itself lawful, and one that is forbidden, whether malum in se or malum prohibitum, and they will not be both subject to the same rules in regard to their affect in ref- to which he did not contribute, and which erence to the rights of others.

While it is true that the defendant would be liable if his obstruction of the creek, by his pond and dam, was in itself the cause of the injuries complained of, yet, if the consequences are to be attributed to the acts of others, so affecting his property that it becomes a public nuisance, it would not appear consistent with justice or propriety that he should be held to responsibility.

*450

*The mere erection of the mill and dam on his own land was no nuisance; and if results, though injurious, yet not proximate and direct, followed, because set in motion by the acts of others, either in cutting the ditch, which, by the accumulation of sand, choked the channel and raised it higher than the adjacent banks, thus forcing the water over the edges of the ditch or banks, and collecting it in pools or holes, or 1rom the increased cultivation in the neighborhood, it would seem that the consequences are to be referred to an agency operating on the property of the defendant, for which he should not be liable, because not employed by him. They were not proximate or direct, in the legal sense in which those terms are understood. He must be held accountable for the unlawful effects which naturally or directly proceeded from his acts.

In civil actions fixed and adjudged rules have been adopted. On the criminal side of the court the authorities are few, and none that we have examined of express bearing on the question we are now considering. One is held liable to an action for a private nuisance, arising out of the use of his own property, because in such use he has infringed upon the rights of others. A conviction for a public nuisance proceeds upon the same principle applied to the public, and not to individuals. In civil cases, however, a defendant is not responsible for results, except such as are natural, proximate and direct .-2 Green. Ev., §§ 256, 635; Whatley v. Murrell, 1 Strob., 389; Harrison v. Berkley, Ib., 548 [47 Am. Dec. 578]; Carey v. Brooks, 1 Hill, 365.

In the case before us, the presiding Judge did charge "that the defendant should be acquitted if the jury should be of opinion that the timber in the bottom, above the dam, was killed either by the ditch or by the natural filling up from the cultivation of the lands above, or from both combined," or "if the ditch or dead timber above the dam was the cause of the 'smells and stenches' complained of." We think, however, that he should have gone further and instructed them that if, in their opinion, the dam, in itself, or conjointly with the pond, was the cause of the alleged injuries, the defendant should be convicted; but if other causes, did not arise from his agency, so affected the dam and pond, or either, as to produce them, then they were too remote to be ascribed to his act, and the verdict should be in his favor.

The motion for a new trial is accordingly granted.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *451

*CURETON v. WATSON.

(April Term, 1872.)

[Guardian and Ward (\$\simes 33.]]
In October, 1861, a debt due to the ward, well secured by a bond with sureties, and a mortgage of real estate given in 1858, was discharged by the guardian, and a note of the principal debtor, with one surety, taken in payment. In April, 1863, the guardian received payment of the note in Confederate currency, then much depreciated, and invested the amount in Confederate States eight per cent. bonds: Held, That the guardian was liable for the amount of the debt.

[Ed. Note.—Cited in Singleton v. Lowndes, 9 S. C. 490; Koon v. Munro, 11 S. C. 153; Hyatt v. McBurney, 18 S. C. 217.

For other cases, see Guardian and Ward, Cent. Dig. § 150; Dec. Dig. \$33.]

[Guardian and Ward \$\infty\$=65.]

The guardian held liable for other sums invested in 1863 in Confederate States eight per cent. bonds.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 105; Dec. Dig. ६=65.]

[Guardian and Ward 55]
In the years 1862, 1863 and 1864, the guardian received Confederate currency for the hire of his ward's negroes hired during the war: Held. That for these sums the guardian was not chargeable, if, upon enquiry, it should appear that they were invested for the ward in Confederate States 8 per cent. bonds.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 105; Dec. Dig. ⊕=65.]

Before Thomas, J., at York, November Term, 1871.

Bill in Equity by Benjamin J. Cureton, and Alice M., his wife, plaintiffs, against Joseph J. Watson, defendant, for account.

The facts of the case are stated in the report of the Referee given below in full, and it is only necessary to state here: that the defendant was appointed by the Court guardian of the female plaintiff in March, 1860; that the bond and mortgage of Massey to the Commissioner in Equity, mentioned in the report, were given in December, 1858; that the sums received for negro hire were for the hire of the ward's negroes in the years 1861-'62 and '63; and that Watson died after the evidence had been taken by the Referee, and the bill was revived against F. H. Barber, his administrator.

John G. Enloe was appointed Referee in the cause, and it was referred to him to take and state the accounts of the defendant. He made the following report:

"It having been referred to me as Special Referee, by order of the Court, to inquire and report as to the amount received by the defendant as guardian of Alice M. Stewart, now Alice M. Cureton, wife of B. J. Cureton, and the balance now due to the complainant on account of said guardianship, with leave to report any special matter, in compliance with said order, I respectfully report as follows:

"The paper annexed, marked A, contains a statement of the accounts of the defendant as guardian, making the balance due on the 18th September, 1871, \$3,708.91. In said statement, I have allowed defendant credit for the notes of J. R. Daniel and C. J. Kee. given for negro hire, it being in proof that

*452

said persons and *sureties were solvent when the notes were taken and subsequently became insolvent. Also, the note of B. J. Patterson, for same reasons,

"I have also allowed the defendant credit for the amount of \$550, loaned by him to D. C. Roddey & Brother, with interest thereon from 18th March, 1860, as it is in proof that said parties were entirely solvent at the time of said loan, and subsequently became insolvent.

"The real estate of James Stewart, deceased, under a decree made by Chancellor Job Johnston, on the 16th day of November, 1858, was sold by the Commissioner in Equity, and the purchase money secured by bond of the purchaser, with good and sufficient sureties, and a mortgage of the premises. Among the purchasers was B. H. Massey. The interest of Alice M. Stewart in his bond, secured as aforesaid under the decree of the Court, was \$1,767.73, on the 14th of October, 1861. On said date, with the consent of said defendant, J. J. Watson, the said bond was marked satisfied, and on the same day the defendant took the note of the said B. H. Massey for the said sum of \$1,767.73, with J. H. Stewart as surety.

"In March, 1863, the defendant said to B. H. Massey and others: 'If any of you gentlemen that owe me wish to pay me, you must do it by a certain day specified, as I then expect to go to York to fund it in Confederate bonds.' B. H. Massey replied that he was owing him and would pay him before that day, which he did, and on the 17th of April, 1863, defendant invested the amount in Confederate bonds. Whether, as guardian, the defendant had the right to act as above stated, involves legal questions which I respectfully submit for the decision of the Court.

"The defendant, also, on different occasions, specified in the testimony, collected notes and other claims due his ward's estate, receiving Confederate money in payment of the same, and invested the same in Confederate bonds. Whether he should be allowed credit for said investments, also involves legal points which I respectfully leave for the decision of the Court.'

The defendant excepted to the report, because the Referee should have allowed him credit for the whole amount invested by him for his ward in Confederate States bonds.

The Referee overruled the exception, and

the case came before the Circuit Judge on seribing securities in which trustees shall the exception to the report.

His Honor sustained the exception, and made a decree that the bill be dismissed.

*The plaintiffs appealed on grounds which will be fully understood from the opinion of this Court.

Wilson, for appellant:

The money due on Massey's bond was not needed for the purposes of the guardianship, and the mortgage securing the bond could not have been discharged otherwise than by payment or tender in coin or United States currency. Accepting Massey's note, and afterwards payment of same in Confederate currency, was an unnecessary act, imprudent, careless, and without any prospect of benefit to ward's estate.—Fitzsimmons v. Fitzsimmons, 1 S. C., 413; Mayer v. Mordecai, 1 S. C., 383; Sanders v. Rogers, 1 S. C., 458-9; Allen v. Gaillard, 1 S. C., 279. "It is not the duty of trustees to call in money invested on good real security where no risk is apparent." Hill on Trustees, 562, 381; Howe v. Earl of Dartmouth, 7 Ves., 150; Sadler v. Turner, 8 Ves., 621. "Even an express power for the trustees to vary the securities, does not authorize changes made without any apparent object, or any prospect of benefiting the trust estate.-Hill on Trustees, 563; Brice v. Stokes, 11 Ves., 324.

Facts similar to the case of Mayer v. Mordecai. The Court say:

"What has been said in regard to the bond of White, applies with still more force to those of Kerr & Goldsmith. The trustee, under the circumstances already referred to, invited or called them in, without any offer of payment from the obligers," p. 397. the act in itself was an incautious one, it will not be sustained, and no aid, derived from the fact that the trustee was countenanced in it by the participation of prudent men, will give it sanction or support," p. 398.

The Act of the Legislature, 25th December, 1861, only applied to guardians and other trustees having funds to invest.

Hart, contra:

1. The first ground in appellants' brief takes exception to the fact that the guardian. Watson, drew from Commissioner's office a certain fund, (\$1,767.73,) and loaned it out on personal security. "It is the ordinary duty of trustee to collect with all convenient speed."—Hill on Trustees, 380.

The Act of the Legislature of 1748, 3 Stat., 708, requires guardians to possess themselves of wards' estate. Trustees' liability not measured by an abstract rule of duty.

*454

there, or is there *not, evidence of faithful endeavors to perform it."-Hext v. Porcher, 1 Strob. Eq., 170. No rule in this State pre-

invest.—Boggs v. Adger, 4 Rich., 408.

2. But the ward's interest was not lost by this act of the trustee. He may have assumed great risk, but nothing more than a risk in lending on personal security. Had it been lost here, the act might not have been sustained.—2 Story's Eq. Jur., 641.

The Courts in England have sustained such investments upon general principles, even where the fund was lost in consequence. -Harden v. Parsons, 1 Eden., 148.

Chancellor Kent sustains the same view in the cases cited.—Smith v. Smith, 4 Johns. Ch., 281, 441.

Not a dollar seems to have been lost, but the note was collected in full in 1863, which brings us to the Confederate bonds:

1. The investment was authorized by State law.—A. A., 1861, 13 Stat., 87.

2. Authorized by Act of Confederate States Congress.

3. A ruinous tax imposed, if not invested; and also tax upon outstanding obligations for money when payment in Confederate notes refused.

4. The best advice sought and active diligence displayed. Court of Ordinary of the County advised it generally.

5. The investment had the implied sanction of plaintiff, who made no objection in 1864.

If he made a mistake, he is not liable where the alternative of investing in different securities is given.—Shepherd v. Mouls, 4 Hare, 500; Hill on Trustees, 371, note; Robinson v. Robinson, Hill, 374, note.

Where a trustee, in investing funds, acts faithfully and with "common diligence" and sagacity, he will not be liable if the funds be lost.—Boggs v. Adger, 4 Rich., 408.

"Transactions in Confederate currency during the war and investments in Confederate securities (when properly made) must now be held to be as valid and binding as if made in times of peace in a sound currency."

"Definitely settled by legislative enactments, by repeated decisions of the Court, recognizing the validity of such decrees and investments, and by the Supreme Court of the United States."-Walker, Ex'r., v. Page, 21 Grattan's Va. Reps.

"A contract having been entered into between parties, valid at the time by the laws of the State, no decision of the Courts of the

*455

*State subsequently made can impair its obligation."—Chicago v. Sheldon, 9 Wal., 50.

A guardian who invested the funds of his ward bona fide in Confederate bonds, under a statute passed during the rebellion, authorizing such investments, is entitled to credit for the amount invested .- Owen v. Peebles, 42 Ala., 338.

Trustee accepted payment in 1863 of a

ate notes, without objection. There was no evidence of bad faith: Held, that judgment debtor was not liable, and whether trustee had acted in good faith was a question for the jury.-King v. King, 37 Ga., 205.

The case of Mayer v. Mordecai differs from this:

- 1. That the cestui que trust was to be consulted as to the investment of the funds.
- 2. They (the bonds) secured by mortgage were collected in 1863 for less than they would have sold for.
- 3. There was evidence that they would have sold for more than their face value.
- II. In Fitzsimmons v. Fitzsimmons, S. C., 413,) the Court says: "The principal question is, whether the unreasonable detention by the administratrix of the effects of the estate subject her to liability for that portion lost by inevitable accident." . That question was decided against her; and the whole evidence in the case showed laches and bad faith in dealing with the trust estate. She was not a guardian, but an administratrix.

III. In Sanders v. Rogers, (1 S. C., 458,) the trust deed required an investment of the funds by the trustee "as soon as practicable," in a particular species of property, a requirement which he apparently made no effort to comply with. There was no discretion to exercise in the execution of the trust. and when he violated it he at once became liable.

IV. In Allen v. Gaillard, (1 S. C., 279.) the trustee invested in a second class personal security, having only a speculative value. There was not shown any mala fides, but the Court supposed the investment, under the circumstances, an imprudent one.

In Sanders v. Rogers, decided later, the Court lays down a more liberal rule than the one governing in Allen v. Gaillard. It is virtually overruled.

In Clark v. Tompkins, (1 S. C., 128,) the Court says: "Had he (guardian) in good faith, with funds in hand, made an investment for his wards, which was lost from

*456 circumstances beyond his control, *he might have submitted a claim to the Court for an extension in his behalf of the principles which govern it in passing upon the conduct of those who occupy fiduciary relations."—Nance v. Nance, 1 S. C., 209.

Aug. 12, 1872. The opinion of the Court was delivered by

MOSES, C. J. The decree of the Circuit Court sustains the investment made by the defendant, as guardian of the plaintiff, Alice M., and dismisses the bill.

There is a question, however, which lies behind that, and which the Judge below has

judgment on promissory note, in Confeder-Jentirely failed to consider. It is a material point made in the case, and one on which the plaintiffs strongly relied for the relief asked by their proceeding. It refers to the duty of the guardian in calling in the outstanding securities, and thus, himself, providing a fund in hand for investment. It was one of the points submitted for the judgment of the Court by the report of the special Referee.

> The principal item is the sum of \$1,767.73, averred to have been received of B. H. Massey on 11th April, 1863. The transaction in regard to this debt was as follows: The plaintiff, Alice M., was entitled to a bond of the said B. H. Massey, with good and sufficient sureties, and also secured by a mortgage of real estate, given on the sale of the property of her deceased father, sold by the Commissioner in Equity, under an order of the Court, and by him held. On the 14th of October, 1861, without any money having been paid to the Commissioner or Watson, the latter receipted for the full amount to the former, and the bond was marked satisfied. On the same day Watson took the note of Massev for the said sum, with J. H. Stewart as surety. was the motive which induced the change, it is difficult to imagine, so far as Watson could have had in view the interest he was bound to protect. It was said in Sanders v. Rogers, 1 S. C. 459, on the authority of Lord Eldon, "that generally it is not the duty of trustees to call in money, invested in good real estate, where there is no probable risk." Here is seems to have been called in without any necessity for its immediate use, and without the purpose of obtaining a higher rate of interest, and for no conceivable object, having in view any advantage to the ward. Where a concession of this extraordinary kind is made, he who makes it, assumes all the hazard of loss, and must bear the consequences.

Let us now pursue the note. On 11th *457

April, 1863, payment of *it was accepted in Confederate money, and about the 17th of the same month, the proceeds were funded in 8 per cent. Confederate bonds. At this time there had been a great depreciation in the currency of the country, and the result of this operation between Massey and Watson was, that the former actually paid for the land an amount in a depreciated currency, nominally equal to the sum due on the bond, but which was demandable and payable in specie. The difference is not perceived between this case and that of Sanders v. Rogers, so far as relates to the acceptance of Confederate notes by Pawley, in satisfaction of the bonds payable in gold, and secured by a mortgage of real estate, or that of Mayer v. Mordecai, (1 S. C., 383 [7 Am. Rep. 26]), so far as relates to the general

principle applicable to the collection of the bonds were at a premium, and the diminution bonds by the defendant there. Watson, in effect, exchanged a bond secured by personal sureties and a mortgage of landed property, for a simple note of hand, with one surety. Are we to require testimony to satisfy us of the relative marketable value of each of the paid securities, considered even without reference to their respective dates? When, however, it is remembered that the bond was given in 1858, promising the payment, in gold and silver, and the note in 1861, leaving doubtful the character of the currency to be required for its payment, a difference in their value at once appears to the prejudice of the latter, though the full extent is not shown in the testimony.

In Nance v. Nance, (1 S. C., 209,) it was held that the duty of the guardian, or other trustee, required him to take as security mortgage of unencumbered real estate of value sufficient to make the fund safe; and it is only where such real security can not with reasonable diligence be procured, that he may take personal security in lieu thereof. The defendant here, so far from presenting a case coming within the rule there laid down, actually exchanged the security of the higher grade for that of the lower. The course of the guardian in this particular is in evident conflict with the duty imposed by his trust, and cannot be upheld.

Then, as to the other items of investment, in his return of 1860 he includes \$650, received on 10th April, \$184.87, on 17th July, and, in his testimony, states that these sums, with \$250 transferred on 24th March, 1861, from himself, as administrator of M. M. Stewart, to himself as guardian of Alice Stewart, and various other sums received down to 1863, were all included in the said bonds for \$3,000, for which he claims credit. It is a little singular that, so far as appears by his returns filed, none of the credits

*458

disclosed by *him are included in them after the entry of July 17, 1861, except the amount received from Massey. It is not less strange that, of those received in 1860 and 1861, to say nothing of 1862, he never thought it necessary to put them in the shape of an investment until about 17th April, 1863. There is something more, in the evidence of the defendant, which cannot escape attention or remark.

He refers to various receipts as comprised in "the bonds above alluded to," or "embraced in said bonds," or in bonds above recited. The bonds call for \$3,000, and the various sums said to be so funded are in excess of that amount. It is not contended that such concurred.

thus accounted for.

The report states that "the defendant, also, on different occasions, specified in the testimony, collected notes and other claims due his ward's estate, receiving Confederate money in payment of the same, and invested the same in Confederate bonds." We are to assume that these notes and claims were based on a specie currency. The testimony is conclusive to show that, without any offer of payment by the debtors, he notified them "that he would (on a certain day) invest in Confederate bonds, and that those who owed, and wished to pay, must do it by that time.'

In conformity with this intimation, he received the Confederate money, which was at a large discount, compared with gold, which he had a right to demand-waived such right, and accepted what he knew was a depreciated medium. The loss which resulted should not be endured by the ward, who was without power to avert it.

It would have placed the defendant in a better position, if at the time of the alleged investment, he had so endorsed the bonds that the ownership in them might have plainly appeared, or to have entered in his return of 1863, a credit in his favor by the amount invested, thus shewing the disposition of the balance with which he stood charged. If, in the course of events, the result of which could not be foretold, the bonds had attained a par value in gold, while the Confederate Treasury notes may have been below it, there was nothing on which she could have relied to claim property in them. He himself says in his examination, "the moneys he collected for his ward, he did not keep separate, but mingled it with his own."

The defendant, however, is entitled to a credit for the negro hire received in 1862. 1863 and 1864, if charged with it in the account, and if included in the bonds or certificates to which he refers in his testimony. This hire accrued yearly, had reference to the prevailing circulation, and was receivable *459

in it. He should also be credited *with any payment of taxes he made, and of which in the account he has not had the benefit.

It is ordered and adjudged that the order of the Circuit Judge, dismissing the bill, be set aside. That the case be remanded to the Circuit Court for York County, that the necessary orders may be had, to give full effect to the principles and directions herein expressed.

WILLARD, A. J., and WRIGHT, A. J.,

3 S. C. 459

HINTON V. KENNEDY

(November Term, 1871.)

[Appeal and Error \$\simes 901.]

On an appeal from the concurring judgment of the Commissioner and Chancellor upon a question of fact, the onus is on the appellant to show, from the facts in evidence, that there is no reasonable doubt of the error alieged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. ©=901.]

[Executors and Administrators \$\infty\$176.]

Where the estate of a decedent becomes insolvent after his death, the general assets cannot be longer applied to the maintenance of the

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661-666; Dec. Dig. \$\ins176.]

[Executors and Administrators \$\sim 281.]

Where the administrator of an entirely solvent estate pays simple contract creditors out of their order, reserving ample funds for the payment of specialty creditors, equity will re-lieve him from the legal consequences of the technical devastavit, if his conduct in making the payments was prudent and judicious; nor will he be charged because of the loss of the reserved assets, if no blame on account of such loss can be imputed to him.

[Ed. Note.—Cited in Crawford v. Crawford, 17 S. C. 526.

For other cases, see Executors and Administrators, Cent. Dig. § 1109; Dec. Dig. &==281.]

[Executors and Administrators ⊕281.]

Where a sealed note of decedent was due, not full twenty years before it is paid by his administrator, the presumption being that it represents a valid and subsisting debt of decedent, fraud, or collusion with the creditor, must be shown or the payment will be sustained.

[Ed. Note.—Cited in Bolt v. Dawkins, 16 S. C. 213. 213.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1102-1104, 1106-1115; Dec. Dig. ⊕=281.]

[Executors and Administrators \$\infty\$ 103.]

Investment, in 1863, by an administrator, of \$4,000 in Confederate securities, sustained.

[Ed. Note.-Cited in West v. Cauthen, 9 S. C. 60.

For other cases, see Executors and Administrators, Cent. Dig. § 421; Dec. Dig. &==103.]

[Appeal and Error = 132.]
The Supreme Court cannot hear an appeal from a pro forma decree of the Circuit Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 896; Dec. Dig. ⊗⇒132.]

Before Carroll, Ch., at Chester, July, 1867. Bill in Equity by L. C. Hinton, administrator, with the will annexed, of Richard E. Kennedy, deceased, plaintiff, against Sarah Kennedy and others, devisees, legatees and creditors of testator, defendants.

The object of the bill was to wind up the estate of testator alleged to have been made insolvent by the emancipation in 1865 of the slaves belonging to the estate.

The accounts of the plaintiff as adminis-

the Court, who made his report thereon as follows:

On the 9th day of June, 1855, Richard E. Kennedy executed his last will and testament, and appointed James Hemphill, execu-

tor *thereof. On the first day of November thereafter, he departed this life, and on the 7th of the same month the will was admitted to probate in common form. James Hemphill renounced the executorship, and the complainant was appointed administrator with the will annexed.

The will provides for the payment of all just debts. (Item 1st.)

First. By application to that purpose of all moneys collected from choses in action due the testator. (Item 2nd.)

Second. By sales of property. (2nd Item.) It contains several devises and bequests. both specific and general. The specific devises and bequests are:

First, to the widow, Sarah Kennedy, for the support of herself and testator's children until the youngest child was twentyone years of age, the dwelling house and lot in the Town of Chester; two plantations known as the Robinson and Lee places; all household and kitchen furniture; all the cattle, hogs, &c., on the said three places; one year's provisions of all kinds; a carriage and a pair of carriage horses to be bought; the necessary mules, wagons and agricultural implements for the two places; such house servants as she may need. (3rd Item.)

Second. To his wife, Sarah Kennedy, sufficient money to complete necessary repairs of dwelling, and to make and repair others that may be needed. (13th Item.)

Third. To his brother, John Kennedy, Jr., the buggy and horse in the State of Mississippi. (4th Item.)

The general devises are: First, all negroes (5th Item) and all bank stock (6th Item) to be equally divided between the widow and six children.

Second. All the rest and residue of the estate to be sold at the discretion of the executor and proceeds to be equally divided between wife and six children. The property mentioned in 3rd Item to be sold when the youngest child arrives at twenty-one years of age. (7th Item.)

It contains a number of directions to the executor as follows:

1st, A discretionary power to sell bank stock. (6th Item.)

2nd. A discretionary power to retain the legacy of the son Allen D. after he arrives at twenty-five years of age. (10th Item.)

3rd. A discretionary power to complete carriage shop. (11th.)

4th. To sell turbulent slaves. (11th Item.) 5th. To keep small negroes on the plantrator were referred to the Commissioner of tations mentioned in 3rd Item. (12th Item.) *461

*6th. The wife authorized to select horses to work the Robinson & Lee places. (12th Item.)

7th. Executor may hire out all the negroes. (12th Item.)

8th, Directs the opening of a street. (14th Item.)

The testator at the time of his death was seized and possessed of a large estate, both real and personal, consisting of four tracts of land; the dwelling house and lot, and the carriage shop and lot in the town of Chester; about 135 slaves; 500 shares in the capital stock of the Bank of Chester; over \$50,000 owing in choses in action; mules, horses, cattle, hogs, crop, agricultural implements, household and kitchen furniture.

He was very much involved in debt and from the language of the 2nd clause of the will, he supposes that the money owing him on notes and accounts would be insufficient to pay his debts.

The testator left him surviving as the principal beneficiaries under his will, his widow Sarah Kennedy and six children, Allen D., Catherine, Sarah, Eliza Jane, Margaret Mary, and Pauline. His widow afterwards intermarried with David Pinchback, by whom she had one child named David Howard. David Pinchback died in 1858. In 1860 the widow again married Charles E. Simms and died the same year. David Howard Pinchback, the only issue of the second marriage, died in 1865. Allen D. Kennedy, the son, married soon after his father's death; was killed in battle during the war, and left a widow and two children.

The eldest daughter intermarried, in 1860, with E. T. Atkinson, and in 1864 departed this life, leaving her husband and two minor children surviving.

Of the testator's family there are now living, therefore, four daughters, all unmarried, two grandchildren, issue of his son Allen D. Kennedy, and two other grandchildren, the issue of his daughter Catherine Atkinson.

The complainant, as administrator with the will annexed, took charge of the estate in November, 1855; assented to the specific devises and bequests of property on hand; bought the carriage horses; furnished money to pay for repairs on the dwelling and kitchens; collected a large sum from choses in action; sold two tracts of land, the lot with the carriage shop, the bank stock, five or six negroes, and some other personalty; paid debts of testator, regardless of their rank; hired out most of the slaves, and contributed to the support of the family from the income of the portion of the estate remaining in his hands.

*462

*There are several large debts of testator, all of the grade of bonds and sealed notes, still unpaid. One claim for more than \$12,-

000 is proper debt of the testator, and six others, to which he was security and is now bound to pay, amounting in the aggregate to \$127.370.67; in 1865 the slaves were emancipated and the balance of the real estate on hand depreciated thereby, so that the assets are insufficient to pay these large debts.

The complainant has filed this bill asking for leave to account for his administration of the estate of his testator. That the creditors shall be called in; that the real estate be sold; and the balance of the estate be distributed among the creditors by this Court.

At the last session of the Court the following orders were passed, to wit:

"Ordered, That the complainant do account before the Commissioner of this Court for the administration of the estate of his testator, Richard E. Kennedy, and that the Commissioner do report on said accounting to the next term of this Court. Ordered, further, That the creditors of said testator be required to present and establish their respective demands before the Commissioner on or before the first day of May next. And that notice thereof be given them, by publication in the Chester Standard, at such intervals as the Commissioner may think proper."

The publication for the creditors of said testator was made in the Chester Standard, for 3 months in 1866, and for one month in 1867, and the claims presented and established are all of the rank of sealed notes and bonds amounting in the aggregate of principal and interest, on 1st of July, 1867, to one hundred and twenty-seven thousand three hundred and seventy dollars and sixty-seven cents.

The complainant has also accounted for his administration of the estate of his testator. The accounts are hereunto annexed, and show a balance against the complainant on the 1st day of July, 1867, of twelve thousand five hundred and one dollars and twenty-three cents.

The accounts up to 1st of January. 1863, have been made up in the usual way, by striking a balance at the end of each year, and carrying it forward to the debtor or creditor side of the account of the succeeding year. On the 1st of January, 1863, the balance against the complainant was \$14.370.82. During the year 1863 he paid out \$2,857.23 more than he received, and of the moneys paid \$4,331.22 was of debts of testator. It is proper, therefore, that he should have the benefit or credit of this sum, of \$2.857.23, *463

*as of the 1st of January, 1863, as will be seen at the end of Exhibit "A" in what is there called "the concluding statement."

It appears that the complainant, in his account with the Ordinary, has charged himself each year with the aggregate hire of the negroes for the previous year, whether the

same had been paid or not; and he has presented a number of these unpaid notes taken for hire previous to 1st January, 1863, and claimed credit for them; this claim has also been allowed, as will appear in "the concluding statement." A list of the notes so allowed, with a calculation of the balance of principal and interest due thereon up to 1st of July, 1867, are set forth in Exhibit B of this report.

During the year 1864 and first part of 1865, the estate has barely paid expenses, and this portion of the account being altogether in Confederate currency, has been made up separately. In 1864 the expenditures exceeded the receipts by \$3,038.30, but of the \$15,260.72 paid out this year, over \$10,000 was paid in December. In 1865 the receipts of Confederate currency exceeded the payments, but was not quite sufficient to refund to the administrator the balance of \$3,038.30 due him in 1864. Of the payments in 1865, however, the sum of \$1.960.75, is receipted for in December, 1865, long after this currency was worthless. I suppose that it was not paid at all, although receipts were given. Deducting therefrom this sum of \$1,960.75 from the payments of 1865, the receipts in this year would be more than sufficient to reimburse the balance in his favor in 1864, and even after allowing these credits there remained a balance of \$985.86 of Confederate currency due the administrator on the account of 1864 and 1865. Regarding this balance, whether in favor of the estate or administrator, as worthless. I have not carried it forward into the general result. The negroes and the plantations have simply supported themselves and the family of testator during that time.

In May, 1865, after the surrender of the Southern armies, a new currency is introduced, and a new account is opened. From that time till 1st of July, 1867, I find a balance of seventeen hundred and twenty-five dollars and ninety-four cents against the complainant, which is added to the balance of principal and interest brought forward from 1863, as appears in "the concluding statement."

In this accounting the charges against the administrator are identical with the charges contained in the returns to the Ordinary, with one single exception. The sum of \$863 of the 17th March, 1856, seems to have been

*464

omitted by some oversight, and has been *inserted in the account herewith reported. The only credits claimed by the complainant and rejected by the Commissioners, are as follows:

First. All expenses of the family of the testator incurred and paid since the 27th of September, 1865.

Second. Three receipts of Wm. A. Lewis, dated January 7th, 1856, for \$278.45 in lieu of a receipt of 23d January, 1856, for \$103.42.

Third. Receipt of W. W. Edge, of 17th of March, 1858, for \$600, for overseer's wages in 1858

Fourth. Four thousand dollars invested in 7 per cent. Confederate bonds in 1863.

On the 27th of September, 1865, the institution of slavery in this State was abolished by a solemn Ordinance of a Convention of the people. That result, which had been anticipated by our people, and was, in fact, a foregone conclusion from the termination of the war, made the estate of Richard E. Kennedy insolvent beyond all contingency. The administrator had been in the possession of the estate ten years, and must be presumed to have known the nature and value of the assets exclusive of the slaves, as well as the indebtedness of the estate of his testator, and cannot now plead a want of notice of the emancipation, or want of knowledge of the condition in which the estate was left by that act. His payment, therefore, of expenses incurred for the support and education of the family since 27th of September, 1865, was from a fund that he knew or ought to have known belonged to the creditors of his testa-These payments amounted in the agtors. gregate to \$727.38.

The three receipts dated 7th of January, 1856, amounting to \$278.45, are endorsed upon a long statement of accounts between the creditor and testator for services rendered for making collections of debts due to the testator individually, and to a partnership or two, of which he was a member. One called Kennedy & Hutchinson, and another Kennedy, Hutchinson & Co. In these amounts was one charge of one hundred dollars for a mistake, and some other items that might have been considered objectionable. On the 23d of the same month, Lewis gave another receipt to the administrator for \$103.42, "it being balance due for settlement of the business of R. E. Kennedy and Kennedy & Hutchinson, as appears by the receipts on these settlements." The administrator, in his returns, only claimed credit for \$103.42, and that sum has been allowed by the Commissioner and the other rejected. The fact that

*465

the complainant *claimed credit for \$103.42 only in his returns to the Ordinary, while this transaction was comparatively fresh in his memory, and that he has offered no satisfactory explanation of the existence of the two receipts, are sufficient to satisfy the mind of the Commissioner that the sum of \$103.42, which has been allowed, was the sum actually paid by the administrator on the final adjustment of the claim.

With regard to the payment to W. W. Edge, the complainant makes this statement: That he had employed Edge to oversee the Reed place in 1858 and put him in possession; that, subsequently, he made an advantageous sale of this land to Dr. Wm. P.

Thompson, upon condition that he was put | hire of the slaves for the year previous, when into immediate possession of the premises, and that Edge refused to leave the land till his salary was paid. In order, therefore, to secure the sale of the land to Dr. Thompson, complainant paid Edge his salary.

This payment to Edge was certainly a purchase of his services for the whole of 1858. It does not appear, however, that he per-It does formed any service for the estate. not appear that the administrator endeavored to make use of Edge and failed. salary was a large one. No overseer before Edge had been paid more than \$350, and that was paid always at the end of the year.

The administrator states that Edge and the other overseers were supplied with some portion, or all of their provisions, a milch cow, &c., in addition to their regular salary. But all these facts do not satisfactorily account for the payment of so large a salary so early in the year for services that were not rendered: and no excuse or explanation given for the failure to make some profit from his services.

Inasmuch as Edge was already on the land, and the year had begun before the delivery was made to Dr. Thompson, and there was difficulty at that late date to get another new home, I think the complainant ought to have some benefit for the payment made, but to what amount, I cannot, in the absence of evidence, satisfactorily determine. Under all the circumstances brought to the notice of the Commissioner, the complainant may be allowed credit, without any great injustice, for the sum of \$350, the salary paid to the other overseers.

This sum, with interest and commissions, has been deducted from the general balance due from the administrator, as will be seen in "the concluding statement."

The investment of \$4,000 in Confederate 7

*466

per cent. bonds was *not allowed for several reasons. In the first place the administrator does not appear from his accounts to have used that diligence in applying the funds in his hands, to the payment of the debts of his testator, as it was his duty to have done. On the 1st of January, 1861, there was a balance of \$6,238.75 in his hands; on the 1st of January, 1862, \$9.267.64, and on 1st of January, 1863, \$14,370.82; and yet in the year 1860, he paid only \$2,973.59 of the debts of his testator; and in 1861, only \$100, and in 1862, \$270.89. During all this time there were large debts of the deceased, outstanding. It was his duty to apply the money in satisfaction of these obligations as fast as it came into his hands, and if loss has been occasioned by reason of his neglect of a plain duty, it should fall upon the administrator. It is stated, however, that the balance on hand of the administrator were made

in fact none or but a small amount had been actually collected.

No proof has been made on this point beyond what appears in reference to payment of the hire of negroes for 1860 and 1861, and M. S. Harden and L. C. Hinton both say this payment was made in 1862. But it has been conceded by defendant's solicitors that Harden made this payment in March, 1863, and that it amounted to \$6,000. It seems that Mr. Hinton was doubtful as to the propriety of receiving this money from Harden, and consulted with Mr. Hemphill, who was his legal adviser and a large creditor of the testator, as to what he should do. Mr. Hemphill advised him to accept the money from Harden and invest it. The reply to this advice that prudence would have dictated, would have been, that he, as administrator, would receive it from Harden, and if Mr. Hemphill would accept it in part payment of his claim, and if he would not accept it, this would have furnished a good excuse for not accepting the money from Mr. Harden. From the testimony of both Mr. Hemphill and Harden, I should infer that Hemphill would have taken the money if it had been pressed upon him. And it would not have been consistent in him to refuse to receive that currency in payment of debts due to him, which he advised Mr. Hinton to receive. There is no evidence that Mr. Hinton pressed this money on Mr. Hemphill, but if there was, and Hemphill had refused to receive it, there were other creditors for large sums, to whom he might, but does not appear he did offer to pay it. That he might have paid it to some of the creditors we may fairly con-

*clude, when he did pay out, in 1863, the sum of \$4,331.22, on the debts of testator.

The defendant's Solicitor has objected to the allowance of the greater part of the credits claimed by the complainant. The objections were of three kinds:

First. Several claims paid after they were barred by the statute of limitations, were objected to as improperly paid.

Second. The payment of \$2,397.42, on the 28th of March, 1856, to Maj. John Kennedy, on sealed note, was objected to because that note was not a debt, but simply evidence of so much money advanced by Maj. John Kennedy, the father of the testator, to his son.

Third. It is contended that the Act of 1789, prescribing the order for the payment of debts of deceased persons, is mandatory; that an executor or administrator cannot depart from it, under any circumstance, but at his peril; that the total amount of money that has passed through complainant's hands as administrator, was sufficient to have discharged in full all the debts in the first, second, third and fourth classes, and up by charging himself annually with the also to have satisfied in full or in greater

part, all debts of the 5th class; that in pay- under objections of complainant's solicitors,) ing debts of the 6th class, or simple contract debts, in paying the current expenses of the family of the testator, and for repairs upon the dwelling, while debts of the 5th class, or bonds were still unsatisfied, was a devastavit on the part of the complainant, and that he and his sureties are now liable to pay all the outstanding debts in full, or pro tanto as would have been applicable to them if the complainant had complied with the strict rules of the law.

The defendant's Solicitors, therefore, while admitting the evidence of the payment of the debts of testator, by promissory notes or open accounts, and of the current expenses of the family, and for repairs upon the dwelling by the administrator, as satisfactory, contend that they have been improperly paid, and that he is to have no benefit from them unless the assets shall be more than sufficient to discharge the debts of a higher grade.

As to the first objection, the Commissioner rules that it is not the imperative duty of an executor or administrator to plead the statute of limitations, and that if he be satisfied that the debt is bona fide and not paid, he may lawfully waive the protection offered by the statutes and pay the debt; more especially may he do this, when the testator, as in this case, has directed all just debts to be paid.

*468

*The Commissioner has allowed the administrator credit for \$2,397.42 paid Maj. Kennedy, on the 28th of March, 1856, which is the subject of defendant's second objection. When an administrator is ordered to account for his administration, he is entitled to credit for only so much money as he proves that he has paid for the estate. It was his duty to examine every claim presented against the estate he represents, and be convinced that each is an actual bona fide debt unpaid, before he liquidates it. The presumption of law would be that he has done his duty, unless the contrary is made to appear. Before he can be made to respond for moneys improperly paid, it should be shown, not only that the debt paid was not the debt of the deceased, but that the administrator knew it was not, and colluded with the pretended creditor in defrauding the estate; or that the claim was so unreasonable or suspicious, from the manner of its execution, or from other circumstances, as to put the administrator, if an honest man and faithful trustee, upon such inquiry as would have discovered the falseness of the claim.

The evidence offered is not such as by excluding all other conclusions, demonstrates that this was not the debt of the testator. The testimony of the testator, (obtained, reduced to writing, and published in another case during his lifetime, and offered here on hand that had been destroyed by the vis

did state that he at one time put into his father's book a note for \$1,000, for money advanced by his father, which he says was the only note he ever knew of his father having for money advanced by him to his chil-

The testimony of several witnesses was offered on the same subject, but all more vague than that of the testator. And if the evidence had demonstrated that the note alluded to, was the identical note referred to by the testator, as given for money advanced, we might infer from the fact that testator knew that this note was in his father's possession, and that he might some day be made to pay it; that he intended to pay it, and by these acts betrayed the purpose to waive the gift his father intended for him. But leaving these considerations out of view, there is no question but that the signature to the note was genuine; that upon its face it appears to be a bona fide subsisting legal demand. There was no proof impeaching the integrity of the complainant in this transaction. Maj. Kennedy was a very old man at the date of this settlement. The administrator was his son-in-law and a brother-in-law of the testator. John Kennedy, Jr., a brother of testator, and possibly *469

Mrs. *Coleman, his sister, all participated in this settlement, and all are, or were, persons of integrity. I cannot believe that one, much less all, of these relatives of the testator, would have colluded to defraud the widow and minor children of their deceased brother, upon whose grave the clay still lay fresh.

The third objection or point made by defendant's solicitors is the chief one in the accounting, both on account of its novelty, the magnitude of the sum of money in this case dependent upon its decision, as well as tending to settle the rule by which all persons shall account who have been so unfortunate as to hold offices of trust during the war.

The assets of the estate are manifestly insufficient to discharge the debts that have been presented and established. dinary circumstances, when the estate of the deceased is insolvent at his death, the administrator would at his peril proceed to pay the debts out of their prescribed order. But if the terms of the statute are mandatory, he would depart from this prescribed order, in all cases, at his own risk. Even if the assets were far more than sufficient to discharge all debts of all grades, and the representative had applied some portion of the assets to the extinguishment of debts by simple contract because they were more urgent, he could not excuse himself from the payment of debts of a higher grade, by showing that there was an abundance of assets

major, and without his fault. If this be the priety of investments in seven per cent. Conlaw, executors or administrators could proceed safely only by distributing every sum, however insignificant, pro rata among all creditors of the highest grade at the time, however numerous, and by cutting off the family or beneficiaries of the deceased from participating in the enjoyments of any portion of the income, leave them to starve, with, possibly, an immense fortune in view. Such a rule would be impracticable, unreasonable and unjust. The great rule of law, applicable to trustees in every capacity, is "due diligence and good faith," such as any prudent and honest man would exercise in the management of his own estate; and if an executor or administrator, in the exercise of due diligence and acting in good faith, looking to the best interest of the estate, depart from the order of payment of debts prescribed by the statute, and assets of the estate, sufficient at that time to discharge all debts, are afterwards lost or destroyed by vis major, I do not think he can or ought to be held responsible.

Evidence has been introduced to show that *470

the estate was known *to be involved very largely in debt; that the testator was surety to Thomas DeGraffenreid for a very large sum: that DeGraffenreid was insolvent, and known to be so, and that, therefore, the administrator, in this instance, has not exercised that diligence due from him, inasmuch as he had not sold the slaves long before the war, and applied the proceeds to the extinguishment of these claims. It is unnecessary to discuss the question of what might have been the liability of the complainant, in case it had been conclusively shown that Thomas DeGraffenreid was insolvent before the war. The testimony of C. D. Melton, who was the attorney of Thomas DeGraffenreid and well acquainted with his affairs; the testimony of Messrs. Hemphill & McLure, both lawyers and intelligent business men, and that of Mr. Agurs, a shrewd and watchful merchant, is enough to settle the question of DeGraffenreid's solvency up to the date of the decree of DeGraffenreid v. De-Graffenreid. For the payment of this large decree, Thomas DeGraffenreid was responsible before the testator, and he was possessed of a very large estate, ample, in the opinion of Mr. Melton, to discharge all his debts, including the decree. The complainant was also a party to that suit, and, through his solicitor, co-operated with and materially assisted the complainant, T. H. DeGraffenreid, in securing a decree during the war, when our Judges, as a general rule, refused to hear litigated cases. I think, therefore, the defendant has failed to show a want of proper diligence on the part of the complainant, in reference to the DeGraffenreid claim, beyond the point ruled in considering the profederate bonds.

If we leave this large DeGraffenreid debt out of view, the estate of testator, before emancipation of the slaves, was sufficient to pay all debts, and there would still remain a handsome estate for distribution among his children. If these conclusions be correct, there are no evidences of bad faith on the part of the administrator in paying debts by simple contract before debts by bond, and in allowing the family of the testator to have the benefit of the income of the corpus of the estate, as well as in furnishing the necessary funds to pay for the repairs on the house.

For these reasons the Commissioner has allowed the complainant the benefit of all payments made on account of the debts of the testator, or for support and education of his family, up to the 27th of September, 1865, and also for repairs of the dwelling.

The following statements made from calculations not claimed to be precisely, but only approximately correct, may be useful in *471

*showing what amount of money was received by the administrator up to 1st of January, 1864, from what sources received and how it was applied:

Received. From income, (crop, hire, interest,)..... 33,223 61

From sales of property......

| From collection of notes and accounts | 38,413 10 |
|---------------------------------------|--------------|
| | \$131,114 96 |
| Paid. | |
| For widow's dower, horses, mules, &c | |

For repairs on house..... 6.272 75 Administrator's commissions.... Debts of testator...... 83,098 81 \$ 97,007 82 Total payments of family... \$97,007 82 \$ 37,107 14 From this sum (\$37,107 14) deduct balance against administrator, 1st of January, 11.513 39 1864

And there is left...... \$ 25,693 55 which seems to have been expended for the benefit of the family. This sum is about \$8,-

000 less than the income up to 1st of January, 1867.

The plaintiff excepted to the report on the following grounds, viz:

- 1. Because the Commissioner disallowed to its full amount the payment of \$600 to Warren Edge, in March, 1858, when it appeared that the said payment was made in good faith, and for the benefit of the estate, and in the absence of all proof to the contrary, it should have been allowed.
- 2. Because in his mode of charging and carrying forward interest on the annual balances, the Commissioner has in effect compounded the interest against the administra-
- 3. Because the Commissioner, whilst in every instance charging interest against the

administrator, on annual balances, when was not subject to the control or direction against him, has not allowed him interest on the annual balances in his favor.

4. Because the principle of charging interest on the annual balances, is not properly applicable to cases of administration during the earlier years of the same, when the funds are necessarily retained in hand to meet the demands of creditors.

- *5. Because the Commissioner erred in reporting large cash balances against the administrator in 1861 and 1862, when it appears from his accounts, and from the testimony in the case, that said apparent balances arose from the fact that, in his return to the Ordinary, the administrator has charged himself annually with the gross amount of the hire of the negroes belonging to the estate, whether the same had actually been collected or not: whereas, the hire of the negroes, for the years 1860 and 1861, amounting to \$6,000, was not paid to the administrator until March, 1863.
- 6. Because the Commissioner erred in making a rest in the accounts of the administrator, at January, 1863, and reporting the balance then apparently in the hands of the administrator, as so much cash to be charged against him, absolutely and unconditionally, and not subject to be reduced by subsequent disbursements or balances, in favor of the administrator; whereas, it is submitted, the accounts should have been carried regularly forward, allowing the administrator the benefit of all subsequent disbursements and investments.
- 7. Because if this mode of stating the accounts be correct, the balance reported 1st January, 1863, should be reduced by the whole amount of notes for negro hire, then uncollected, and particularly by the sum of \$6,000 paid by M. S. Hardin, for negro hire in March, 1863, due for the years 1860 and 1861.
- 8. Because the balance 1st of January, 1863, was a balance in Confederate money, and should have been carried forward regularly with the accounts of subsequent years.
- 9. Because the investment of \$4,000 in 1863. in Confederate money, was authorized by law; was made in good faith, of funds which could not have been applied to the debts of the estate, and the administrator should have been allowed credit for the same.
- 10. Because the administrator should have been allowed credit for the payments made by him since September, 1865, for the support and education of testator's family, out of the income and rent of that portion of the estate specifically bequeathed and devised by testator for that purpose; for the reason that the devises and bequests of the will in favor of the family was assented to by the administrator when the estate was solvent, and the right to the income thereof far as assets *came into his hands, which

of the administrator, but the said income was a trust fund in his hand for that specific purpose.

*473

*Some of the defendants also excepted to the report on the grounds:

- 1. For that the Commissioner has allowed various amounts of credit to the complainant, amounting in the aggregate to \$16.775 for the payment of simple contract liabilities, whilst a large amount of testator's own liabilities by specialty remain unpaid, for which his sureties are liable.
- 2. Because the Commissioner has erred in allowing complainant — thousand dollars for so much money expended upon the dwelling house of the testator without proof that so much was required to make the necessary repairs on said dwelling.
- 3. For that the said Commissioner erred in allowing credits to the complainant on account of the widow and children of testator, over and above the provision of his testator, for their maintenance and support.
- 4. For that the Commissioner has erred in allowing complainant credit for the sum of \$2,397.45 for so much money paid by him to Major J. Kennedy on a paper, purporting to be a sealed note for \$1,000, dated April 10, 1836, when by the proof it is clear that said paper was given to the said Major K. by testator, his son, as evidence of an advancement made by him, the said Major K., to the said testator. And whereas, even if the said note had been a bona fide obligation, the law presumed it to have been paid, from the lapse of time and attendant circumstances.
- 5. For that the Commissioner erred in allowing complainant credit for the sum of \$300, for so much money paid to William M. McDonald, when there was no proof that any such debt ever subsisted.
- 6. For that the Commissioner erred in holding that an administrator was not bound to plead the Statute of Limitations.
- 7. For that the Commissioner erred in holding that the Act of 1789, as to payment of debts, was directory and not mandatory.
- 8. For that the Commissioner erred in allowing to the complainant a credit of \$350, paid to W. W. Edge, for services never rendered.
- 9. For that whereas the testator, by his last will and testament, directed that all debts due to him should at once be collected and applied to the payment of debts, and that any deficiency should be made up by sales of property; and whereas, the administrator neglected, for several years, to make such sales and extinguish said debts, be should be made responsible for the same, so

*474

have since been lost by the casualties of war that \$6,000 of the sums referred to were, or otherwise.

Carroll. Ch. Numerous exceptions have been taken to the Commissioner's report, ten by the plaintiff, the administrator, and nine by the defendants, the specialty creditors of Richard E. Kennedy, deceased. The former will be first considered.

For the payment of \$600 to Warren Edge, the plaintiff has been allowed a credit of \$350 only. The amount of the credit is objected to on both sides, the administrator contending that it is too little, and the creditors that it is too much. The ruling of the Commissioner seems to be well sustained by the decisions in Davis v. Whitridge, 2 Strob., 241, and Atkinson v. Fraser, 5 Rich., 519.

It has not been shown that the administrator is charged with more than simple interest upon the annual balances against him, and the Commissioner seems to be correct in his conclusion that the plaintiff's second exception is founded in mistake.

Interest is allowed upon the balance for the year of 1857, in favor of the plaintiff, the Commissioner having modified his original report in that regard, without objection on the part of the creditors. The balance in the plaintiff's favor, for 1863, is deducted from the balance against him for 1862. As to the Commissioner's omission to compute the interest on the apparent balances in favor of the plaintiff, on the 1st of January in the years 1865 and 1866, respectively, the explanation submitted in the report upon the exceptions, is regarded, upon the whole, as not unsatisfactory. The plaintiff's pecuniary transactions in 1864 were, of course, altogether in the currency of the late Confederate States.

The balance in his favor of \$3,038.30, which they exhibit, arose out of some \$10,000 paid during the month of December, 1864, when that currency was almost valueless. If the feigned payment in December, 1865, of \$1,960.75, in Confederate Treasury notes, be struck out of the account, the receipt of 1865 would more than repay that balance. Substantial justice seems to have been accorded to the plaintiff in the several matters complained of in his third, sixth and seventh exception.

The rule of computing interest upon the annual balances has been long and firmly established. No authority has been cited, nor any sufficient ground suggested, to warrant the modification of the rule proposed by the plaintiff's fourth exception.

The sums due for the hire of the negroes

*475

in 1859 and 1860, the *plaintiff, in his returns to the Ordinary, sets down as having been received, respectively, on 1st of January, 1860, and 1st of January, 1861. It is conceded, as we are informed by the report,

in point of fact, never paid to the plaintiff until March, 1863. Yet, in his statement of the accounts, the Commissioner has charged the plaintiff with the receipt of those sums, as of the dates set down in his return. It is not perceived why the plaintiff should be charged with having received the \$6,000 referred to at a date earlier than that of its actual receipt. He certainly was not estop-1ed, by his returns to the Ordinary, from showing when, in point of fact, the fund really came into his hands. Whether the moneys of his testator's estate were properly administered, or were allowed to remain idle and unproductive, or were otherwise misapplied, seem to be matters wholly irrelevant in determining the date at which that fund should be treated as having been received by the plaintiff.

The balance of \$14,370.82, reported as against the plaintiff on 1st of January, 1863, does not consist wholly of receipts prior to 1st of January, 1862. On the contrary, it comprises moneys to the amount of \$3,484.77 not received by the plaintiff until the 3d of November, 1862, and also six thousand dollars due for hire of the negroes in 1860 and 1861, which, as we have seen, was, in fact, never paid to him until March, 1863. In regard to those receipts it is considered that the plaintiff is entitled to such abatement as may be authorized by the Ordinance of September, 1865; and to that extent the plaintiff's eighth exception is held to be well founded.

Of the \$6,000 dollars received by the plaintiff in March, 1863, he invested four thousand dollars in the bonds of the late Confederate States of America. The Commissioner has rejected the credit claimed for this investment. It is manifest that prior to the plaintiff's receipt of the \$6,000, the moneys actually in his hands were insufficient for the payment of his testator's debts. It was plainly his duty to provide the funds necessary for that purpose. It was proper, therefore, if practicable, to collect the \$6,000 due for hire of negroes. But payment could only be obtained in Confederate Treasury notes. It is in proof that, in the District of Chester, "Confederate money, in 1862, was current with every one." In 1863, "some large debts to the Bank of Chester were paid in that currency." It was received in that year by the teller of that bank in payment of a sum of money due to him by the plaintiff as ad-

*476

*ministrator. On the 12th of March, 1863, it was accepted by a gentleman, resident in Chester and a member of the legal profession, in payment of a debt due to himself as trustee. The Sheriff of that District received that "money till 1864, when not notified by the plaintiffs in execution not to receive it." It appears, therefore, that in re-

ceiving that currency in March, 1863, the plaintiff only acted as many other persons in that community seem to have done.

The Commissioner infers from the testimony of Mr. Hemphill that he would have taken this money if it had been pressed upon him. It may well be questioned whether any amount of pressure would have sufficed, when the testimony of the plaintiff is borne in mind "that in 1862 and 1863, he offered to pay Hemphill; that he frequently offered to pay him, but he declined to take Confederate money." This evidence is confirmed by Hemphill himself, who testified that the plaintiff did offer, in 1863, to pay in "money or notes, and that witness then declined the offer; and that if the money had been offered by Mr. Hinton, in 1862, witness thinks he would have received a part of it." No proffer of this sum of money to Hemphill could have been made by the plaintiff in 1862, for it never came into his hands, as has been stated, until March, 1863.

It is stated in the report that in the course of the year 1863, the plaintiff paid debts of his testator to the amount of \$4,331.22. This very fact goes to vindicate the plaintiff's receipt of the \$6,000 referred to in Confederate treasury notes.

He deposes that he was advised by his legal counsel, Mr. Hemphill, to receive payment of the debt in that currency; that it was best to receive and invest it, and the latter in his testimony has not denied or impugned the statement. It does not appear that any censure or blame can justly be imputed to the plaintiff for accepting payment of the \$6,000 in Confederate treasury notes. The fund being now in his hands, how was it to be disposed of? All of his testator's proper debts were paid by the plaintiff, except those due to Hemphill, who was unwilling to receive that currency. There is no sufficient proof that the plaintiff could have made any better disposition of the \$4,000, which remained unexpended, than was done, when he converted it into treasury bonds of the late Confederate States. In doing so, he was not placing the funds beyond his control. It was intended to be an investment, and so to remain subject to be re-converted into like money, if demanded by the exigencies of the estate. No wilful misconduct is imputed to

*477

him, and to hold *him responsible for the loss which has resulted from the investment in question, would be to enforce a harsher rule of accountability, than there is recognized in this jurisdiction. "The Court," it is said, "is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable on slight grounds."—2 Williams on Executors, 1630, Haile v. Shannon, Mss., 1866. It is considered that there is good and substantial grounds for the plaintiff's ninth exception.

As to the concluding exception, on the part of the plaintiff, (the 10th,) the judgment of the Commissioner is entirely approved.

The exception exhibited by the specialty creditors remains to be considered.

It is in proof that, at his death, the testator's dwelling was in bad condition; the roof leaky and the back piazza decayed; that the dining room built was necessary to the comfortable enjoyment of the dwelling, and that "the improvements made added as much to the value of the property as they cost." It has not been shown that the credit allowed the plaintiff, upon this account, exceeded the actual costs of the improvements and repairs. It cannot be safely affirmed, that the judgment of the Commissioner, overruling the second exception taken by the creditors, is unwarranted by the evidence.

The obligation, or single bill mentioned in the fourth exception on the part of the creditors, was certainly of a very ancient date, when paid by the plaintiff. It may have been intended originally to serve as the mere evidence of an "advancement" from Major John Kennedy, to his son, the plaintiff's testator. But the deposition of the testator, Richard E. Kennedy, which was produced before the Commissioner, is not regarded as competent evidence to disprove the debt. A similar demand was set up by Maj. Kennedy against the representative of another of his deceased sons, Henry Kennedy, and as it seems, was admitted as a set off against his purchases from the administrator. There was proof also of certain declarations by Major Kennedy, to the effect that he had "let his sonin-law, Coleman, have money, and had taken his note for it; that he did not expect Coleman to pay, but if Coleman did not do right in the matter of Henry Kennedy's estate, he, (Major K.) had it in his power, and should make Coleman pay it." The plaintiff deposes that the payment was made by him in good faith, and that he "did not suspect that there was anything wrong" about the claims.

*478

*I am not satisfied that the Commissioner has erred in his conclusion as to the payment.

The demand of Wm. M. McDonald is founded upon a promissory note. The original note was not produced, nor its absence accounted for before the Commissioner, nor was the attention of the Court directed to any secondary evidence of its contents. fifth exception on the part of the creditors must of course prevail. Their sixth exception must also be sustained. It does not point out, as it should have done, the particular credits, to which it applies, neither does the report indicate them. It only states vaguely that "several claims paid after they were barred by the Statute of Limitations, were objected to as improperly paid." The objection was overruled, the Commissioner

holding that an executor or administrator, acting in good faith, might waive that defence. It is sufficient to say that it was otherwise adjudged in Bird v. Houze, Sp. Eq., 255.

Mrs. DeGraffenreid was contingent, and the amount of such liability was not ascertained until by the decree of the Court, in the suit against Thos. DeGraffenreid, referred to in the report. The sum decreed against him in

What has already been said in commenting upon the plaintiff's first exception, disposes of the 8th exception taken by the creditors.

The remaining exceptions on part of the

latter may be considered together.

At his death the testator, R. E. Kennedy, owed debts of his own to a large amount, and he and Thomas DeGraffenreid were the sureties of Mrs. Sarah DeGraffenreid upon her bond as Committee of her lunatic son. But Thomas DeGraffenreid executed to him a bond of indemnity, and had thus the primary liability of such suretyship.

The testator directs his debts to be paid as soon as possible, out of the proceeds of his notes and accounts, and should they prove insufficient, the deficiency to be supplied by "moneys arising from sales of property." Not doubting that after the payment of all the debts, there would still remain a large estate, the plaintiff proceeded accordingly in his administration, paying the simple contract debts to a very considerable amount; leaving unpaid the less urgent specialty creditors; and expending moneys for repairing and improvements upon the testator's dwelling, and for the personal expenses and household supplies of his widow and children. The negro slaves of the testator have been subsequently emancipated, and the unfortunate issue of the recent war, with its disastrous consequences, have brought insolvency both upon Thos. DeGraffenreid and the estate of the testator, R. E. Kennedy.

It is urged by the specialty creditors of the latter, that the plaintiff ought to have sold *479

his testator's slaves long previously *to their emancipation, and out of the proceeds should have paid the debts, he being fully aware of their existence, and having failed to do so, that he should now be held accountable for their value; that in making advances for the use of the testator's family, and in paying his debts by simple contract, while his specialty debts were left unpaid, the plaintiff plainly departed from the order of payment, and the course of administration prescribed by law, and that in any event he should be liable to the extent of the assets thus misapplied. The estate of the testator, R. E. Kennedy, was of very considerable value, his negroes, slaves, at his death being one hundred and thirty-five in number. "If," says the report, "we leave this large DeGraffenreid debt out of view, the estate of the testator, before the emancipation of the slaves, was sufficient to pay all debts, and there would still remain a handsome estate for distribution among the children."

The liability of the estate as surety for

amount of such liability was not ascertained until by the decree of the Court, in the suit against Thos. DeGraffenreid, referred to in the report. The sum decreed against him in that cause seems to have been greatly more than was anticipated by the parties interested. It is in evidence that DeGraffenreid was reported to be a man of wealth, was owner of some 200 slaves, and of a large plantation in Chester District. An intelligent witness testifies that he "was attorney and adviser of Thomas DeGraffenreid from 1857 to 1863: was in possession of his papers; had no doubt of his solvency during that period; his good assets, over and above his lands and negroes, amounting to \$75,000 at least; thought him good even after the decree against him," which has been referred to. No wilful misconduct in his administration has been imputed to the plaintiff. It was under the advice of legal counsel that he paid the testator's simple contract debts, and made advances of money for the repairs and improvements of his dwelling and for the personal and household expenses of his family. The Act of 1789 prescribing the order in which debts are to be paid "says the Court is merely directory to the executor, and intended for his security and protection in the event of the insolvency of the estate. He may, if he thinks proper, first pay the debts of an inferior grade, and the only consequence is that, in the event of a deficiency of assets, he is liable, personally, to the extent of the assets for the preferred debts." -Huger v. Dawson, 3 Rich., 330.

*480

*Where there is a sufficiency of assets, executors may pay debts by simple contract before specialty debts, if not objected to by the specialty creditors.—2 Wms. Ex'ors, 1536. When, therefore, an executor, acting in good faith, and having good grounds for believing the assets to be ample, pays debts by simple contract before the specialty debts are paid, but without objection on their part, he commits no breach of trust-no violation of duty. To adhere to the prescribed order of payment, with rigorous and inflexible exactitude, would be attended with infinite inconvenience and mischief. The consequences that would result are well set forth in the report. "If this be the law, an executor or administrator could proceed safely only by distributing every sum, however insignificant, pro rata among all creditors of the highest grade at the time, however numerous; and by cutting off the family or beneficiaries of the deceased, from participating in the enjoyment of any portion of the income, thereby leaving them to starve, with probably an immense fortune in view." From regard to such considerations, when a clear surplus is admitted, and all the parties competent to con-

sent have consented, the Court has ordered general ruin of debtors. The principles which payment in part of a legacy, before the creditors have been paid.—Roper on Leg., 7: Pearce v. Baron, 12 Ves., 459. In the case referred to, the Court itself had assumed the administration of the estate, and there were infants concerned, who were, of course, incapable of consenting to the order passed. In the will of the testator, Kennedy, there are various provisions and directions computing that the great bulk, at least, of his negro slaves were not intended to be sold. He bequeaths to his widow "such house servants as she may need," and authorized her to select "for the plantation devised to her, such negroes as she may prefer to work the same;" other negroes he gives to his wife and children, "to be equally divided among them, share and share alike." He directs his young negroes to be kept on one of his plantations, and empowers his executor to "hire out all his negroes not expressly excepted," and "to sell any of them that are turbulent or otherwise troublesome."

The decree against DeGraffenreid seems to have been made in 1863. The inference is that the sum payable under the decree was not ascertained until the coming in of the report upon the accounts of Mrs. DeGraffenreid as Committee, and its confirmation at the next succeeding sitting of the Court in July, 1863. In view of all the circumstances mentioned, the plaintiff, prior to the decree in 1862, cannot justly be charged with want *481

of ordinary prudence and *circumspection, in having forborne to sell the slaves of his testator in order to pay a contested debt. the amount of which was wholly unascertained, and for which the primary liability rested upon Thomas DeGraffenreid, then possessed of a large estate, and the amplest pecuniary resources.

After the decree had been pronounced, and the indebtedness under it ascertained, the proof is that Thomas DeGraffenreid still continued solvent, and it is to be inferred, so remained until the close of the recent war. The amount decreed was large, some \$70,000, and its payment by the plaintiff would have absorbed probably the entire estate of his testator. It is further to be remarked that in 1863 the Confederate Treasury notes, then the sole currency of the country, were greatly depreciated in value, and were becoming more so every day. It may well be doubted, upon the proof adduced, whether the persons entitled to the moneys payable under that decree would, after July, 1863, have consented to accept payment, in that currency, of so large a sum.

The insolvency of Thos. DeGraffenreid, as of the estate of the testator, Kennedy, must be attributed to the emancipation of slaves, with its direct consequences—the fearful depreciation of other forms of property and the justifying a rest in the accounts of the admin-

determine the liability of trustees, technically, in regard to trust funds in their custody, apply also to executors and administrators, in respect of assets come to their hands. If a trustee is robbed of money belonging to his beneficiary without his own default or negligence, he will not be chargeable. cannot vary the case whether the robbery be effected by a party of highway men, or by a political party under forms of law. course of the administration of estates," says Judge Story, "executors and administrators often pay debts and legacies, upon the entire confidence that the assets are sufficient for all purposes. It may turn out from unexpected occurrences that there is a deficiency of assets, and, if they have acted with good faith and due caution, they are clearly entitled to relief."-1 Story Eq., § 90. It may be well doubted whether an executor would be chargeable even at law, and after judgment against him de bonis testatoris, for a subsequent loss of assets, without blame on his part.-Caldwell v. Micheau, 1 Sp., 280. An unforeseen event, the consequence of a revolution in the government, is set down as ground for relief in this jurisdiction, under the head of accident.-1 Story Eq., § 93.

But the defense of the plaintiff against the *482

claim of the creditors *rests upon even stronger ground. The emancipation of the slaves, which has caused the deficiency of the assets, has been legalized by a formal provision in the present Constitution of the State. It was certainly no breach of trust, or duty, on the part of the plaintiff, that he failed to foresee and provide for those events. The deficiency of assets, which has resulted, was not caused by his act, but by the Act of the State.—the act of the law, and upon the principles recognized by this Court in the cases of Hext v. Porcher, Boggs v. Adger, and Spear v. Spear, the plaintiff cannot be held responsible for losses, which have been thus produced.

The exceptions taken by the plaintiff, numbered five, eight and nine, and those on the part of the defendants, the specialty creditors, numbered five and six, are sustained, and all other exceptions to the report are overruled. and it is accordingly so ordered.

It is further ordered that the report be recommitted and reformed as herein above adjudged.

The plaintiff appealed from the decree on the following grounds, viz:

- 1. Because the payment of six hundred dollars to Warren Edge, was made by the administrator in good faith, in the exercise of a sound discretion, and he should have been allowed full credit for the same.
- 2. Because there is no reason, either in the law or equities of this case, requiring or

istrator to be made on the 1st of January, 1863.

3. Because the rents and profits of the real estate, devised by the testator for the support of his family, were not assets in the hands of the administrator for the payment of debts, after the administrator had assented to the devise and the same had vested in the parties beneficially interested therein, according to the terms of the devise.

The creditors of the testator also appealed, and moved this Court to reverse the decree on the following grounds, and in the following particulars:

1. Because the Chancellor erred in overruling the defendants' first exception, to wit: that the said Commissioner, by his report, had allowed various items of credit to the complainant, amounting in the aggregate to \$16,775, for the payment of various simple contract liabilities, whilst a large amount of testator's own proper liabilities by specialty remain unpaid, and which, by reason of said devastavit, the sureties of said testator are liable to pay, the Chancellor deciding, in his said decree, that the statute of 1789 is merely directory.

*483

*2. Because the Chancellor erred in overruling the fourth exception of the defendants', which is in the following words: That the administrator had paid the sum of \$3.-397.43 to Major John Kennedy, on a paper purporting to be a sealed note, of \$1,000, dated April 10, 1836, when, by the proof, it is clear that said paper was given to said Major John Kennedy by the testator, his son, as evidence of an advancement made by him to said testator. And whereas, even if the said note had been a bona fide obligation, the law presumed it to have been paid, from the lapse of time and attendant circumstances.

3. Because the Chancellor erred in not sustaining the ninth exception, to wit: That the testator, by his last will and testament, directed that all debts due to him should be at once collected and applied to the payment of his debts, and that any deficiency should be made up by sales of property; and whereas, as the administrator neglected, for nine years, to make such sales and extinguish such debts, he should be made responsible for the same, so far as assets came into his hands, which have since been lost by the casualties of war or otherwise.

4th. Because the Chancellor erred in sustaining the ninth exception of the complainant, which was in these words: "Because the investment of \$4,000 in Confederate bonds, in 1863, was an investment authorized by law, and was made good in faith, of funds which could not be applied to the payment of the debts of the estate, and the administrator should have been allowed credit for the same."

The Supreme Court refused to hear the appeals until the final accounting was adjusted according to the decree. They were afterwards adjusted by a Referee appointed by the Circuit Court, and from the judgment, on his report, appeals were also taken, but it is unnecessary to state these proceedings, as the only appeals considered by the Court were those from the decree of Chancellor Carroll.

Brice, for plaintiff. McAliley & Brawley, contra.

Aug. 13, 1872. The opinion of the Court was delivered by

WILLARD, A. J. Complainant's first exception presents a question of fact, whether \$600 was a proper allowance to him, instead of \$350, allowed by the Commissioner and *484

approved by the Chancel*lor, as a disbursement to an overseer employed by him upon one of the plantations under his control as administrator, cum testamento annexo. No question is made by the defendants as to the propriety of some allowance to the complainant, they not having excepted to that part of the decree of the Chancellor that sustains the allowance made by the Commissioner. It is, therefore, a question merely of the amount proper to be allowed.

The concurrence of the judgment of the Commissioner and of the Chancellor, as to the force and effect of the evidence, throws upon the complainant the burden of showing a clear state of facts, entitling him to the amount claimed, admitting of no reasonable doubt as to the correctness of his charge.

It is enough to say that he has not supported his demand by such clear evidence of the necessity and propriety of such disbursement, as to place the conclusions of the Commissioner and the Chancellor clearly in the wrong as to such matter of fact.

Under such circumstances this Court will not disturb their conclusions of fact. This exception should be overruled.

The second exception of complainant was abandoned on the argument of the cause.

Complainant's third exception is as follows: "Because the rents and profits of the real estate devised by the testator for the support of his family, were not assets in the hands of the administrator for the payment of debts, after the administrator had assented to the devise, and the same had vested in the parties beneficially intrusted therein according to the terms of the devise." The proposition of law stated in this exception is not considered by, nor involved in the decree, as broadly as it is here laid down. As a proposition effecting the basis of the accounting, which had already taken place before the Commissioner, the Chancellor was only bound to consider it so far as

the Commissioner's report.

The only exception of the complainant to the Commissioner's report, involving the proposition, to any degree, is as follows: "Because the administrator should have been allowed credit for the payments made by him since September, 1865, for the support and education of the testator's family, out of the income and rent of that portion of the estate specifically bequeathed and devised by testator for that purpose, for the reason that the devises and bequests of the will, in favor of the family, were assented to by the administrator when the estate was solvent, and the right to the income thereof *485

was *not subject to the control and discretion of the administrator, but the said income was a trust fund for that specific purpose."

The case does not involve any question of the effect of assenting to a specific legacy, on the subsequent powers of the administrator over assets affected thereby. Nor does it involve any question of the right of the administrator as it regards the control and disposition of the rent and income of land specifically devised. There is no trust created by the will for the maintenance of the family out of the general income of the estate, or out of any fund left in the administrator's hands. On the contrary, it would seem that the testator looked to his specific devises and bequests, contained in the third clause of the will, as a fund sufficient for that purpose, until his estate should be settled and distributed.

The question presented to this Court is simply whether the general assets of the estate could be applied to the maintenance and support of the family, after the estate had become insolvent. This proposition was correctly solved by the decree in the nega-

The first exception of the defendants, the creditors of the testator, is based on the decision of the Chancellor, to the effect, in substance, that the complainant is not liable to the specialty creditors, although the estate is insufficient to pay their demands, notwithstanding that assets have been applied by him to the payment of simple contract creditors, leaving the specialty debts unpaid, on the ground that, at the time such simple contract debts were paid, assets sufficient were reserved for the payment of the specialty debts, and although such assets have been lost by events for which the administrator is not responsible.

Apart from the relief afforded in such cases, upon the principles governing Courts of Equity, it is perhaps questionable, whether an administrator can be defended from liability to the specialty creditors, when voluntary payment is made to simple contract

it was brought before him by exceptions to 1 creditors, leaving known specialty debts unprovided for, and where such fact is charged by way of devastavit.

> It is laid down in Bac. Abs., Executor, (L., p. 1.) as one of the instances of a devastavit, the payment of debts out of legal order, and the payment of legacies before creditors.

> Judge Story says, (Story's Eq. Juris., § 90,) "in the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made

*486

known at a subsequent time, *that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law. But, in a Court of equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground that, otherwise, they will be invariably subject to an unjust loss for what the law itself deems an accident." Again, he says: "But to found a good title to such relief, it seems indispensably necessary that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets; for, if there has been any negligence or misconduct, that, perhaps, may induce a Court of equity to withhold its assistance."

Our own cases leave this question open. There is the strongest reason to support the doctrine laid down by Story.

The bearing of this question on the responsibility of executors and administrators, and on the facility of administering estates, is highly important, as cases affected by it are constantly occurring. The facts of the present case illustrate its bearing in the most usual and most important form.

An administrator cum testamento annexo holds abundant assets to satisfy all the claims of creditors, and to fulfill the objects of the will, according to the terms of which he is bound, subject to the rights of creditors, to administer the estate. Among the claims against the estate is a contingent liability of the testator, that may or may not, according to circumstances, become a charge on the assets. In the present case the contingent liability arose out of a guardian's bond, to which the testator was surety.

The primary liability rested upon guardian or his estate.

Even after the fact of liability has been ascertained, there yet remains the necessity of ascertaining its extent, before the assets can be applied to its extinguishment.

This amount may, as in the present case, have to be ascertained by judicial proceedings, and, even after that is done, the extent to which contribution by co-sureties can be compelled, after exhausting the remedy against the principal, may have to be ascertained by further legal proceedings. Under the operation of a judgment de bonis testathese circumstances, it is the duty of the administrator to hold in his hand the assets of the estate, so far as they are applicable to the payment of debts of the grade of such contingent liability, or of an inferior class, until the actual extinguishment of such contingent liability. If that is the absolute duty of the administrator, then it is of no importance how small may be the contingent liability, or how large the amount of assets. *487

*If that is the law, the simple contract creditor must await the satisfaction of all liabilities, absolute and contingent, and the settlement of all disputed claims, before he can demand payment, however insignificant the extent of his claim, and however abundant the assets of the estate may be for all purposes of administration.

That this is not the legal notion of the rights of the simple contract creditor is obvious, from the fact that under such a state of facts he is entitled to judgment at law against the administrator in respect of the assets; the effect of which judgment is an admission of assets at the date of its recovery.—Brown v. Hellegas, 2 Hill, 447; Caldwell v. Micheau, 1 Sp., 276; Williams on Exors., 1770, et seq.

As an administrator, with ample assets for all purposes, could not defeat the recovery of a judgment by a simple contract creditor by pleading merely the fact that prior demands still remain actually unsatisfied, the recovery of such a judgment would furnish no evidence of a devastavit by the administrator, but would operate as a legal partition of the fund satisfying the simple contract debt with part, and leaving the rest subject to the claims of prior creditors.

It may be a question whether at law the administrator could protect himself, where such partition of the assets had been made, unless resulting from a judgment, or decree. recovered without his fault, binding the assets.

What the Court of law may do, through the operation of its judgments, is it not competent for the Court of Equity to do by a simpler and less expensive process? What may be accomplished at law, but is there attended with the disadvantage of a multiplicity of suits, involving unreasonable ex-·pense and complication, may always be done, by simpler means, by a Court of Equity, providing the thing to be done is not beyond the reach of equity, or contrary to its nature. It is not to be questioned that equity will, and daily does, administer the assets of decedents' estates, by applying them to the satisfaction of debts of an inferior grade, when debts of a superior grade are in dispute or not in a condition to be discharged, and for that purpose, apportions the assets substantially as they would be apportioned under v. Miles, to hold that it determined that,

toris. It is clear, then, on fixed equitable principles, that where an administrator has already done that which the Court of Equity would have ordered done under the circumstances, it will sanction his act, and afford him protection from any evil consequences that might arise at law, from such course of *488

action; and *it is equally clear that the qualification made by Story, that he must have acted prudently, is applicable in determining how far he is entitled to protection.

In Swift v. Miles, (2 Rich. Eq., 147,) although sureties of an administrator were charged on the principle of a devastavit, on account of the payment of simple contract debts, leaving debts of a higher class unprovided for, yet the devastavit did not simply consist in the payment of the simple contract creditors, but in the fact that the administrator, as party to a partition suit among the distributees, allowed the realty to be distributed without making provision for the payment of the specialty creditors. Ch. Dunkin places the decision of the Appeal Court, distinctly on the ground that the administrator was charged as a party to the partition suit, with the protection of the rights of the creditors, which he wholly neglected.

The misapplication of the personal assets, by paying simple contract debts in preference to specialty debts, was not the real point at issue in that case, although Ch. Johnson, in his Circuit decree, viewed it wholly in that light, for the personal assets, thus misapplied, had been replaced out of the sales of the realty, and such restored fund applied to the specialty debts. The real misapplication on which the case turned, according to the judgment of the Appeal Court, was that which took place when the administrator suffered the proceeds of the realty to be distributed without provision made for the specialty creditors. It must be conceded that the case just noticed treated the application of the personal assets to the payment of simple contract debts, leaving the specialty debts unprovided for, as a misapplication of such assets. It must, however, be borne in mind that it was not a question in that case, whether the course pursued by the administrator in paying out assets to the simple contract creditors was justified by the condition of the estate, and the situation of the debts, respectively, at the time, but upon subsequent conduct of the administrator tending to defeat the rights of the specialty creditors. It must also be borne in mind that such an application, in derogation of the established order, by payment, is a devastavit in itself, unless justified by the peculiar situation of the estate at the time. It would not be a sound construction of Swift

under all conditions and circumstances, the loss of assets will be considered under the payment of simple contract creditors before defendants' third exception. specialty creditors, is a devastavit against which equity cannot relieve. The present

*489 question does not turn on the peculiar *wording of the statute of 1789. The principle of priority does not depend on that statute, although it established the order of priority. Reference was made in argument to an expression that occurs in Com'r v. Greenwood, (1 Des., 450,) where it is said, "that this Act is directory to executors and administrators in the disposing of the assets of the deceased, and, therefore, if they should administer them contrary to the directions of that law, and the estate receive an injury, they might be held to answer in an action for devastavit." It is evident that the Court was not considering the distinction between mandatory and directory statutes, in using the expression "directory." The object of its use appears to have been to show that the Act conferred duties on the executor and administrator, for the neglect of which they would be liable, in opposition to the idea that it merely created rights of priority as among creditors, without imposing on the executor or administrator any duty in respect to such priority, for the disregard of which they could be held liable to such creditors. In order to support the right of equity to afford relief in a case like the present, it is not necessary to weaken the force of the

It may be assumed that the duty imposed upon the executor or administrator, is indispensable, and that even the Court of Equity cannot relieve him from its performance. The question then remains, whether setting apart an ample fund for the payment of the creditors having a prior demand, under circumstances satisfying a Court of Equity as to its propriety and prudence, is not a substantial compliance with the requisitions of the statute.

statute by artificial construction.

That it is within the power of the Court so to do, without impairing the force and effect of the statute, appears to be without question.

Both the Commissioner and the Chancellor concur in holding that the circumstances of the estate justified the appropriation of a part of the assets to the payment of the simple contract creditors at the time such payment was made, and there is no ground to interfere with their conclusions in this respect.

The question just considered must be solved by the state of facts existing at the time the payment to the simple contract creditors was made.

The subsequent loss of assets presents a totally different question, to be solved on a different state of facts, and by the application of altogether different principles. The with interest. It is not made to appear *that

*The second exception of defendants objects to the allowance to the administrator of a credit for payment of a sealed note of testator. It is not alleged, nor does it appear, that twenty years had elapsed from the date of the note at the time of such payment. although, if the date of the note is correctly stated in the defendants' fourth exception to the Commissioner's report, the period of twenty years must have been within a few days of expiring. As the case stands, the legal presumption of payment, arising from lapse of time, does not apply to it. therefore, a question whether the administrator had reasonable ground to suppose that the note had been paid, or that it was intended by the parties as merely evidence of an advancement made by the father to his son. It was held, in Gee v. Hicks, (Rich. Eq. Cas., 5,) in regard to the onus probandi in such cases, that the legal presumption is, that the debt is the debt of the deceased; a contrary presumption can only be raised by showing fraud and collusion between the executor and administrator and the creditor; that if the objection is in point of law, it must appear that it was not a subsisting debt; if as to matter of fact, some suspicion of its correctness must be created by evidence. The Commissioner and Chancellor having found this issue of fact in favor of the complainant, upon evidence of a doubtful and presumptive character, this court will not disturb their conclusions.

The defendant's third exception is grounded on the proposition that the delay of the complainant in administering the estate precludes him from setting up a loss of assets by casualties of war and other inevitable causes. This proposition was denied by this Court in Fitzsimons v. Fitzsimons, (1 S. C., 400,) and under that ruling the third exception should be overruled.

The defendant's fourth and last exception is based upon the refusal to charge the complainant with \$4,000 invested in Confederate securities in 1863. It is not charged that this sum was a loan to the Confederate government in aid of rebellion against the United States, or even that the securities were purchased directly from the Confederate government, or its agents. It must therefore be assumed that the investment consisted in purchasing in the market obligations of the Confederate government already in circulation. It must also be held, upon the evidence and facts found, that this purchase was made with Confederate currency. It must therefore be regarded as simply converting a Confederate promise to pay a demand, without interest, into one to pay on time *491

this conversion prevented the administrator from availing himself of any opportunity that might present itself to dispose of the depreciated securities in his hands. does it appear that the retention of the Confederate currency would have prevented the loss occasioned by the destruction of the Confederate power. The point is not distinctly made that the administrator became possessed of this Confederate currency in an improper manner. It appears that the \$4,000 of Confederate money was received for the hiring of slaves. Such transactions, as well as necessary sales of perishable produce, were only practicable at that time with reference to such currency. In the absence of distinct allegations and proof, it must be assumed that this Confederate currency came legitimately into the hands of the administrator, and that the loss that occurred by the depreciation of such securities was not enhanced by the fact that the currency was changed into securities of a more permanent character. The exception should be disallowed.

No ground appears in the exceptions brought before us by the supplemental brief—taken in the course of the accounting under the decree—for interfering with the account taken under such decree. It appears that the complainant's exception proceeded upon a misapprehension of the effect of the report of the Special Referee, and as it regards the defendant's exception to such special report, they appear to have been passed upon pro forma by the Circuit Judge, and under the practice of this Court cannot be heard here.

The decree of the Chancellor should be in all things affirmed.

MOSES, C. J. and WRIGHT, A. J., concurred.

3 S. C. 491

GAGE v. CHARLESTON.

(April Term, 1872.)

[Courts = 93.]

The decision in Copes v. Charleston, 10 Rich., 491, that the City Council of Charleston has the power, under the city charter, to subscribe to the stock of railroad companies within and without the State, and tax the inhabitants of the city to raise money to pay the subscriptions, sustained upon the principle of stare decisis.

[Ed. Note.—Cited in Roof v. Railroad Co., 4 S. C. 62: Rogers v. Huggins, 6 S. C. 364.

For other cases, see Courts, Cent. Dig. § 336; Dec. Dig. ©=93.]

[This case is also cited in Mauldin v. City Council of Greenville, 33 S. C. 20, 11 S. E. 434, 8 L. R. A. 291, as to the proper plaintiffs in actions against county.]

Before Graham, J., at Charleston, April Term, 1872.

Action by Alva Gage and seven other named persons, "inhabitants and property holders of the city of Charleston, for themselves

*492

*and others, inhabitants and property holders of said city," plaintiffs, against the Mayor and Aldermen of the city of Charleston, constituting a corporation known as the City Council of Charleston, John S. Riggs, John Phillips and George I. Cunningham, defendants.

The complaint alleged:

First. That the plaintiffs are inhabitants and property holders of the city of Charleston, and that the said City Council are a body corporate by Act of the General Assembly of said State, ratified the 15th day of August, 1783, and altered and amended by Acts subsequent thereto, which said Act and amendments appear in the Ordinances of the city of Charleston, published in 1844, and here shown to the Court.

Second. That by the said Act and amendments the said body was appointed to the office of municipal government in said city. That the functions of said office are specifically indicated, in said Acts and amendments, to be the charge of streets, lanes, public buildings, workhouses, markets, wharves, public houses, carriages, wagons, carts, drays, pumps, buckets, fire engines, the poor, the seamen, disorderly people and negroes; and therein they are vested with the power to make such by-laws and regulations as shall appear to be requisite and necessary for the security, welfare and convenience of said city, but without express power to take, hold or create for itself a corporate capital, without the designation of any commercial object upon which a corporate capital could be expended; without express power to make investments of individual capital, or to borrow money, or to make any form of security for the performance of any moneyed obligation, or to raise money in any form whatever, but by assessments on the inhabitants of Charleston, and those holding taxable property therein, nor by assessment, but for the safety, convenience, benefit and advantage of the said city.

Third. That under the said Act and amendments, the City Council for the time being of said city, at various times from the year 1818, to within a period shortly preceding the filing of this complaint, transcending their office of municipal government, have assumed large obligations to objects not indicated in the said Acts, and to meet these obligations have issued securities or acknowledgments thereof, in the form of stock, whereon they have borrowed large sums of money, which sums of money it is declared in the said stock, that at distant dates and with certain rates of annual interest, shall be paid by the said city of Charleston.

*493

*Fourth. That of the obligations to which these several securicies have been issued, some have not been specifically indicated, and a very large part have been declared to be in the construction of certain railroads, some beyond the limits of the State of South Carolina, and all beyond the limits of said city of Charleston, and beyond the jurisdiction of the said municipal body, as follows:

1st. In the year A. D. 1837, to the Louisville, Cincinnati and Charleston Railroad, by way of an investment in the stock thereof. \$700,000, bearing interest at the rate of 5 per cent. per annum. Also, in the same year, by way of loan thereto, \$100,000, with like interest, which said road was intended to commence at Branchville, in the State of South Carolina, and extend through the State of Tennessee to Louisville, in the State of Kentucky.

2d. In the year A. D. 1850, to the Nashville and Chattanooga Railroad, \$500,000, interest 6 per cent. A road commencing at Nashville, in the State of Tennessee, and extending to Chattanooga, on the Tennessee River.

3d. In the year 1853 to certain other Railroads, to wit: the Blue Ridge Railroad, the Northeastern Railroad, the Cheraw and Darlington Railroad. The first of which roads was to extend from Anderson, in this State. through Georgia and North Carolina, to Knoxville, in the State of Tennessee, and the last from Florence to Cheraw, in this State; and also to certain public expenditures, \$1,-000,000.

4th. In the year A. D. 1854, to the Northeastern Railroad, a road extending from beyond Charleston to Florence, in the State of South Carolina, \$150,000, interest 6 per cent.

5th. In the year 1854, to the Memphis and Charleston Railroad, a road extending from Chattanooga, Tennessee, through parts of Alabama and Mississippi, to Memphis, Tennessee, \$250.000, interest 6 per cent.

6th. In the year A. D. 1855, to the Blue Ridge Railroad mentioned above, \$400,000, interest 6 per cent.

7th. In the year 1856, to the Blue Ridge Railroad mentioned above, and the Charleston and Savannah Railroad, a road beyond the limits of Charleston to Savannah, in the State of Georgia, and to other purposes, \$1,-163,055, 6 per cent, interest,

Fifth. That the said municipal body is the creature of its said charter of incorporation, and can exercise no power not conferred on it by its charter; and cannot exercise the

*494

powers conferred on *it by its charter in any other form than is therein specifically indicated: and in assuming powers not conferred by its charter, and proceeding upon forms not warranted therein, its acts are null and

charge the inhabitants and holders of property of the said city; and that the construction of railroads Leyond the limits of the said city is not an object indicated in the charter, and it is not vested with power to issue any such securities as aforesaid; and in entering into obligations to the construction of said railroads, and the executing such securities for moneys applied, or pretended to be applied, to those or to any other objects, not within the office of said municipal body, the said body has broken the trusts of its office, and therein has not imposed a charge for the payment of either the principal or interest of such securities upon the plaintiffs, and others, inhabitants of said city and holders of property therein, as afore-

Sixth. That of the said securities so issued to the construction of railroads, as aforesaid, some are outstanding in their original form, and some have been funded under provisions of an ordinance ratified August 11th, 1857, to arrange the time for the payment of the city debt, for which, in exchange, other securities in the form of stock were then issued, but are of the securities to the objects aforesaid, in their original or altered form, and are still outstanding in the hands of persons who assert these are valid claims upon the said City Council, and through that, upon the property of these plaintiffs and others.

Seventh. That these securities constituted originally much the largest portion of the debt claimed against the city, and they have been much increased by other issues of like securities under recent ordinances providing for the funding of interest thereon, which had come to be largely in arrear.

Eighth. That these securities, so issued as aforesaid, are now affirmed by the said defendants, the City Council, as existing and valid obligations upon said city; and as such they have claimed to take the property of these plaintiffs and others, by assessment, for the payment of the interest thereon as it accrues, and the principal as it may fall due; and they have actually collected large sums of money of these plaintiffs, which they now propose to pay to the holders of said stock; and they propose to assess and collect still other sums to that object, as occasion may require. All of which the plaintiffs say is a breach of the trusts of that

municipal office *for the benefit of these plaintiffs and others, to which the said body is committed by its charter of incorporation aforesaid.

Ninth. That these plaintiffs and others have not been consulted by said body in the obligations so assumed, and securities so issued; that they have not assented to the imposition of any such charge upon them, or void, and utterly without the efficacy to taken any benefit or advantage therefrom;

that the transactions to the said investments (375,) and it was ordered and adjudged that in railroads, and to the said securities asserted to have been issued thereto, have been between the said City Council, for the time being, and others, parties unknown to these plaintiffs; that the charge upon these plaintiffs to the said securities so issued as aforesaid, amounts to very nearly one-half the value of all the property held by these plaintiffs, and others, within the limits of the said city; and the plaintiffs, not participating personally or by procuration in the said transactions, out of which this charge arises, have had no chance of answer or defence, but are liable at any instant of delay in the payment of the sums exacted, to execution upon their property; and without this, irreparable injury to result from such powers of execution, can assert their rights in no other form against this most unwarrantable exaction.

Tenth. That the holders of the said stock so issued by the said City Council, in breach of trust as aforesaid, are very numerous. That they are not all known to the plaintiffs, and if known, could not practically be made parties to this bill: but that of those holding said stock, are John S. Riggs, John Phillips and George I. Cunningham, who stand in the same rights as all other holders of said stock, and who, for themselves and others, are charged to defend the matters alleged in this complaint.

Wherefore the plaintiffs pray judgment:

1. That the said defendants may answer the premises, and show what stock has been so issued, what portion thereof is outstanding, and in whose hands the same may be; and the facts appearing as stated in this complaint, that the said City Council did not have power under said charter to bind by such securities to such objects the property of these plaintiffs.

2. That the defendants, the City Council, be enjoined from collecting further funds of these plaintiffs, by assessment, to the payment of the principal or interest of such securities as have been issued to railroads as aforesaid, or of such as have been issued to the interest in arrears thereon; and also from issuing further securities to such arrears of interest, and that they be enjoined

*496

from paying *any funds collected of these plaintiffs, and others, to the interest accruing on said securities.

The City Council demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. Phillips and Cunningham severally answered, and plaintiffs demurred to the answers, because the facts therein stated are insufficient to constitute a defense.

His Honor the Circuit Judge held that the questions involved in the case were concluded by the decision in Copes v. Charleston, (10 Rich., 491,) and the Act of 1854, (12 Stat.,

the demurrer of the defendant, the City Council, be sustained, and the summons and complaint be dismissed with costs.

The plaintiffs appealed.

Brewster, Spratt & Burke, Cohen, for appellants (a).

Corbin, City Attorney, Phillips, J. Y. Simons, contra.

Aug. 14, 1872. The opinion of the Court was delivered by

MOSES, C. J. We have considered with much interest the argument of the learned counsel for the appellants. It evinces industrious research and elaborate investigation, and brings to bear upon the motion, in a strong and terse form, every possible reason that could be urged in its support. Regarding the point made, as directly decided by the case of The State ex rel. James Copes v. The Mayor and Aldermen of the City of Charleston, (10 Rich., 491,) we have rather held it our duty to consider, whether any controlling policy has been shown, which should induce us to overrule it. A decision which has been accepted and conformed to for over fifteen years-made, too, by the unanimous concurrence of the Court of Errors, composed of all the Chancellors and Judges of the State, should not be disregarded, unless the necessity for its reversal is clear and apparent. Relying on its authority, the public has dealt with the securities to which it referred, as valid and binding on the City Council of Charleston, and now to declare them issued without the sanction of law, would deluge the State with a flood of litigation, the consequences of which would affect it for at least

a half *century. Not only the wealthy capitalist, but the poor widow and orphan, who, by the faith reposed in the said decision, invested their all in these stocks, would feel the heavy blow which a decision against the validity of the ordinances under which they were issued would inflict.

*497

If, in overruling an ordinary case made in a State Court by Judges who preceded those who have now the honor of occupying the places which they long held with so much credit to themselves and satisfaction to the country, the utmost deference should be extended, and the greatest caution exercised to ensure a correct conclusion, how certain and satisfactory should be our conviction. before we ventured practically to set aside an authority, on the faith of which so many important engagements and contracts have

⁽a) As the case went off on the simple point. that the principles involved are settled by a previous decision, it would seem to be out of place to insert the arguments of counsel. Though able, learned and interesting, they add nothing to the value of the case as an authority.

been made. Even if our legal judgment dif- lawyer would, in many instances, know what fered from that pronounced in the said case, looking to the disastrous pecuniary consequences which would follow, we would not, under the circumstances, feel ourselves justified, in any adjudication tending to its reversal, without a judicial necessity which could not be avoided. Stability in the law is of public consequence. A case depending on similar facts, should be decided by the one that has preceded it. If law depended upon principles, there can be no difference in their application to like cases. It is said in Ram. on Legal Judgment, 114, "A reason constantly adverted to as a ground on which to adhere to a former decision, is the importance of certainty in the law. Another reason is the great importance that there should be an uniformity of decision in the different Courts of Westminster Hall. A third reason is the probability that many transactions have taken place upon the footing of the former decision." Lord Kenyon, in Schumann v. Wetherhed, 1 East, 541, said, "I should be sorry to see one decision in 1798, and a different decision on the same facts in 1801;" and in Ram., 33, 34, a reference may be found to the many cases where a rule that has become settled law has been adhered to, although inconvenience has followed its observance, or it has been enforced although another rule may appear upon general principles more reasonable and more just.

Our American commentator, Chancellor Kent, second to none of the modern juristsone whose learning has contributed to the elucidation of the general principles of the law, and whose decisions are referred to as the great lights by which those who have succeeded him in the administration of justice are to be guided—in the 21st Chapter of his work, in the strong but concise language pe-

*498 culiar to *him, bears his own testimony to the importance of adhering "to a solemn decision as the highest evidence which we can have of the law applicable to the subject." Recommending what he there says, and adopting it as the rule by which we must be here governed, we cannot forbear to quote the following from his expressions, applicable to the point on hand: "If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a Court of Appeals or Review, and never by the same Court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. The language of Sir William Jones is exceedingly forcible on this point: 'no man,' says he, 'who is not a lawyer would ever know how to act, and no man who is a

to advise, unless Courts were bound by authority as firmly as the Pagan Deities were supposed to be bound by the decrees of fate."

It is ordered that the motion be dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 498

BUCHANAN v. McNINCH.

(April Term, 1872.)

[Fraudulent Conveyances 57, 58.]

A gift of an inconsiderable part of the donor's property is not fraudulent and void as against existing creditors, if the donor reserves sufficient property to pay his debts and his subsequent insolvency arises from a sudden and extraordinary event which he could neither foresee nor prevent, as, for instance, the general emancipation of 1865.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 144, 150; Dec. Dig. **\$\sim 57**, 58.]

Before Thomas, J., at Chester, November Term, 1870.

Bill to settle up the estate of Samuel Mc-Ninch, who died insolvent and intestate in the year 1867. Franklin A. McNinch, a son, and Celia A., a daughter of intestate, with her husband Hazel E. Davis, were parties defendant, and one of the objects of the bill was to obtain a decree setting aside as fraudulent, and void as against creditors, two deeds of gift of lots, in the village of Chester, made by the intestate, one dated November 2d, 1863, to Hazel E. Davis, in trust for Celia A., his wife, and the other, dated April 6th, 1864, to Franklin A. McNinch.

*499

*When the deeds were made, the debts of the intestate amounted to about \$3,200, and most, if not all, these debts remained unpaid at the time of his death. His property, at that time, consisted, besides the lots, of seven slaves, marble in his marble yard, in Chester, horses, mules and a wagon, valued at \$10,000. He owned no real estate except the lots and they were of inconsiderable value as compared with his personalty. The property which he left was sold by his administrator for \$303.50, which satisfied his funeral expenses and the expenses of administration, and left \$101.75 to be applied to the judgment herein next mentioned.

The plaintiff was the largest creditor of the intestate when the deeds were made. He obtained a judgment by confession for his debt on the 11th January, 1867, and it then amounted to \$801.54.

The deeds of gift were recorded in the proper office, and the dowees entered into possession and improved the lots.

The case was tried before the Circuit

also found that the insolvency of the intestate was caused by the emancipation of his slaves in 1865, that the deeds were not fraudulent, either in fact or in law, and he rendered a judgment dismissing the bill as against McNinch and Davis and wife, with costs.

The plaintiff appealed.

Patterson, with whom was Rice, for the appellant, contended: 1. That the deeds were void for actual fraud. 2. That they were fraudulent and void in law as to existing creditors.—Blakeney ads. Kirkley, 2 N. & McC., 544; Hudnal v. Teasdale, 1 McC., 227; Izard v. Middleton, Bail. Eq., 228; Richardson v. Rhodus, 14 Rich., 96; Brock v. Bowman, Rich. Eq. Cas., 185. That this case was within none of the exceptions.-Salmon v. Burnett, 1 Conn., 525; Hopkirk v. Randolph, 2 Brock, 183; Abbe v. Newton, 19 Conn., 27.

Brawley, contra, contended that the gifts were meritorious acts and having been bona fide made by a father in prosperous circumstances at the time, they were valid in law, and did not become fraudulent and void because of his subsequent insolvency, caused by a sudden unforeseen and extraordinary event. He cited Doe v. Routledge, Cowp., 708; Tunno v. Trezvant, 2 DeS., 264, 270; Leech v. Wilkinson, 5 Ves., 386; Howard v. Williams, 1 Bail., 581; and Salmon v. Bennett, 1 Conn., 525.

*500

*Aug. 14, 1872. The opinion of the Court was delivered by

MOSES, C. J. We do not perceive anything in the evidence which would justify the Court in setting aside the deeds on the ground of actual fraud. The case was tried by the Judge without the intervention of a jury, and his conclusion on the facts submitted through the testimony, must be accepted as

Our examination will be confined to so much of the appeal as charges against him error in law in sustaining the deeds as valid against existing creditors.

Whatever may have been the doubts prevailing at one time from the conflict in the decisions in this State, it must be regarded as now settled beyond dispute, that as a general rule, as against creditors existing at the time of the conveyance, if it was voluntary it is fraudulent in law, and void .-Izard v. Izard, Bail. Eq., 228; Brock v. Bowman, Rich. Eq. Cas., 185; Richardson v. Rhodus, 14 Rich., 95. These cases do not make it a question of intention, but a conclusion of law, unaffected by the fact that the donor, at the time of the gift, had a sufficiency of property outside of that included in the deed, to meet his debts. A qualification, however, has been conceded "that where the indebtedness is slight, as for the current ex-

Judge who found the facts above stated. He | siderable as compared with the value of the donor's estate, and the creditor, by his delay or laches, had allowed the reserved estate to be wasted, in such case the conveyance will be held valid."—Ibid.

> We think, too, that another exception may be added, and which finds justification in the circumstances of this case. It is that where the donor makes a voluntary conveyance of an inconsiderable portion of his estate, leaving unincumbered a probable sufficiency for the payment of his existing debts, it shall prevail, if his subsequent insolvency arises from the loss of his property by sudden and extraordinary events which he could not control or prevent.

> The principle upon which it proceeds rests upon common sense, and no construction of any statute can be safe which is inconsistent with it. A father, as in the case before us, being indebted in about the sum of thirtytwo hundred dollars, with property to the value of ten thousand dollars, in 1863 and 1864, by separate deeds, conveys two inconsiderable parcels of it to two of his children. A large proportion of the property consisted of slaves of the value of five thousand one hundred and fifty dollars, one of whom he afterwards sold. In 1865 these slaves, on the fact and faith of whose possession he had principally obtained credit, and who, in them-

> > *501

*selves, were more than adequate by sale to meet all his debts, are emancipated by the results of the war, and lost to him as the means of satisfying them. His insolvency is referable not to any act of his own; not to any untoward speculation; not to any engagement where the chances of loss were greatly in excess of those of gain, but to causes which, though directly operating on his property, do not owe their origin to any work of his head or hand. Is an insolvency resulting from the sudden loss of property by fire or storms, to be viewed, in regard to all its legal consequences, as insolvency arising from an increase of debt in excess of the means of meeting it? In the one case the donor has contributed to the end, and his indiscretion may often amount to a fault. In the other, the loss has been independent of any action on his part, and could not have been averted by any efforts in his power. The cases agree "that the solvency must be judged of by the event," for it is that by which the validity of the gift is to be tested.

The manner of the insolvency would, therefore, seem to be an important element in determining its influence on the transaction.

In Blakeney ads. Kirkley, 2 N. & McC., 546, Judge Richardson, delivering the opinion of the Court, speaking of the obligation on the donor to shew very abundant property, over and above the gift, retained for the payment of his debts, says, "and if, in the ordinary course of events, such property turns out to be penses of the family, or the debts are incon- inadequate to the discharge of his debts, the

presumption of fraud remains, although the [Charities 30.] property reserved may have been deemed originally adequate to that purpose, if exclusively so applied." In Izard v. Izard, Chancellor Harper, referring to the qualification which would save the voluntary conveyance from the imputation of fraud, says: "Whether there may not be a further exception when the failure has been produced by some sudden and unforeseen casualty, such as a fire or a tempest, it is not necessary to enquire. The fluctuations in the value of property, occasioned by the mercantile condition of the country, cannot, however, he ranked among those casualties." The intimation from these expressions is very clear, that if the insolvency is the result of events "out of the ordinary course," or of casualties which, if even foreseen, could not have been prevented, it should not contribute to the destruction of the deed. The interest of one may be affected in a particular transaction to which, with another, he may be a party, depending on the relation in which each stands to it, but consequences to the one, following causes for which he is

*502

not responsible, should not operate *to the prejudice of either. A different rule would be inconsistent with every principle of justice. The slaves of the donor here, at the date of the instrument, were more than sufficient to meet all his liabilities. His subsequent insolvency, through which this plaintiff has lost his debt, was in consequence of their emancipation, by an authority which he could not resist, and should, therefore, have no effect against the deeds which the proceeding seeks to avoid.

It is ordered that the motion be dismissed, and the judgment affirmed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. 502

PRINGLE v. DORSEY.

(April Term, 1872.)

[Charities @=28.]

[Charities \(== 28. \)] P. being seized in fee of a lot in Columbia, endorsed upon his title deed the following words and figures: "Received from P., in trust for the congregation of Christ Church, Columbia, November 18th, 1850." This endorsement was signed by "C., for the vestry of Christ Church, Columbia," and the deed was delivered to him by P. Christ Church, Columbia, was an unincorporated religious association. They erected a church edifice upon the lot and worshiped in a church edifice upon the lot, and worshipped in it as a congregation until 1865, when it was destroyed by fire. The association was then broken up, and the congregation ceased to exist: Held, that when the congregation ceased to exist, the trust resulted to P., and that he could sell and make good title to the lot.

[Ed. Note.—For other cases, so Cent. Dig. § 62; Dec. Dig. Cm28.] see Charities,

When a voluntary trust, for a specific charitable purpose, fails for a want of a cestui que trust, the trust, whether created by deed or devise, results [reverts] to the donor.

[Ed. Note.—For other cases, se Cent. Dig. § 61; Dec. Dig. €=30.] see Charities.

[Charities 37.]

The doctrine of cy pres, as applied in England, to charitable trusts, has never been recognized as law in this State.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 91-93; Dec. Dig. €⇒37.]

Before Melton, J., at Chambers, Columbia, Nov., 1871.

Action by James M. Pringle, plaintiff, against Edward R. Dorsey, Francis H. Gordon, Thomas S. Davant, and Thomas H. Clarkson, defendants, for specific performance.

The case is fully stated in the carefully prepared brief of appellants' counsel, which is as follows:

I. The complaint states: 1. That the plaintiff is the owner of the lot on which Christ Church stood, in Columbia, as described. 2. That the defendants, on 1st September, 1871, agreed, in writing, to purchase the same for \$2.400 from plaintiff and paid \$200 on the contract, balance to be paid 4th October, 1871, plaintiff agreeing at that day to give good *503

and sufficient titles. 3. That plaintiff *on that day tendered titles, which defendants refused. 4. The plaintiff prays a specific performance.

II. Joint answer of the defendants, 'Dorsey, Gordon and Durant, states: 1. They admit all of the facts of the complaint. 2. They admit the tender of title by plaintiff, but allege that, upon the title deed of the executors of Latta, (from whom plaintiff bought,) the defendants found these words endorsed thereon, in the handwriting of the plaintiff himself: "Received from the Rev. J. M. Pringle, in trust for the congregation of Christ Church, Columbia, November 18th, 1858," signed "Thomas B. Clarkson, for Vestry of Christ Church, Columbia," which deed, so endorsed, was delivered by plaintiff to said Thomas B. Clarkson. 3. That Christ Church was never incorporated, but the congregation, acting upon the delivery of the deed to Thomas B. Clarkson, for their use, erected upon the lot a large and valuable church edifice, in which they worshipped until 1865, (when it was destroyed by fire,) and the plaintiff stood by and consented to the erection of the building upon the lot. 4. That, under the circumstances, defendants are advised that the trust still attaches to the property within the hands of plaintiff, or in the hands of Clarkson, the trustee, and they cannot safely pay, the endorsement being on the title deed; in no event could they claim as purchasers without notice, should

their title be called in question. 5. They the delivered the original deed to Clarkson: suggest to the Court that Thomas B. Clarkson should be made a party. 6. They submit themselves to the judgment of the Court, and are willing to comply and accept title if a good marketable title can be made.

III. Upon motion before Judge Melton, Thomas B. Clarkson was ordered to be made a party; and it was further ordered that the plaintiff have leave to reply to the new matter set up in defendant's answer.

IV. The answer of Thomas B. Clarkson, (upon his being made a party,) states: 1. That he was a member of the congregation on 18th November, 1858, and one of the vestry. That the property was purchased by plaintiff from the executors of Latta, in whole or in part, with his own money, and he took conveyance in his own name. 2. That at the time, plaintiff was pastor of the church. 3. That no legal title could be made to the church—it was never incorporated. That on the 18th November, 1858, plaintiff delivered to the defendant the title of Latta to him, with the words, in plaintiff's own handwriting, endorsed, "received from the Rev. J. M. Pringle, in trust for the con-

*504

*gregation of Christ Church, Columbia," which this defendant signed "Thomas B. Clarkson, for Vestry of Christ Church, Columbia, November 18, 1858." 4. This defendant does not know whether plaintiff intended the purchase money to be refunded to him before he executed legal titles, should the church become incorporated, but the congregation did erect, with plaintiff's consent and approval, on the lot, a valuable house of worship, which they occupied until it was destroyed in 1865, and the plaintiff continued as pastor. 5. That in 1865, after the destruction of the church, plaintiff applied to the defendant for the endorsed deed, which this defendant surrendered, and it has not since been in his possession. 6. That after the destruction of the church, J. T. Sims obtained a decree against the vestry, and to save them from personal liability, the bricks upon the lot were surrendered by plaintiff to the vestry to pay the said debt, plaintiff holding the lot to be his individual property, and not liable for any debt contracted by the vestry in behalf of the congregation of Christ Church. 7. The defendant had no other interest in the property.

V. Reply of plaintiff to the answer of Dorsey, Gordon and Durant, by direction of the Court: 1. Plaintiff admits the delivery of the original title deed to Clarkson, and the endorsement of the words thereon. 2. He did purchase the lot for the use of the congregation of Christ Church with his own funds almost entirely, and some funds contributed by friends. 3. He proposed to convey to Christ Church, when it should have a legal and to show his good faith in the transaction, he endorsed the words on the deed; and Clarkson, representing what was intended to become the legal government of the church, signed his name to the endorsement. stating the purpose for which the deed was delivered. 4. He admits the erection of the church, and its destruction in 1865. 5. He avers that the church never existed as a corporate body, and never could hold real estate. 6. That the congregation has passed away, and does not exist as an association of individuals, acting without charter. That the object of the plaintiff has failed. 8. That there are no debts against the body of which Clarkson was chairman. 9. That the property claimed by plaintiff has never passed from him; that his intention to convey was never carried out, and there being no person or persons who can compel a deed by virtue of the endorsement, the plaintiff claims that the title still is in him, and is a good and sufficient title.

*505

*VI. Upon motion, it was ordered that plaintiff have leave to reply to the new matter stated in the answer of the defendant. Clarkson.

VII. The reply of plaintiff to the answer of Thomas B. Clarkson: 1. Admits the allegations of 1st, 2d, 3d and 4th paragraphs of defendant's answer. 2. In the 5th paragraph plaintiff says that it was his intention to convey the said lot when the church should be incorporated, and that it should be used for the worship of God. 3. That he approved the building of the church. 4. He admits that when the purposes for which the church was built had failed, he demanded and received the title deed from Clarkson. 5. He admits that, a decree having been obtained against the vestry in their personal capacity, he cheerfully surrendered the bricks on the lot, as an easy mode of saving the members of the vestry from personal liability.

The finding of the Court, upon the facts, was as follows:

VIII. This case came on to be heard at Chambers, by consent of all the parties. 1. The hearing was had on the complaint, and the answers of the three first named defendants. The plaintiff replied to the answer and obtained leave to make Thomas B. Clarkson a party defendant, who came in and answered, setting up new matter, to which the plaintiff was permitted to reply. 2. It appears from the pleadings in the case, that James M. Pringle, the plaintiff, with funds of his own, purchased and paid for the land agreed to be purchased by the three first named defendants, against whom the complaint for specific performance has been filed. 3. It appears further, that James M. existence, and there being no incorporation, Pringle, when he purchased the land in ques-

tion, took a deed in fee, and, subsequently, delivered the said deed to Thomas B. Clarkson, the defendant last named in the complaint, and in his own hand writing endorsed on the said deed the declaration of trust, which was signed by the said Thomas B. Clarkson. 4. That it was the intention of the plaintiff to make a title of the property to the congregation of Christ Church at such time as the congregation should, by incorporation, be enabled to hold real estate. 5. That the said congregation never was incorporated, and no title ever executed to the land in question. 6. That the congregation did erect a church edifice on the lot, but this building has been destroyed, and what remains of it, to wit, the bricks, have been delivered up and sold to pay the debts of the congregation, so that now the lot is in the

*506

condition it was before the building was *put there. 7. That the congregation of Christ Church no longer exists.

The finding upon the law was as follows: IX. There is nothing in the purpose of the plaintiff, as declared by him at the time he delivered the deed to the defendant, Thomas B. Clarkson, or subsequently, which can attach any such trust, for the benefit of the congregation of Christ Church, as may prevent the plaintiff from executing a good and sufficient title to the three first named defendants.

The judgment was as follows:

X. 1. That the agreement mentioned in the complaint, and proven in this case, be specifically performed, and that the plaintiff execute and deliver titles to the defendants, Edward R. Dorsey, Francis H. Gordon and Thomas S. Davant, in fee, (premises described.) 2. That if the defendants, Edward R. Dorsey, Francis H. Gordon and Thomas S. Davant, refuse to receive said deed, the plaintiff file the same with the Clerk of this Court, and that upon such delivery, or filing of said conveyance, the defendants last above named pay to the plaintiff, or his attorney, the residue of the purchase money named in the contract set forth in the complaint.

The defendants, Dorsey, Gordon and Davant, excepted to the conclusion of law by the Judge, and appealed to this Court:

- 1. Because the words indorsed upon the deed did create a trust, bearing both upon Pringle and Clarkson, and affecting the land in the hands of either.
- 2. Because the erection of the building, with Pringle's consent, was a further dedication of it to religious purposes by him.
- 3. Because the gift, by Pringle, was intended as a charity, which may still be carried out.
- 4. Because the destruction of the building cannot alter the trusts which follow the land.

Pope & Haskell, for appellants.

Bachman & Waties, contra.

The words endorsed on the deed, "Received from the Rev. J. M. Pringle, in trust for the congregation of Christ Church," indicate a gift to a special, not a general charity.—Story Eq., §§ 1182, 1191; Attorney General v. Bishop of Oxford, 1 Bro. Ch. R., 379; Attorney General v. Goulding, 2 Bro. Ch. R.,

*507

429; Corbyn v. French, *4 Ves., 419, 433; De-Garcin v. French, 4 Ves., 433; note; Jeremy Eq., 243 to 245.

The words of the endorsement are not ambiguous, and if they were, the Court would ascertain the intention of the donor and carry it into effect.—Story Eq., § 1183.

The purpose of the gift having failed by the extinction of the society, the property reverts to the donor,—Elliott v. Morris, Harp. Eq., 231; Bishop of Cloyne v. Young, 2 Ves., 91.

The doctrine of cy. pres. does not prevail in South Carolina. Attorney General v. Jolly, 2 Strob. Eq., 379; and particularly on page 395.

Aug. 15, 1872. The opinion of the Court was delivered by

MOSES, C. J. The intention of the donor is to determine the character of the trust created by the receipt of Clarkson, November 18, 1858, endorsed on the deed of the executor of Latta, conveying to the plaintiff the premises referred to in the bill. We are not satisfied that it is to be ascertained from the declaration of the donor in his complaint in regard to it, to which the Circuit Judge seems to have given weight, nor even that the nature of the trust apparent on the face of the instrument, can be modified or controlled by any evidence on the part of the donor, as to what he proposed by the creation of it, save in the case of alleged mistake or fraud. The words are not of doubtful import; "the trust was for the congregation of Christ Church, Columbia," and it was accepted by and "for the Vestry of Christ Church, Columbia." It is not to be denied, as is contended by the appellants, that the congregation might have compelled a declaration of the trust in their behalf, or even required that it should be executed by a title, while they had an existence as such congregation. The vestry, of which Clarkson was one, must have represented a body from whom they derived their official authority, and they who constituted the body at the date of the receipt, were the congregation of Christ Church, Columbia, subject to be increased by members of their own acceptance. For this body, whoever constituted it, he held, and if they now exist, though diminished in numbers by natural causes. and equitable rights under the trust.

"Where the donor's mind applies to a particular object, and the same is lawful, a general intent cannot be inferred."-Jeremy Eq., 245. The expression of the one object *508

which is the subject of the *charity, must exclude all others, if that is clearly made manifest by the words which he has chosen to denote it.

The subject is so fully treated by Mr. Story in his Equity Jurisprudence, that it is but necessary to refer to his conclusions from the authorities which he has collected. In Section 1182, he says: "All these doctrines proceed upon the same grounds, that it is the duty of the Court to effectuate the general intention of the testator. And accordingly the application of them ceases, whenever such general intention is not to be found. therefore, it is clearly seen that the testator had but one particular object in his mind, as for example, to build a church at W., and that purpose cannot be answered, the next of kin will take, there being in such a case, no general charitable intention." As it is the intention which is to govern and regulate the charity, the same rule must apply, whether it is created by deed or devise.

That the donor intended the proposed trust for the benefit of the congregation of Christ Church, Columbia, admits of no question. If it had been incorporated, and thus accorded an existence during the continuance of its charter, no matter by what name, if the corporation consisted of those who were the expressed objects of his bounty, there would have been an object upon which the trust could have attached, and by successive renewals its existence would have been per-According to the fact, as found petuated. by the Circuit Judge, the "congregation of Christ Church no longer exists." If there is no such congregation, who is there to claim any deeds or even any benefit by virtue of the endorsement on the title, or to demand its execution by a decree of the Court? The donor had in his mind the congregation of the church, recognized as such, represented by the vestry, and when that is dissolved the members dispersed and scattered, is the title to this plaintiff never to revert, because, perchance, at some future time, there may arise another such congregation succeeding to their rights? Is it the inere name that is to confer on others who may assume to be the congregation, the right to have this trust declared in their favor? If so, persons, though differing with the donor in his particular religious creed, under the name of "Christ Church, Columbia," might demand the enjoyment of the trust, which it is manifest he intended for the individuals who concurred.

they may demand of Clarkson all their legal | composed the congregation to which he referred, and who, by connected association, if it had not been dissolved by consequences unforeseen and disastrous, might yet have composed it.

> The building of the church by the con-*509

gregation, with the assent *of the plaintiff, cannot be set up as an independent act through which title enured to it, and if it did, who is there now to claim it? It must be referred to the trust committed to Clarkson, and when that failed, all rights which depended on it for support fell with it.

The doctrine of cy pres, which it is sought to apply to this case, is inconsistent with our institutions, and has never prevailed in this State. It is an arbitrary rule introduced into the common law from the civil law, clothing the Judges with a discretion regulated by no rules or principles, but depending entirely on the exercise of their will. We would hesitate long before we endorsed it, even if. by the force of authority, we were compelled to adopt it. We are, however, freed from the necessity. In Beckman v. Bonsor, (23 N. Y., 9 Smith, 298, affg. S. C., Barb., 260,) it was held "that the cy pres, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity, where the donor has failed to define them, and forming schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisdiction of this State on this subject." Such is the rule in the State of New York.

In Atty. General v. Jolly, (2 Strob. Eq., 395,) Chancellor Johnston, delivering the opinion of our Appeal Court, says: "Then the question is whether, if the legacy had been to this church, by name, the government of the denomination to which it is attached is such as to prevent its receiving the benefits intended. If that were the case, it by no means follows that the Court would be bound to divert the legacy to other kindred objects. That is a doctrine which this Court would be very reluctant to adopt without a strong necessity, and very mature reflection. It has never, to our knowledge, been adopted or recognized in our Courts, and we are persuaded that it ought not to be adopted.

The trust having failed for want of persons capable of claiming its execution, on well recognized principles the property reverts to the donor.

The order affirming the judgment below, and dismissing the motion, has been already filed.

WILLARD, A. J., and WRIGHT, A. J.,

3 S. C. *510

* BURRIS v. WHITNER.

(April Term, 1872.)

[Appeal and Error \$\infty\$260.]

Objection to the competency of oral evidence must be made at the trial when the evidence is offered. It is too late to make it, for the first time, by exception to the judgment.

[Ed. Note.—Cited in State v. Washington, 13 S. C. 457; Fripp v. Williams, Birnie & Co., 14 S. C. 508; Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 578; Information v. Oliver, 21 S. C. 323, 53 Am. Rep. 681; Stark v. Hopson, 22 C. 525, 55 Am. Rep. 730; Petrie v. Columbia & 482, 53 Am. Rep. 730; Petrie v. Columbia & G. R. R. Co., 29 S. C. 317, 7 S. E. 515; Latimer v. Trowbridge, 52 S. C. 196, 29 S. E. 634, 68 Am. St. Rep. 893.

For other cases, see Appeal and Error, Cent. Dig. § 1509; Dec. Dig. \$\infty 260.1

[Bills and Notes \$\infty 141.]

Suit by the payee to recover, from the executrix of a deceased partner, the amount due on a promissory note signed by the other partner in the name of the firm after its dissolution. The note sued on was a renewal, and the consideration of the original note was money borrowed by the firm from the payee: Held, That whether the renewal bound the firm or not, the plaintiff was entitled to recover.

[Ed. Note.—Cited in Heckheimer v. Allen, 89 . C. 452, 454, 71 S. E. 1033.

For other cases, see Bills and Notes, Cent. Dig. § 350; Dec. Dig. 5.141.]

[Appeal and Error \$= 1008.]

Whether a creditor had notice of the dissolution of the firm before taking a renewal note from one partner, is a question of fact upon which the finding of the Circuit Judge in a "case of Chancery" will not be reversed. where the proof of error is not clear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⇐=1008.]

Before Orr, J., at Anderson, September Term. 1870.

Appeal from the judgment of the Circuit Judge in a "case of Chancery," and his order therein refusing a motion for a new trial.

The case was as follows: Joseph N. Whitner and L. A. Osborn were partners, under the firm name of Whitner & Osborn, in the business of tanning leather in the village of Anderson. Whitner died in 1864, and the defendant, E. H. Whitner, is his executrix. Osborn died in 1866, insolvent and intestate.

In 1857, the firm borrowed \$200 from Reuben Burris, the plaintiff, and to secure its payment, gave him the promissory note of the firm, payable with interest. The transaction was with Osborn, who attended to the business of the firm, and the note was signed by him. The note was renewed in January, 1859, and again on the 8th January, 1861. On each occasion the renewal note was signed by Osborn, in the name of the firm, Whitner being absent. The firm was dissolved by

derson Gazette, a newspaper published in the village of Anderson.

The suit was brought by petition in Equity, to recover the amount due on the renewal note of the 8th January, 1861, and the only witness who testified as to the transactions between Burris and Osborn and the consideration of the note was Burris himself. His evidence was heard without objection. Burris further testified that he was a subscriber to the Anderson Gazette at the time the notice of dissolution was published there-

*511

in, and that he generally read the *paper, but he denied that he had any notice or knowledge of the dissolution of the firm before the death of Whitner.

The facts above stated were found by the presiding Judge, and he rendered judgment for the plaintiff for the amount of the note. with interest and costs.

The defendant moved for a new trial on exceptions, which, as set forth in the brief, were substantially as follows:

1. That Burris had legal notice of the dissolution of the partnership, and the presiding Judge erred in holding the contrary.

2. That Burris was an incompetent witness, as to the transactions between himself and Osborn; that his evidence as to those transactions should have been excluded from consideration by the Judge, and as the judgment rests solely and entirely upon such evidence, it is erroneous, and should be reversed.

His Honor denied the motion, and assigned his reasons as follows:

"The motion for a new trial in this case was heard on grounds, all of which may be resolved into the single one, that the decree heretofore rendered in this case was predicated upon testimony which is declared incompetent in the proviso to Section 415 of the Code.

"The plaintiff, Reuben Burris, was examined as a witness, and the facts proven by him, and upon which the decree was founded, were "transactions and communications" between the witness and persons deceased at the time of his examination, and were not competent under the Code.

"But no objection was made at the hearing to receiving the testimony, and it could only have been rejected by the court volunteering an objection. Such an interposition could not be regarded ordinarily otherwise than an impertinent interference, and as the counsel made no objection to the competency of the testimony of Burris, on the above facts, it was received by the Court and duly weighed in making up the decree.

"Can the motion for a new trial be granted now, because of the incompetent testimony thus received? I think not. If incompetent consent on the 5th January, 1859, and notice testimony is offered, it should be objected to of the dissolution was published in the An- at the trial and when presented; if received without objection, the objection is 'considered as waived,' and can furnish no ground for a new trial.—Richardson v. Provost, 4 Strob., 59. The principle in this case is also announced in the case of Turner v. Peak, 1 T. R., 717.

"I have not been able to find a single case *512

in English or Ameri*can authorities sustaining the motion for a new trial in this case. The motion is dismissed."

The defendant appealed on the grounds taken in her exceptions.

Trescot, for appellant. McGowan & Moore, contra.

Aug. 31, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The conclusion of the Circuit Judge, as affecting the competency of testimony of the plaintiff is free from objection. An objection raised to the testimony of a party, under Section 415 of the Code, is to be treated as on the same footing with all other objections going to competency. The practice, as established, is correctly stated by the Circuit Judge. In order to bring before this Court a question of competency as affecting testimony, it is necessary that the objection should have been taken in time upon the trial, and that such fact should appear by a proper exception.

The time to object to the incompetency of a witness to speak as to any particular matter, is when the testimony is offered. It would be unfair to allow a party to postpone his objection as to competency until after the testimony has been given, for in that case he would be enabled to retain the evidence if it enured to his advantage, and to exclude it if it made against him. Such speculative advantages are discountenanced by the Courts.

The first ground of appeal is not well taken, for the case did not wholly depend on the authority of Osborn to subscribe the name of Whitner to the renewal note. The consideration of that note was a partnership debt, and that was in itself sufficient to support the plaintiff's demand.

The question of notice of the dissolution was one of fact, and could only be determined inferentially and probably, owing to the character of the testimony offered. Such an inference it is peculiarly the province of the Judge who tries the question of fact to determine. And as there is no clear proof to contradict his conclusion, and it is not made to appear that he has violated any rule of law applicable to such an inquiry, there is no ground to disturb his conclusion.

The appeal should be dismissed.

WRIGHT, A. J., concurred. MOSES, C. J., absent at the hearing.

3 S. C. *513

*BLEASE & BAXTER v. PRATT.

(April Term, 1872.)

[Bills and Notes \$\infty\$97.]

A promissory note, dated in 1863, after the emancipation proclamation took effect, the consideration of which was the price of a slave purchased by the drawer from the payee, at the date of the note, cannot be impeached for want of consideration on that ground alone.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 181; Dec. Dig. \$=97.]

Before Orr, J., at Newberry, October Extra Term, 1869.

Writ of error to the Circuit Court.

The case is stated in the following report of the presiding Judge:

"This was an action of assumpsit brought by plaintiffs for the use of Jacob Wheeler, against Simeon Pratt, on his note for two thousand and sixteen dollars, payable on the 1st October, 1861, with interest from 1st October, 1857, and dated 12th October, 1857. The note was transferred soon after it was made to Jacob Wheeler. On the 15th September, 1863, a credit was endorsed on the note by Wheeler, of two thousand two hundred and fifty dollars. The only question in the case was whether that credit should be allowed the defendant by the jury, in ascertaining the amount of their verdict. It appeared from the evidence that the credit consisted of a note transferred to Wheeler by Pratt, the defendant, for \$2,250 on F. W. R. Nance and J. K. G. Nance, dated 15th September, 1863. The consideration of that note was a slave purchased by them from Pratt, on the day the note was executed. It was transferred to Wheeler by Pratt the same day, and the credit of \$2,250 entered on Pratt's note to plaintiffs. Wheeler did not inquire or know what was the consideration of the Nance note.

"I instructed the jury that the sale of the slave and execution of the note after the first day of January, 1863—on which day the proclamation of President Lincoln, emancipating all the slaves in this State took effect—rendered the sale invalid and the note void for want of legal consideration, and the note being a void instrument when transferred to Wheeler on the 15th September, 1863, could not be allowed as a credit on defendant's note. The jury were instructed to disallow the credit of \$2,250, which they did and found their verdict for the plaintiffs, according to the instructions of the Court.

"It is proper to add that the plaintiffs introduced the record of the case of Simeon Pratt v. Nance & Nance, on the above note of \$2,250, with verdict for defendants. The case was tried at the present term of the Court, and upon proof that the consideration of the

*514

note was *the purchase of a slave, the jury were instructed that the 34th Section of the 1st Article of the Constitution of this State prohibited the enforcement of such contracts in the Courts of this State, and the Jury found as already stated for the defendants.'

The errors assigned are as follows:

1. That his Honor the presiding Judge erred in charging that a credit endorsed on the note sued on in this case for twenty-two hundred and fifty dollars, on the 15th September, 1869, should not be allowed to the defendant, because (as was proved) the credit was given for a note for that amount, dated fifteenth September, 1863, on other parties, and transferred by the defendant to Jacob Wheeler, then the holder of the note sued on, and now the real plaintiff, the consideration of which note so credited was the price of a slave sold at the date thereof.

2. That his Honor erred in allowing the introduction of testimony to show the consideration of said credit, except upon an allegation of fraud, which was in no way pretended to have been perpetrated.

Baxter & Johnstone, for plaintiffs in error. Fair, Pope & Pope, contra.

Sep. 3, 1872. The opinion of the Court was delivered by

MOSES, C. J. This Court has decided, in Calhoun v. Calhoun, (2 S. C., 283,) that it is no breach of the warranty of title contained in a bill of sale of slaves, that they were afterwards liberated by the government, and that to an action on a bond for the purchase money of the slaves, such liberation cannot be set up as a defense, on the ground of failure of consideration. The principles on which the decision rested were fully considered and discussed in the opinion. The conclusions of the Court are identical with those since pronounced by the Supreme Court of the United States in White v. Hart, [13 Wall. 646, 20 L. Ed. 685], and Osborn v. Nicholson, (13 Wallace, 654 [20 L. Ed. 689]).

The error which is assigned here, in the charge of his Honor the Circuit Judge, consists in holding the consideration of the note credited on the cause of action on the 15th September, 1863, void, as being the purchase money of one who, conceded to have been a slave before the proclamation of President Lincoln, of Jan. 1st, 1863, (Appendix to Statutes, 3d Session of 37th Congress, 2,) it is claimed, was liberated by the force and effect of it.

The question there raised was made and de-*515

cided in the case of *Pickett et al. v. Wilkins and Wife et al., (13 Rich. Eq., 366,) the whole Court of Errors concurring in holding that slaves in South Carolina were not emancipated by the said proclamation. So far from differing with the conclusions there attained. it conforms to our own judgment, as indicated in the case of Brewster v. Williams, (2 S. C., 455.)

The motion is granted, and a new trial ordered, unless the plaintiffs, or the party for whom they sue, on or before the first day of the next Term of the Court of Common Pleas for Newberry County, enter a remittitur on the judgment for the sum of two thousand two hundred and fifty dollars, with interest from the 16th of September, 1863.

WILLARD, A. J., and WRIGHT, A. J., concurred. ____

3 S. C. 515

BOYCE v. SHIVER.

(November Term, 1871.)

[Mortgages 🖘 173.]

Since the Act of 1843, providing that no unrecorded "mortgage, or other instrument of writing in the nature of a mortgage," shall be valid against subsequent creditors and purchasers, an unrecorded equitable mortgage of real estate is void against subsequent creditors without notice, of the mortgagor.

[Ed. Note.—Cited in Parker & Co. v. Jacobs, 14 S. C. 117, 37 Am. Rep. 724.

For other cases, see Mortgages, Cent. Dig. §§ 412, 419-424; Dec. Dig. \$\infty\$173.]

[Mortgages \$\sim 89.]
One of the objects of the Act was to place subsequent creditors of the mortgagor on the same footing with subsequent purchasers from him, and to protect both against secret liens, whether legal or equitable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 411; Dec. Dig. \$3.]

[Bills and Notes \$\iff 440.] Where the drawer of a promissory note requests a third person to take up the note, promising, if he will do so, to pay him the amount due thereon, a new debt between such third person and the drawer for the full amount of the note, is created by the fact of the former's taking it up, although he pays for it much less than such amount.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1230; Dec. Dig. ←440.]

[This case is also cited in Hutzler Bros. v. Phillips, 26 S. C. 148, 1 S. E. 502, 4 Am. St. Rep. 687; Parker v. Carolina Savings Bank, 53 S. C. 584, 596, 31 S. E. 673, 69 Am. St. Rep. 888, as to the creation of equivise uitable mortgages by deposit of title deeds.]

Before Glover, J., at Richland, April Term, 1871.

Bill in Equity by James P. Boyce, plaintiff, against Robert C. Shiver and William Shiver, defendants.

The case will be understood from the following statement of facts, and extracts from the testimony of the plaintiff, taken at the trial.

The bill in this suit was filed 28th April,

1808, to set up an equitable lien to a house were paid by Robert C. Shiver a few days and lot in Columbia, known as the "Assemblefore the confession of judgment. The paybly" or "Shiver" House, and the following are the material facts: February 15, 1858, the plaintiff sold said house and lot to George T. Mason, for \$6,500. The conveyance was duly signed and sealed, but, by agreement, *516

was not to be delivered until the pay*ment of the purchase money. Mason entered upon and held possession of the premises until November, 1860, when he transferred all of his interest to the defendant, William Shiver, for \$8,000, his indebtedness to the plaintiff at that time being \$6,180, besides interest. It was then agreed between the plaintiff, Mason, and the defendant, William Shiver, that the latter should be substituted as purchaser in the place of Mason, and should assume the debt of Mason, amounting to \$6,-180 and interest; and that upon the execution of a conveyance by the plaintiff to William Shiver for said house, William Shiver would give his bond for the purchase money and a mortgage of the property, to secure the payment of it. Upon this agreement, William Shiver went into possession, and, by various payments, reduced his debt, January 5, 1866, to \$1,658.35. On that day the plaintiff duly executed a conveyance for the house and lot, and forwarded it to William Shiver, together with a bond for the balance of the purchase money, and a mortgage of the property, to be executed by William Shiver, and to be returned to the plaintiff; and although frequently requested to do so, William Shiver failed to execute the mortgage until November, 1866, when it was returned to the plaintiff, and was not recorded by him, because, as he alleges, the date was too remote to admit of registry within the time prescribed by law. The plaintiff, therefore, sent to William Shiver a second mortgage, which was executed April 12, 1867, and was not recorded by plaintiff, because, as he alleges, of the death of his attorney, who had charge of his papers, the plaintiff then being out of the State. In the meantime, June 19, 1866, William Shiver caused the conveyance from the plaintiff to himself to be recorded in the proper registry; and July 19, 1866, he confessed a judgment to his son and co-defendant, Robert C. Shiver, for \$5.419, with interest from 25th June, 1866, which was entered up, and a fieri facias was lodged the same day in the Sheriff's office for Richland County. By virtue of this execution, and after the filing of this bill, the Shiver House and lot were sold at Sheriff's sale to Robert C. Shiver for \$2,500. The indebtedness of William Shiver, and on which the judgment was confessed, consisted of \$1,500, advanced by Robert C. Shiver to William Shiver within three months prior to January, 1866, and also sundry notes of William Shiver, discounted by two banks in Columbia, and which

ment of said notes was made in the bills of said banks, purchased by said Robert C. Shiver, at 25 or 28 cents on the dollar, money

*517

in Columbia then *commanding an interest of from 5 to 10 per cent. per month. notes discounted by the banks and paid by Robert C. Shiver were renewals of originals made prior to January, 1861. Robert C. Shiver was induced, as is alleged, to pay the bank notes, in consideration that William Shiver should thereupon confess judgment to him for the aggregate of said notes, and the advance made of \$1,500. The bill charges that Robert C. Shiver was a joint purchaser with William Shiver of the "Shiver House." and was fully cognizant of all the facts and transactions connected with said purchase up to the confession of judgment; that the recording the conveyance and the confession of judgment were with the intent to defraud the plaintiff, and that Robert C. Shiver was a participant in such fraud. And the prayer of the bill is that the judgment confessed by William Shiver may be set aside as fraudulent and void, or if it be not wholly vacated then that so much of the amount of the same as consists of the bank notes may be reduced to the sum actually paid for them, that the mortgage made by William Shiver to the plaintiff may be set up as a lien prior to the judgment confessed to Robert C. Shiver; and that the defendant, William Shiver, be foreclosed of his equity of redemption in the mortgaged premises, and that the same be sold to satisfy the mortgage debt. The defendants, severally, deny that Robert C. Shiver was in anywise interested with his codefendant, William Shiver, in the purchase of the house and lot; and Robert C. Shiver says he never heard of the mortgage until some time after the confession of judgment to him, and he avers that it was long subsequent to the said confession of judgment that he had any knowledge of the fact that the conveyance was not to be recorded until the bond and mortgage were fully executed; and that all knowledge or notice of the existence of said mortgage was derived from the plaintiff's attorney, and long after the confession.

Rev. Dr. J. P. Boyce testified as follows: "In pursuance of his (Wm. Shiver's) request, I caused to be executed, by Col. C. J. Elford, a conveyance to Wm. Shiver of the property known as the Shiver House, on the 5th day of January, 1866, and transmitted the said papers to him for execution of the bond and These papers were transmitted mortgage. either to Spartanburg or Columbia-I think to Spartanburg; and I submit a letter of his from Columbia, dated 12th February, 1866, acknowledging the reception of the papers,

in which he assures me they shall be executed and properly done."

*511

*[This letter, with others used at a former hearing before Judge Boozer, who died before pronouncing his decree, was lost in his hands, but its contents, as above stated, were admitted.]

Rev. Dr. Boyce: "There was no privity of contract between myself and the sons of Col. Shiver. All knowledge of their connection in the matter was derived from Col. Shiver. Col. Shiver represented to me that his two sons joined with him in the purchase, and I beg to submit a letter of Col. Shiver, about 24th October, 1861, in which that fact is distinctly admitted by Col. Shiver."

[The original of this letter was also lost in the hands of Judge Boozer, but its contents were admitted.]

Rev. Dr. Boyce: "I received payment upon the property from Col. Wm. Shiver, on the 2d day of November, 1860, \$500. This was the only payment in good money that was ever made to me. On the 6th day of February, 1863, I consented to take \$1,000 in Confederate money; made no objection to doing so. On the 14th October, 1863, I received \$1,000 in Confederate money; also, on, the 19th December, 1863, I received \$1,-500 in Confederate money. In the spring of 1864, Col. Wm. Shiver came to me and said that by the Funding Act of the Confederate Government, his wife would be compelled to lose a considerable amount of the earnings of her hard labor, unless I would consent to take whatever old currency she might have at its face, or take the amount in Confederate four per cent. bonds. I then regarded myself as being very well off. I had always had a high personal regard for Mr. and Mrs. Shiver. I had received acts of kindness from Col. Shiver, and as a matter of generous action, I consented to take whatever amount he might send me in four per cent. bonds. He sent me \$3,000 of such bonds, which were credited on his bond as of the date of 6th April, 1864. These were all the payments I ever received on the bond."

His Honor, the Circuit Judge, after stating the facts, concluded his decree as follows:

Glover, J. In setting up his equitable lien, the plaintiff contends that the judgment confessed to Robert C. Shiver should be set aside as fraudulent; and this depends upon the fact whether Robert C. Shiver had either actual or constructive notice of the existence of the mortgage. If he had, he was, both at law and in equity, as much affected by it as he would have been by registry. Such notice must be clear and undoubted, amounting in effect to evidence. The mere want of caution is said not to amount to notice, unless a

*519

party *shall wilfully abstain from inquiry. after such information as should lead a prudent man to ascertain the truth. The distinction is recognized between notice to rebut an equity, and notice, as in this case, to supply the defect of registration. "To supply the want of registration," says Chancellor Harper, "the notice must be full, explicit and clearly proved."-City Council v. Page, Sp. Eq., 212. In Price v. White, Bail Eq., 216, Colcock, J., announcing the judgment of the Court, says: "I am not aware of any case, either in the Court of Equity, or in the Court of Law, in this State, where anything short of direct notice has been considered equivalent to recording; and I am one of those who think that the Court went too far, even in admitting that." The defendants, in their answer, respectively deny that Robert C. Shiver was anywise interested with his father in the purchase of the Shiver House and lot: and there is no evidence to overcome these denials, which are directly responsive to the allegations of the bill. So, too, respecting actual and constructive notice. The fact of such notice had by Robert C. Shiver is distinctly averred in the bill, and is explicitly denied by the answer of Robert C. Shiver. It is not proved by the evidence of the plaintiff, on his examination in Court, and is directly disproved by the evidence of Robert C. Shiver, who was examined as a witness; and. according to the evidence of William Shiver, who, so far from informing Robert C. Shiver of the mortgage or the agreement concerning it, he, on the contrary, assured him that there was no incumbrance whatever on the property. The allegation of the bill, that there was actual or constructive notice, being expressly denied by the answer, and no proof having been offered by witnesses, nor by corroborating circumstances and a witness, the defendant is entitled to the benefit of his answer denying notice.

It was contended that a mortgage, incomplete for want of registry, may be set up as an equitable lien, and cases were referred to establishing and enforcing such liens in equity against subsequent creditors without notice. It is not necessary to notice the several classes of these imperfect securities mentioned by Mr. Adams, (Adams' Eq., 122,) not only because there has been no uniformity in the decisions of the different States of the Union in regard to the effect of such liens, but because our statute law, in respect to unregistered mortgages, has materially affected the principles applicable to such equitable liens. In England the doctrine has been long established, and acted upon, that although the equitable lien will not prevail against a subsequent purchaser for valuable considera-

*520

tion without *notice, yet that a Court of

creditors; and many cases may be found in our reports up to 1843 decided upon the same principle.—Welsh v. Usher, 2 Hill Ch., 167 [29 Am. Dec. 63]; Chancellor Harper refers to Taylor v. Wheeler, (2 Ves., 564,) and other cases decided in England and South Carolina, where agreements for mortgages, incomplete for want of delivery, &c., have been established as equitable liens against prior judgment creditors. These cases, however, were decided before the passage of the Act of 1843, (11 Stat., 256,) which provides "that no mortgage or other instrument of writing in the nature of a mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same shall be recorded in the office of Register of Mesne Conveyance for the District wherein such real estate lies, within sixty days from the execution thereof." If, therefore, the provisions and policy of this Act are of force, it cannot be contended that an equity can arise in favor of an unregistered mortgage, which the Act declares invalid, both against creditors and purchasers; and I apprehend that no case can be found since the passage of the Act of 1843, where a mortgage, not recorded within the prescribed time, has been held to be a preferred lien against a subsequent judgment creditor without notice.

The plaintiff also contends that Wm. Shiver's indebtedness, by the notes discounted by the two banks in Columbia, was contracted long before his engagement to execute the mortgage; that by acquiring the ownership of said notes, no new debt against Wm. Shiver arose, but the old indebtedness was merely continued and transferred, and that Robert C. Shiver is not, therefore, a subsequent creditor of Wm. Shiver, in the meaning of the Act of 1843. As between the banks and Wm. Shiver, the indebtedness was not in its origin subsequent to his engagement respecting the mortgage; but as between him and his son, Robert C. Shiver, it certainly was. was not merely a contract between Robert C. Shiver and the banks as to the transfer of the notes, but there was another and a distinct agreement between him and his father, Wm. Shiver, which in substance was, that in consideration that Robert C. Shiver would take up the bank notes, and therefore relieve the endorsers from their liability, he, Wm. Shiver, would confess a judgment for an amount embracing the advance made by Robert C. Shiver and the principal and interest of the bank notes, without regard to what he had paid for them. One of the motives of Wm. Shiver, in asking the aid of Robert C. Shiver, was to relieve his endorsers, and that

*521

was to be effected by *the satisfaction of the notes. The advance of \$1,500 and the bank notes was a debt acknowledged by Wm. Shiv-

Equity will enforce it against subsequent creditors; and many cases may be found in our reports up to 1843 decided upon the same principle.—Welsh v. Usher, 2 Hill Ch., 167 [29 Am. Dec. 63]; Chancellor Harper refers to Taylor v. Wheeler, (2 Ves., 564,) and other cases decided in England and South Carolina, where agreements for mortgages, incomplete

It is ordered that the bill, as against Robert C. Shiver, be dismissed with costs, and without costs as against Wm. Shiver.

The plaintiff appealed on the grounds:

- 1. Because the question was, not of the registration of a legal mortgage, but of the lien of an equitable mortgage, insusceptible of registration.
- 2. Because the agreement of the defendant, Wm. Shiver, to execute a legal mortgage created an equitable mortgage on the 5th day of January, 1866, the day on which the plaintiff executed the conveyance, and delivered it, with the bond and mortgage, to be executed by the said Wm. Shiver.
- 3. Because an equitable mortgage is a lien, superior to any other claim, except that of a subsequent purchaser for valuable consideration without notice.
- 4. Because no legal mortgage susceptible of registration was ever executed by the said Wm. Shiver to the plaintiff until long after his confession of judgment to the defendant, Robert C. Shiver, and the recording of the conveyance.
- 5. Because the Act of 1843 does not apply to equitable mortgages, but to legal mortgages susceptible of registration, the language of the Act being, "mortgage, or other instrument of writing in the nature of a mortgage."
- 6. Because, even if the Act did apply to equitable mortgages, the indebtedness of Wm. Shiver to Robert C. Shiver does not fall within its provisions, the debt of \$1,500 being admitted to have been created before, and not after, the 5th day of January, 1866, the day on which the equitable mortgage was created, and the other debts being mere payments by Robert C. Shiver of antecedent debts of Wm. Shiver, which merely put him in the place of the antecedent creditors.
- 7. Because the relation of father and son between the defendants—the admission by the defendant, Robert C. Shiver, that he had knowledge of the transaction between his father and the plaintiff until after the war; the fact that he was the custodian of his father's papers, of which the unexecuted bond

*522

and mortgage formed a part; *the fact that the conveyance of the plaintiff to Wm. Shiver was delivered by Robert C. Shiver to the Clerk for registration, was paid for and taken out by him; the extreme haste with which the debts of Wm. Shiver were purchased by Robert C. Shiver, the conveyance recorded, and the confession of judgment made and entered up, together with the positive evidence

of the plaintiff—fix notice upon Robert C. after the lien in favor of plaintiff was cre-Shiver, and affect him with the fraud charged. assume that the judgment was confessed before notice of the lien was given; as-

S. Because, in any event, his Honor should have rejected the antecedent debt of \$1,500, and reduced the remaining indebtedness to the amount actually paid for it by the defendant, Robert C. Shiver, and the plaintiff should have had the benefit of such reduction.

9. Because, inasmuch as the property was sold under the execution of the said Robert C. Shiver, and purchased by him pendente lite, his Honor should have ordered an inquiry as to the value thereof, and given to the plaintiff the benefit of any excess therein over and above the indebtedness of the said Wm. Shiver to the said Robert C. Shiver.

10. Because the property, having been sold, pendente lite, did not bring its real value, and his Honor should at least have ordered a re-sale in order to ascertain its true value in relief of the plaintiff.

Pope, for appellant:

That what is known as the "vendor's lien," a lien given by the law itself to secure the payment of the purchase money of real estate sold and conveyed, (Mackreth v. Symmons, 15 Ves., 342,) has not existed in this State since the decision in Wragg v. Comptroller General, 2 DeS., 508, we fully concede. Upon no such ground do we stand. Our position is that the transaction between William Shiver and the plaintiff, in reference to the sale and conveyance of the Shiver House, and the mortgage to be given to secure the payment of the balance of the purchase money, created an equitable mortgage of the property which the plaintiff has the right to enforce against Robert C. Shiver-Hill. on Mortg., 647; Adams' Eq., 123.

It is clear, upon the facts, that William Shiver practiced a gross fraud upon the plaintiff, and it is equally as clear, upon the law, that the transaction created an equitable mortgage which bound him and the land.—Russell v. Russell, 1 Lead. Cas. in Eq., 541; Read v. Simmons, 2 DeS., 552; In the matter of Howe, 1 Paige, 125.

Then as to Robert C. Shiver. If he held as a purchaser for valuable consideration without notice, the plaintiff would be concluded;

*523

*but his position is not that of purchaser but of creditor. The question then arises, and it is the principal question which the case presents, whether a subsequent creditor, without notice, is protected against an equitable mortgage.

That the law, as it stood prior to the Act of 1843, did not protect such a creditor, is clear upon the authorities, and the fact that he obtained a judgment for his debt, before he had notice of the lien, added nothing to the strength of his equity. Assume that the debt to Robert C. Shiver was contracted

ated; assume that the judgment was confessed before notice of the lien was given; assume all this, and yet, according to every reported case, the lien must prevail, notice having been given before the purchase at Sheriff's sale.—Basset v. Nosworthy, 2 Lead. Cases in Eq., 33: Williams v. Hollingsworth. 1 Strob., 103; Bank v. Gourdin, Sp. Eq., 20; Dow v. Ker, Sp. Eq., 417; Massey v. Mc-Ilwain, 2 Hill Ch., 428; Pow. on Mortg., 459. The subsequent general creditor without notice has no equity as against the equitable mortgagee, because the former has no interest or lien of any kind, whereas the latter has a specific lien amounting to an estate or interest; the subsequent judgment creditor has no such equity, because his lien is general, and, therefore, inferior; a general lien binds all that the debtor owns, but it binds only his interest or estate in any particular piece of property, whatever that interest or estate may be. If the interest or estate be subject to liens, the judgment binds only what remains after such liens are satisfied.

A purchaser at Sheriff's sale, even if he be a third person, is bound by all the equities, whether he had notice of them or not, that bound the judgment creditor.—Freeman v. McBane, 2 Jones' Eq., (N. C.) 44; Bank v. Campbell, 2 Rich, Eq., 179; Williams v. Holingsworth, 1 Strob. Eq., 103; Winslow v. Chiffelle, Harp. Eq., 19; Taylor v. Fields, 4 Ves., 396. But, in this case, the plaintiff in the judgment was the purchaser; he paid no money; his bid went as a credit upon the judgment, and he had notice of the equity before the sale.

It is clear, then, that Robert C. Shiver is not protected by his position as purchaser at Sheriff sale, nor by his right as a subsequent judgment creditor, and it is equally as clear that as a subsequent general creditor without notice—assuming him to be a subsequent creditor—he is not protected against the plaintiff's equitable mortgage, unless the law has been changed by the Act of 1843, 11 Stat.,

*256, which provides "that no mortgage or other instrument of writing in the nature of a mortgage of real estate, shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same shall be re-corded * * * within sixty days from the execution thereof." This Act does not change the law in relation to equitable mortgages; it relates only to legal instrumentsto "mortgages or other instruments of writing in the nature of mortgages."-Harper v. Barsh, 10 Rich. Eq., 154. The instruments which these terms embrace, are those well known legal instruments called mortgages, or some legal "instruments of writing" of the same nature. An equitable mortgage is a very different thing; it grows out of a transaction, whether written or not, or partly ence on the 2d November 1860, and not on the written and partly verbal, or it may grow out of acts-it is a lien given by the law and not by the contract of the parties. How can a mortgage arising from a "mere deposit of title deeds," or from the "implied agreement of the parties," or from the "justice of the case," (1 Hill. on Mortg., 647; Adams' Eq., 123,) be recorded? But the rule is general-it applies to all equities, whether arising from deeds or acts or otherwise. Such equities are "wholly without the scope and operation of the recording Acts."-Le Neve v. Le Neve, 2 Lead. Cas. Eq., 137; Grimestone v. Carter, 3 Paige, 421.

It is clear, then, that the Act of 1843 does not include equitable mortgages. It follows that the law applicable to the case before the Court is the law as it existed when that Act was passed. By that law an equitable mortgage was good against subsequent creditors without notice, and as Robert C. Shiver can occupy no higher or better position than that of a subsequent creditor, his defence falls to the ground.

[The counsel also contended, upon the evidence, that Robert C. Shiver was not a subsequent creditor; that the debts for which the confession was taken existed before the mortgage; and that his position was that of an assignee or purchaser of the debts.]

Carroll & Melton, McMaster & LeConte, contra:

- 1. The defendant's, Wm. Shiver's, contract with the plaintiff to execute a mortgage of the Assembly or Shiver House and lot, was not, of itself, an equitable mortgage, in its proper sense, but simply an agreement to execute a legal mortgage.—2 Story Eq., § 1020; Coming ex parte, 9 Ves., 115; Norris v. Wilkinson, 12 Ves., 192.
 - 2. That the mortgage contemplated was *525

never executed until *April, 1867, and was, therefore, "insusceptible of registration" at an earlier date-was palpably the result of the plaintiff's own supineness and laches.

- 3. By the Act of 1843, subsequent creditors are placed upon the same footing with subsequent purchasers for valuable consideration without notice; and if the latter would prevail against the plaintiff's alleged equitable mortgage, as is conceded, so also must the former.
- 4. The Act of 1843 is in terms directly applicable to the mortgage contracted for between the plaintiff and the defendant, Wm. Shiver; and the opposite exposition of the statute would be in effect to offer a premium for its disregard and violation, and reward for laches and negligence.
- 5. If the equitable mortgage claimed by the plaintiff was created by the agreement for the legal mortgage, then that equitable mortgage must be regarded as having come into exist-

5th January, 1866. And as to his demand of \$1,500 for moneys advanced, Robert C. Shiver, the defendant, is, therefore, a creditor of Wm. Shiver subsequent to such equitable mortgage.

- 6. But if the demand of \$1,500 for moneys advanced were deducted from the amount of the judgment confessed by Wm. Shiver to Robert C. Shiver, there would still remain of the judgment debt \$3,919, exclusive of interest, a sum exceeding by more than \$1,400 the price (\$2,500) at which the Shiver House and lot were sold by the Sheriff under that judgment; and if this be so, then it is wholly immaterial whether the demand of \$1,500 arose before or after the plaintiff's alleged equitable mortgage.
- 7. The payment by Robert C. Shiver of Wm. Shiver's notes held by two of the Columbia banks, did not serve merely to "put him in the place of the antecedent creditors," (the banks,) but, on the contrary, by the express terms of the agreement between Robert C. Shiver and Wm. Shiver, operated to satisfy and extinguish those notes, and to create a new and distinct debt against Wm. Shiver.
- 8. Between Robert C. Shiver on the one side, and the plaintiff and Wm. Shiver, or either of them, on the other, there existed no relation of trust or confidence which disabled R. C. Shiver from contracting with Wm. Shiver as he did respecting the notes held by the two Columbia banks, and the consideration he (R. C. Shiver) should receive for paying and satisfying them.
 - 9. Notice to R. C. Shiver of the mortgage *526

contracted for between *the plaintiff and Wm. Shiver was not only not proved, but was fully and effectually disproved; and as the Circuit Judge has so decided, and the evidence upon which he acted has been wholly omitted from the appellants' brief, the question of notice, it is respectfully submitted, ought not even to be entertained by the Court.

- 10. The plaintiff's application to have the mere agreement for a legal mortgage set up as an equitable mortgage, is an appeal to the jurisdiction of the Court to decree the specific execution of contracts; a jurisdiction never exercised when the plaintiff has not shown himself "ready, desirous, prompt and eager to perform the contract," nor when the decree would operate harshly and inequitably, or against public policy.—1 Story Eq., §§ 776 and 709; Seaton v. Slade, 7 Ves., 265. (Am. Notes,) 3 Lead. Eq. Cases, 80; Woollan v. Hearn, 2 Lead. Eq. Cases, (Am. Notes,) 699.
- 11. The injury, of which the plaintiff complains, has been brought upon him by his own laches and negligence, and he is precluded from relief by the principle of law, that "whenever one of two innocent persons must

suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.—Liekbarron v. Mason, 1 Smith Lead. Cas. 854; 1 Green. Ev., § 207; Vermont y. Delaire, 2 Des., 323.

Sept. 3, 1872. The opinion of the Court was delivered by

MOSES, C. J. The equity of the plaintiff, as presented by the brief, is certainly of a high character, and it was due to his zealous counsel, who pressed their conviction of the right of their case in an able and learned argument, that we should not only give it a full consideration, but examine with care the various views by which a reversal of the Circuit decree was sought.

If it were within our power to administer what we might regard as justice, measured alone by our individual conception of it, we most probably would conclude that the plaintiff was entitled to all that he claimed by his bill. But it is not within our province to substitute our own notions of abstract right, in the place of the well established rules which have been prescribed for our adoption by the wisdom of the law, fortified, as they have been for ages, by their acceptance as the proper standard for the regulation and control of property, and sanctioned by the experience and wisdom of the judicial luminaries who have been called on to enforce them.

Impotent and vain, too, would be the endeavor to prevent injustice, by limiting or modifying the application of legal principles

*527

by *our own considerations of equity, regardless of the well defined and accepted rules decreed by "the great masters" who have built up a science with principles now almost as well defined and ascertained as those of the common law itself.

The decree determines the question of fraud in favor of the defendant, R. C. Shiver, and we see nothing in the evidence which shews that he had any notice of the circumstances attending the execution of the title by the plaintiff to his father, William Shiver. The deception which he practiced on the plaintiff cannot affect the judgment, if R. C. Shiver occupied the position of a subsequent creditor without notice, for there was no duty or obligation which could place him in the relation of a trustee.

It becomes, therefore, necessary to enquire whether the said R. C. Shiver stood as an antecedent or a subsequent creditor of the said Wm. Shiver, on the 19th July, 1866. Assuming that, as to the \$1,500, he was an antecedent creditor, there would yet remain of the judgment \$3,919, besides interest, an amount exceeding the price at which the premises were sold. This arose from the indebtedness of the father to the son, on account of the transaction with the banks, and

alone consider. It does not appear from the brief on what cause of action the confession of judgment was founded. We are prevented from supposing that it was on the notes of Wm. Shiver transferred by the bank to R. C. Shiver, which might raise a question of some interest as to the position in which he could be regarded in respect to them, for the bill alleges that "he paid the debt of his father in bank notes at par, for which he had paid not more than twenty-five cents on the dollar," and prays, among other things, that if the confession cannot be vacated for fraud, "it may be reduced to the amount actually paid for the notes of William Shiver." If he satisfied these notes at the request of his father, which does not appear to be controverted, the liability of the father to him arose at the time of the payment, and from that period alone was he a creditor. A confusion has arisen as to his relation, by viewing him at times as the purchaser of the debts from the bank, which is at variance with the tes-

It was competent for William Shiver to contract with his son for the payment to him of the full amount due on the notes, if he would pay and satisfy them. Holding, therefore, that as to this portion of the debt, he occupied the position of a subsequent creditor, and that the debt is to be estimated at *528

the sum recognized by both of them, *the only further enquiry is, whether the agreement of William Shiver with the plaintiff, Boyce, amounted to an equitable mortgage, and if so, whether it can prevail against the said R. C. Shiver, as such a creditor without notice?

The doctrine of lien, by equitable mortgage, either arising from imperfect attempts to mortgage, or to devote specific property to the payment of a particular debt, or established "as implied from the agreement of the parties, or the justice of the case," or even created by the deposit of title deeds, has long prevailed in England, and has been recognized by our Courts. The principle is not confined to the lien by mortgage only, but extends even to agreements for sale of real estate, and permits the equitable interest thus raised to prevail against a subsequent creditor, though holding by a general lien, In fact, in the case of the Bank v. Campbell, 2 Rich, Eq., 191, effect was given to the equitable interest against the legal title of a purchaser deriving it from a sale under a subsequent lien. To what extent this Court might be willing to adopt the principle there announced, it is not necessary now to determine, for the plaintiff's counsel here, so far from insisting on the doctrine therein declared, concedes "that by general principles, and without reference to recording acts, no equity can stand against a bona fide purchaser for

valuable consideration, without notice." R. not only impaired, but prevented by giving C. Shiver, however, does not occupy that position, for he purchased while the cause was pending, and can therefore be regarded only as claiming as a subsequent creditor, without notice, and must stand or fall by the consequences which follow that relation. The plaintiff, according to the rule maintained, both by the Courts in England and this State, is entitled to the relief which he seeks, unless estopped by the provisions of the Act of 1843, 11 Stat., 256.

It is contended for the plaintiff that equitable mortgages are not within the recording Acts. This is true so far as they are recognized as creating rights in themselves, binding all who were parties to their creation, and, so far as they do not come within the letter or spirit of any legislative prohibition, which refuses to give effect to a perfect, legal mortgage, unless recorded as by law provided and required. Before the Act of 1843, a written mortgage, complete in form. but not recorded, was preferred to a subsequent creditor without notice. A mortgage, conferring only an equitable right, frequently incapable in itself of being recorded, was good, too, against such subsequent creditor, but neither could take precedence of a subsequent purchaser for valuable consideration *529

without notice. *The plain and manifest object of the Act was to destroy the distinction in the position of the subsequent creditor and purchaser, and to place them both on the same footing. While this is not denied as to those claiming under mortgages in legal form, it is insisted that the Statute works no change in the mortgage which, by the very nature of it, cannot be recorded. To say that the validity which the Legislature withholds from a legal mortgage, for want of recording, shall be given to an equitable mortgage, which may be known only to the parties interested in it, and then often relying on human testimony for its purposes and intention, would be to charge the law-making power with an inconsistency too gross and violent to be entertained for a moment.

The wisdom and policy which dictated the Act, to suppress the mischief it was intended to subdue, must be extended to all contracts and agreements through which an equitable lien by way of mortgage can be asserted. The consequence of imparting validity to unrecorded mortgages wrought most injurious consequences, by depreciating the value of real estate, which to some extent depended on the facility of the means of ascertaining its title.

In a country where land is often changing hands, freed from, and unfettered by the laws which confine it to hereditary succession and descent, the admitted policy is to afford a ready mode of discovering all changes in the title, or incumbrances upon it. This is effect to secret conveyances, which are seldom brought into notice until some innocent party is to be injured by their introduction. The proposition of the plaintiff seeks to place an equitable mortgage upon a better footing than a duly executed mortgage. It is admitted that if the plaintiff had a complete mortgage of the land, it could not prevail against the defendant, R. C. Shiver, for want of recording; why? because he had no notice of it; and yet it is claimed at the same time, that his unwritten equitable mortgage, growing out of the transaction between him and William Shiver, is to operate to the prejudice of R. C. Shiver, who, in ignorance of it, became his creditor. It would seem that the proposition, by its mere statement, refutes itself.

Grimestone v. Carter, 3 Paige, 437, referred to as an authority, proceeded upon the ground that the purchaser had notice of the possession which was sufficient to but him on enquiry. It was a priority sought against a subsequent purchaser without notice, which it is admitted in the argument, for the motion before us cannot prevail in this State. So far as the case is to have any force as es-

***530**

tab*lishing an equitable claim, it will be remembered that the Chancellor (p. 439) remarks that such claims are "expressly excepted from the provisions of the Statute (1 R. S., 762, § 38,) requiring conveyances to be So far from any disposition to recorded." extend the provisions now existing by law, in favor of secret liens, we feel that the highest considerations of public policy require that they should be held within their prescribed bounds. There is not a single modern writer, whose opinion carries weight, who does not regret that the Courts ever favored the introduction of secret liens on property, and many of the most eminent Judges of England, while they felt bound from precedent and authority to sustain them, denied the wisdom and policy of the rule which permitted them, and but few Judges in our country, whilst also following the authority of names which preceded their own, have failed to declare their determination not to extend them beyond the limits to which they have been carried.

We live in a day of enterprise and commerce, and no lien on property of any character should avail unless an opportunity is afforded to the public to be informed of it.

It is asked "if it was the intention of the Act of 1843 to cut up by the roots the whole doctrine of constructive trusts, as administered by this Court?" While we answer that such may not have been its purpose, we at the same time hold that effect cannot be given, as against a subsequent creditor without notice, to an agreement or transaction

through which an equitable lien is asserted peal, returned into this Court by the Clerk of the Circuit Court as copied from the record on and claimed.

The case is a hard one on the plaintiff, who, in his dealing with William Shiver, has exhibited a generous and liberal, though a misplaced confidence, but we cannot deprive the son of his right because the father has violated his trust to the plaintiff, who possessed him with the legal title, and thus permitted him to gain credit on the faith of it.

We do not think, however, that it is a case

for costs against the plaintiff.

It is ordered that the motion be dismissed -William Shiver to pay all the costs, and in case of his inability to do so, each party to pay his own.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C. *531

*SULLIVAN v. THOMAS.

(April Term, 1872.)

[Appeal and Error \$\sim 1008.]

The Supreme Court has jurisdiction, in "cases of Chancery," to review, on appeal, the facts of the case, and if error be found therein, to reverse or modify the judgment of the Circuit Court.

[Ed. Note.—Cited in Lucken v. Wichman, 5 S. C. 414; Trotter v. Robinson, 6 S. C. 410; Fraser & Dill v. Charleston, 8 S. C. 339; Shaw v. Cunningham, 9 S. C. 272; In re Solomons' Estate, 74 S. C. 191, 54 S. E. 207.

For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. &=

1008.1

[Courts c=244.]

By the term "cases of Chancery," as used in Art. 4, Sec. 4, of the Constitution, declaring the jurisdiction of the Supreme Court, is meant such cases as were cognizable by the Courts of Equity of the State, existing at the time of the adoption of the Constitution.

[Ed. Note.—Cited in Gibbes v. Elliott, 8 S. C. 61; State ex rel. Douglas & Jackson v. Gaillard, 11 S. C. 316.

For other cases, see Courts, Cent. Dig. §§ 733, 734, 737–740; Dec. Dig. €⇒244.]

[Appeal and Error 556, 559.]

What is meant by the term "case" in the Rules of the Circuit and Supreme Courts, and Code of Procedure, explained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2483-2489; Dec. Dig. 🖘 556, 559.]

[Appeal and Error 76.]

What is a "final judgment" in a "case of Chancery." from which an appeal may be taken, considered.

[Ed. Note.—Cited in Ex parte Farrars, 13 S. C. 260.

For other cases, see Appeal and Error, Cent. big. §§ 426-428, 430, 431, 435-443; Dec. Dig.

[Appeal and Error \$\iff 516.] and there ded the judgment of Chancery," upon the pleadings and exhibits, evidence, written and oral, taken by a Referee, the Circuit decree, and notice with grounds of apiss as follows:

file in his office.

[Ed. Note.—Cited in Ivy v. Clawson, 14 S. C.

For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2340; Dec. Dig. \$\simega516.]

[Fraud €=58.]

The facts of the case upon a question of fraud reviewed by the Supreme Court on ap-peal, and the decision of the Circuit Court finding that no fraud was proved, held, error of fact, and decree reversed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ६⇒58.]

[Guardian and Ward \$\sim 131.]

[In a suit to set aside receipts executed by a guardian, etc., on the ground that the same were procured by fraud, evidence examined, and held to show fraud warranting a decree for complainant.]

[Ed. Note.—For other cases, see Guardian and ard, Cent. Dig. §§ 447-451; Dec. Dig. 😂 131.]

[Appeal and Error \$\sim 987.]

[On appeal in equity cases the court will consider the evidence, and determine as to the truth of the matters involved, giving due weight to the opinion of the chancellor.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893–3896; Dec. Dig.

[Appeal and Error \$\sim 1008.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⇐=1008.]

[This case is also cited in Flinn & Hart v. Brown, 6 S. C. 212; Sloan v. Westfield, 11 S. C. 447, as to jurisdiction and procedure in chancery cases, and in Cureton v. Hutchinson, 3 S. C. 607, there can be no appeal from a judgment not final.]

Before Orr, J., at Greenville, August Extra Term, 1871.

Bill by James M. Sullivan and others, plaintiffs, against William M. Thomas, George W. Tolbert, John R. Tolbert, William Hickson and Martha Hickson his wife, T. Henry Stokes and Abigail Stokes his wife, George W. Collins, Anna Child, and others, defendants.

The brief, upon which the case was heard on the appeal, contained copies of the bill, answers and exhibits, the evidence, oral and written, taken by a Referee, the opinion and decree of the Circuit Judge, and the notice and grounds of appeal.

The questions made in the Supreme Court, and there decided, will be understood from the judgment of that Court; and the opinion and decree of the Circuit Judge, which

Orr, J. The bill in this case was filed 26th; ment on his wife's interest was made until July, 1869, to set aside certain receipts exe- after the termination of the war; when they cuted by James M. Sullivan, guardian, Wil- received from Tolbert \$3,000 in gold, equal liam Hickson and wife Martha. George W. Collins and wife, (now deceased.) to William M. Thomas, late Commissioner in Equity for Greenville, and to set aside and annul the receipt of T. Henry Stokes and wife Abigail, endorsed on the bond of defendants Tolberts, 31st October, 1865, "satisfied, so far as my wife's interest in this bond is concerned," and also their loose receipt for three thousand dollars in gold, in satisfaction of their claim on the bond of the Tolberts, and for account.

*532

*George W. Tolbert purchased at Commissioner's sale the Cambridge land of the "Shaw estate," for the sum of fifteen thousand one hundred and eighty-nine dollars, containing 915 acres, on the 6th day of February, 1861, payable in two equal annual installments, with interest. He gave his bond for the purchase money, with R. R. Tolbert, his father, and John R. Tolbert, his sureties. George W. Tolbert, the principal in the bond, (now deceased,) filed his answer to the bill 9th November, 1869, to which reference may be made, and which has been adopted by John R., the administrator.

The last installment of the bond fell due 6th February, 1863, and at least one of the parties in interest (Collins) desired that the bond should be paid. Thomas, the Commissioner in Equity at that time, wrote to Tolbert. After a correspondence between them, George W. Tolbert requested Thomas to advance the money due on the bond, and that he would reimburse him for such advance by the sale of cotton he then had on hand. The money due on the bond (or nearly all of it) was advanced by S. Thomas, the father of the Commissioner, and on the 6th of February, 1863, Thomas paid to Collins and wife four thousand five hundred dollars, and, by receipt of same date, to Hickson and wife four thousand five hundred dollars, and on , 1863, to Dr. James day of M. Sullivan, the sum of \$606.31, and on the day of June, 1863, to Dr. James M. Sullivan, as guardian, the sum of \$1,132.66, making the aggregate paid to him in his own right and as guardian, the sum of \$1.738.97.

These payments nearly extinguished the interest which the above named parties had in the bond. After the payment there remained due to Collins and wife \$139.93; to Hickson and wife \$139.93; and to Dr. Sullivan and his wards the sum of \$249.51. No payment was made in satisfaction of the interest of T. Henry Stokes and wife (the only other distributees) till after the war. agreed to receive Confederate money from Thomas for his wife's interest, but after the money had been raised by Thomas, Stokes refused to receive it from him, and no pay-

(in October, 1865,) to \$4,800 in United States currency, in full satisfaction of his wife's interest in the Tolbert bond.

The facts found in this case are, that the arrangement made between George W. Tolbert and William M. Thomas, late Commissioner in Equity, was fair, upright and bona

fide; that Tolbert ap*plied to him to advance the money to the heirs of the "Shaw land" for him on the bond; that he advanced to George W. Collins and wife the sum of \$4,500; to William Hickson and wife \$4,500; and to James M. Sullivan, individually and as guardian, \$1,738.97; leaving due to the above parties only the sums heretofore set forth. That the above parties all received the money from Thomas, gave him unconditional receipts for the same, and used it; that these receipts are all dated in 1863, and that the present bill to cancel them was not

filed till 1869.

That Collins and Hickson were importunate to have the Tolbert bond collected as soon as due. That no fraud, imposition or misrepresentation was practiced by Thomas on Collins, Hickson, or Sullivan: that they received the money with full knowledge of the fact that he was advancing it for G. W. Tolbert, principal in the bond; that the claim now set up by Sullivan, Collins and Hickson is an after thought, which would never have been conceived if Confederate money and bonds had not become valueless; that when they received the money their receipts were given for the several sums specified, and extinguished their respective interests in the Tolbert bond to that extent. That no collusion has been found between Thomas and Tolbert, to injure or defraud the parties having interest in the Tolbert bond; nor are any of the acts of Thomas in the whole affair proved to be mala fides; that Thomas, at the July Term of the Court for Greenville, 1863, the first Court held after the arrangement made with his father, reported the same, exhibiting the payments to Sullivan, Hickson and Collins, and the assignment of the bond to his father, S. Thomas; that it was a public and official report, and silences the complaint and clamor of Sullivan, Hickson and Collins, that they had no cognizance that the money was raised otherwise than by payment by the Tolberts; and that they slept on their rights from July, 1863, to July, 1869, when this bill was filed. Thomas, having advanced or procured the advancement of \$10,738.97, and procured, in good faith, receipts of the parties above named for that amount, proceeded to make a settlement with George W. Tolbert, the principal in the bond: upon which settlement, on the 31st Oct., 1865, Tolbert paid him the

sum of \$2,000 in gold, equal at that time, to test of the said Abigail in the bond of George \$4,160 in U.S. currency, in full satisfaction of the money advanced by or through Thomas, to pay Hickson and wife, Collins and wife, and Sullivan, guardian.

As to T. Henry Stokes' demand to have the settlement between himself and G. W. Tolbert opened on the grounds of fear, fraud

*534

*and misrepresentation—a settlement made 31st Oct., 1865, when he signed a receipt on the bond, acknowledging satisfaction of the bond so far as his wife had an interest in it, and the joint loose receipt of himself and wife for the sum of three thousand dollars in gold, in satisfaction of her interest in the bond—it is even more preposterous than that set up by the other parties interested in the bond. The facts found with reference to his claims are, that George W. Tolbert paid him and his wife the sum of \$3,000 in gold, equal in U.S. currency to \$4,800, on 31st Oct., 1865; that in consideration that it was paid in cash, without hazard, litigation or expense, they accepted it in full satisfaction of the wife's share or interest in the bond of Tolbert; that no fraud or misrepresentation was practiced upon him by either of the Tolberts; that before accepting their offer, he went to Abbeville and informed himself of the pecuniary condition of the Tolberts; and being thus informed, he accepted the offer, expressed himself well satisfied with the arrangement before and after the money was paid, and congratulated himself on receiving on the bond a sum so much greater than that paid to the other parties in interest in Confederate money in 1863; that the compromise was fair and honest when made; that T. H. Stokes was not put in fear to make the settlement, and that neither fraud nor misrepresentation were practiced upon him. It is further found that there remains due and unpaid to Collins and (then wife) now step-daughter, Anna Child, on bond, \$130.93, with interest from the 6th February, 1863, one-third thereof to Collins and two-thirds to Anna Child; the same amount to Hickson and wife, with interest from same time; to Dr. J. M. Sullivan, in his own right, \$56.53, and as guardian of all his children, \$193.04, with interest on same from 6th February, 1863.

It is, therefore, adjudged that the defendant, John R. Tolbert, as administrator of the estate of George W. Tolbert, pay the parties aforesaid the said sums of money remaining unpaid on the bond of G. W. Tolbert, with the interest thereon; the payments to be made from the assets of the estate of said G. W. Tolbert, and if insufficient, then to be paid by the said John R. Tolbert, as executor of R. R. Tolbert, and by the said John R. Tolbert, in his own right. It is further adjudged, that T. Henry Stokes and wife, Abigail, have been fully paid and satisfied the inter-

W. Tolbert, and that the settlement made by them with said Tolbert is final and conclusive, and that they are not entitled to have the settlement opened, or to the relief pray-

*535

ed for, and *that the bill, as to said T. Henry Stokes and wife, be dismissed at their costs. It is further adjudged, that John R. Tolbert, administrator of G. W. Tolbert, pay the remaining costs in this case.

The plaintiffs gave notice of appeal, as follows:

The plaintiffs give notice to the defendants and their attorneys, and to Wm. A. McDaniel, Esq., Clerk of said Court, that the plaintiffs appeal from the decree of Hon. James L. Orr, in this case, filed 16th October, 1871, and will make their motion at the next sitting of the Supreme Court in Columbia, to modify the same so far as it disallows their claim to rescind the receipts given by the said James M. Sullivan to the defendant. Wm. M. Thomas, and to hold the obligors of the bond given by George W. Tolbert, R. R. Tolbert and John R. Tolbert, responsible for the full share of the said James M. Sullivan, in his own right, and as guardian of his said children, in said bond, to wit: One-fourth part of one-half of the principal and interest of said bond amongst them, on the following grounds:

- 1. Because the said Wm. M. Thomas, whilst Commissioner in Equity, executed, without any authority whatever, the pretended and fraudulent assignments endorsed on said bond, respectively, first to S. Thomas and then to Wm. M. Thomas, and again to Wm. M. Thomas, as attorney of S. Thomas, and said assignments being in fact and law fraudulent, could confer no rights whatever on the respective assignees, nor could they authorize the obligors of said bond to pay any portion of said bond to said assignees, or either of them; and that in fact the said obligors never paid said Wm. M. Thomas, whilst Commissioner, any part of said bond, except the two first credits endorsed thereon, to wit: One of \$676.70, and the other of \$322. And the said obligors are liable to pay the entire balance of said bond, deducting the \$3,000 they paid to T. Henry Stokes and wife.
- 2. Because the allegations of the bill, that William M. Thomas falsely and fraudulently misrepresented to the complainants and the other parties entitled to the proceeds of said bond, that the Tolberts paid him said bond in Confederate money, was fully proved by the testimony in the cause, and the said obligors, with a full knowledge that they had not made said payment, and had not authorized him to do so, adopted the fraud of said William M. Thomas, and in fraud of plaintiff's rights proceeded to make payment to him to the extent of \$2,600 in gold and four

office, and they should have been held liable *536

for said *payments, as well as the balance of said bond, less the \$3,000 paid to T. Henry Stokes and wife.

3. Because the said bond, in law and in fact, to the extent before indicated, should, under the proof in the case, have been regarded and treated by the Court as due and unsatisfied, and the obligors liable therefor.

4. Because, it is respectfully submitted, that the decree of the Court, to the extent complained of, is not only without evidence, but is in opposition to it and the law of the case

[For subsequent opinion, see 6 S. C. 201.]

Sullivan & Stokes, for appellants:

1. Wm. M. Thomas, as Commissioner in Equity, was a public officer, and, as such, subject entirely to the order and direction of the Court, as to the bonds and other choses in action in his office, and any disposition of them for his own benefit, or that of others, than the parties to whom in equity they rightfully belonged, was in law and fact fraudulent.

"Whenever a Master or Commissioner takes charge of funds or estates under an order or decree of Court, he shall be held to act officially; and the sureties to his official bond will be liable for his acts, unless he has, by an order or decree of the Court, been appointed Receiver, and has given bond and security, as required by the A. A. of 1824."-Lowndes v. Pinckney, 1 · Rich. Eq., 155.

"Where a Commissioner took a bond, payable to himself, for property sold by him under decree of the Court, and retained the bond more than twenty days after the date of his successor's commission, and received payment thereon after he went out of office: Held that the failure to deliver the bond to his successor was a breach of the condition of his official bond, and that his sureties were liable for the amount of such payment."—Ibid.

"The annual reports and accounts of the Commissioner conclude nothing as to the rights of the parties whose estates or funds are accounted for."-Jackson v. McAliley, 5 Rich. Eq., 38.

The duties and privileges of a Master expire with his term of office. Sales ordered, but not made, his successor must make, and the officer who makes the sale is entitled to the commissions.-Keith v. Gray, Rich Eq. Ca., 227.

A Commissioner in Equity, in suing out letters of administration on a derelict estate, under the Act of 1857, acts officially, and when he ceases to be Commissioner, he ceas-

es to be administrator. If no *one else should apply, his successor should sue out Wallace, 3 Rich. Eq., 111.

bales of cotton, after Thomas was out of letters of administration de bonis non.-Levi v. Huggins, 14 Rich., 167.

The Statute of Limitations does not run in favor of a Master against an account for proceeds of property sold by him in his official character, until a demand on him by the party entitled, or notice by him that he holds adversely; at least the plea of the Statute will not avail when the Master has been directed to apply the proceeds to the maintenance and education of the complainant, and to re-invest the surplus. So that he was, in fact, trustee.-Houseal v. Gibbes, Bail. Eq.,

That, within twenty days after a successor in office to any Master, Commissioner or Register shall have been elected or appointed, and shall have received his commission, and entered upon the duties of his office, such Master, &c., shall likewise pay over, transfer and deliver to his said successor all moneys, bonds, notes, certificates of stock and other choses in action or property, held by such Master or Commissioner by virtue of his office.—See 26th Section of the Act of 1840. to define and ascertain the powers, duties and liabilities of Masters, Commissioners and Registers in Equity, &c.

Not to practice in Court of Equity, or with a partner in Court of law .-- 33d Section of same Act.

Sheriff or Deputy Sheriff shall not purchase property sold by them officially; on conviction thereof, shall be deprived of his office, fined and imprisoned, at the discretion of the Court, and such purchase shall be null and void .- See 69th Section of the Act of 1839 concerning the office, duties, &c., of Sheriff.

Where the Sheriff has advanced money to the plaintiff on an execution in his office, with an understanding that he was to be reimbursed when the execution was collected: Held, That the execution was satisfied, and that neither the Sheriff, nor any one else, could afterwards use it to enforce any claim against the defendant.-Martin v. Goudy, 1 Hill, 417.

Defendant, a Commissioner in Equity, having funds of the Court to the amount of about \$1,600 in his hands, was ordered by the Court to invest the same at interest, on good personal security. One M. owed the defendant on his private account about \$1,000, and defendant, as Commissioner, loaned M. the \$1,600 on bond and personal security, retaining, by M.'s offer, out of that sum, the amount that M. owed him. M. and his security afterwards became insolvent, and nothing could be collected on his bond: Held, That the defendant had not invested the *538

\$1,600 in conformity to the *order of the Court, and that he was liable for the whole amount thereof, with interest.-Mulligan v.

257

the hands of the Master, it is the duty of the parties, and not of the Master, to have proceedings instituted for their collection; and where a minor is the party interested, it is the duty of his guardian to see to their collection.-Wightman v. Gray, 10 Rich. Eq.,

- 2. That the conduct of Wm. M. Thomas, in attempting to dispose of said bond of the Tolberts, either to his father, S. Thomas, or to himself, without the order and direction of the Court, and for his benefit, or that of his father, was ipso facto a fraud, and void, and conferred no rights whatever, either as to himself, his father, or the obligors of said bond.-Lowndes v. Pinckney, 1 Rich. Eq., 155; Mulligan v. Wallace, 3 Rich. Eq., 111; Clark v. Deveaux, 1 S. C., 172.
- 3. That it is manifest, from the whole testimony in the case, that the Confederate money that Wm. M. Thomas paid to the complainants and other parties in interest was not paid to him by any of the Tolberts, but was falsely represented by him to the parties who received it, to have been paid by them, and that they would not have received it, if they had not been misled and deceived by such representation.

The answer of G. W. Tolbert, as to authorizing Thomas to advance money, not responsive, and no evidence, and contradicted by R. R. Tolbert's letter.

The assignment by its own terms stating net amount of funds collected is false, as the debtors had paid nothing. See assignment on bond.

So much of the answer as relates to request of Tolberts to advance, not evidencenot being responsive to bill.

"The annual reports and accounts of the Commissioner conclude nothing as to the rights of the parties whose estates or funds are accounted for."-Jackson v. McAliley, 5 Rich. Eq., 38.

4. That when the Tolberts were aware that they had not paid anything upon their bond except the two sums endorsed thereon, as stated in the first ground of appeal, and then proceeded to avail themselves of Thomas' illegal and fraudulent act, they acted in their own wrong, and could acquire no right or benefit by it, and their bond remained unsatisfied to the extent complained of in this appeal.

Established by R. R. Tolbert's letter afore-*539

said, who was agent of *the obligors, as well as party; also testimony of James P. Moore, as to tender of Confederate money, &c., to "Though one cannot be punished for the fraud of others, he cannot avail himself of it."-Farr v. Sims, Rich. Eq. Cas., 122; Miller v. Tollison, Harp. Eq., 170, as to effect of fraud.

5. So much of the evidence relied on by

Where choses belonging to suitors are in His Honor based on or derived from the answers of G. W. Tolbert and William M. Thomas, as well as what James P. Moore proved as to what G. W. Tolbert told him after settlement with Thomas, was incompe-

> If the defendant, in addition to his answers to the matter concerning which he is interrogated by the plaintiffs, sets up other facts by way of defence, his answer is not evidence for him in proof of such new matter, but it must be proved aliunde, as an independent allegation.-3 Green. Ev., § 290. The answer is limited to those parts of it which are strictly responsive to the bill. The testimony of one witness is sufficient to prove fraud, although denied by the answer, if corroborated by the circumstances of the case.-Rowe v. Cockerell, Bail. Eq., 126. See, also, Martin v. Sale, Bail. Eq., 1; Magwood v. Lubbock, Bail. Eq., 382; Johnson v. Slawson, ibid. 463.

> New Trial.—"The Court will grant a new trial if the verdict be clearly against evidence."-Hudson et al. v. Williamston, 1 Tr. Con. Rep., 374.

> A verdict clearly contrary to evidence set aside, and a new trial granted.—Cockfield v. Daniel, 1 Mill, 193.

> The Court will grant a new trial, toties quoties, where the verdict is contrary to law, and where there is no evidence on which the jury can form their verdict.—Turnbull v. Rivers, 3 Mc., 51.

> This Court will grant a second new trial where the verdict is manifestly against the evidence, and always when it is against the law.—Smith v. Hill's Executor, Columbia, December, 1829.

> Where the evidence is all on one side, and is neither impeached or questioned, if the jury find against the evidence, a new trial will be awarded, although the presiding Judge certify that he has no reason to find fault with the verdict .-- Furman & Smith v. Peay, 2 Bail., 394.

> A new trial was ordered, when the Court were unable to perceive how the jury could

*540

have drawn, from the evidence before *them. the conclusion upon which they based their verdict.—Rucker v. Frazier, 4 Strob., 93.

Arthur & Arthur, Perrin & Cothran, for Thomas.

Easley & Wells, for Hickson, Collins and Stokes.

Earle, for Tolbert, contra.

In the argument of this appeal for the respondents, we propose to discuss the following propositions:

- I. The appeal cannot be maintained on the pleadings, because:
 - 1. There is no case made.
 - 2. There is no judgment filed.

Circuit Judge, there is no such error of law as to warrant a change of the decree.

III. If the Court should hold the appeal maintainable, the decree is sustained by the evidénce.

As to the first proposition-

1. No case is made.

The counsel has contented himself by putting in his brief the pleadings and testimony, and the decree of the Court, adding thereto some general statement of opinion as to the law and the facts of the case, as "grounds of appeal." But let us see what the law requires, and test his "grounds of appeal" by the standard of its requirements.

The 55th Rule of Court requires that when it is intended to review by appeal a trial by the Court, "a case, or exceptions, or case containing exceptions," shall be prepared by the party intending to review the trial, and prescribes the manner in which it shall be done. Rule LVI reads as follows:

"Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the Judge, upon settlement, to strike out all the evidence and other matters not necessarily inserted."

"It seems that, to entitle a party appellant to review any questions, either of fact or of law, arising upon the trial, or upon the decision, where the action is tried by the Court without a jury, or by a Referee, a case, or exceptions, which is the same thing under the Code, regularly settled and filed, and made a part of the papers presented to the Court, is indispensable."-Supreme Court. 1858; Conoly v. Conoly, 16 Howard Pr. R., 224.

*541

*A copy of the case, as settled, must be filed."-Parker v. Link, 26 Howard Pr. R.,

"The Supreme Court, in reviewing, at general term, a judgment entered upon a report of a Referee, or upon a trial before a Judge without a jury, acts purely as an Appellate Court, and their review cannot be had, except on a case containing the findings upon the law and fact, with the exceptions inserted. The case should be presented in the precise shape required by the Court of Appeals. The case is to be single, and made up as though the findings and exceptions were had on the trial-the exceptions, in their proper order, following the findings. Where the review is upon the facts, it is essential that the findings of the Referee upon the facts be explicit, and cover all the material facts in the case."-Supreme Court, 1860; Rogers v. Beard, 20 Howard Pr. R., 282.

"A case on appeal to the Court of Appeals should present, with legal and logical precision, the questions which are to be examined

II. The "facts" having been found by the in that Court, and should contain nothing else."-Court of Appeals, 1859; Bissel v. Hamlin, 20 N. Y., 519.

> "A statement of facts proved, and of the conclusions of law, separately, must be inserted in the case.—16 N. Y., 610; Id., 613; Id., 117; 3 Kern., 344. The report of a Referee (although required by Rule 32 of the Supreme Court to state his conclusions of fact and of law separately,) will not be accepted by the Court of Appeals for a case."—Ib.

> "If the case contain no exception, this Court cannot review it."-Ct. of Appeals, 1867; Douglass v. Day, 3 Keyes, 434.

> Not only is this the law, with all the presumption of reasonableness and necessity in its favor, but these are manifest. This is a Court for correction of errors of law, and it only wants so much of the facts of the case as are necessary to exhibit to the Court the mistake of the law, or to manifest its misapplication. If the learned counsel desires to show this Court that the Circuit Judge has committed an error of law, he should have presented us a statement of facts found by the Court, upon which he was willing to rely, as showing a misapplication of law. If we had allowed this as correct, it should then have been settled by the Judge; or, if we amended, he should have allowed or corrected, and then referred to the Judge. By following this simple legal requirement, the facts upon which counsel are content to rest their case are concisely and authoritatively presented to this Court. Ignoring the law,

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and the reason for it, he throws before *the Court all of the facts, for a general review, and, having done this, his grounds of appeal are equally comprehensive. The "first" leges that the assignments made were, "in fact, and in law, fraudulent," whereas the Circuit Judge found, as "a fact," that this transaction "was fair, upright, and bona fide." The "second" alleges that William M. Thomas "falsely and fraudulently misrepresented to the complainants, and other parties entitled to the proceeds of said bond, that the Tolberts paid him said bond, in Confederate money, was fully proved by the testimony in the cause," whereas His Honor the Circuit Judge finds, as a "fact," that no fraud, imposition or misrepresentation was practised by Thomas on Collins, Hickson or Sullivan. The "third" is, that the bond, "in law and in fact," "under the proof in the case," should have been regarded as due and unsatisfied. And the "fourth" is, that the decree "is not only without evidence, but is in opposition to it and the law of the case." Now, we respectfully submit to the Court that these "grounds," instead of presenting errors of law for the correction of the Court, are simply a rhetorical statement of the appellants' view of the case, for the purpose of

opening up the points for a new trial, by way the bond, the first of which is affected by the

"Where the Court is substituted for triers, its determination of the facts cannot be excepted to, and is final. But its decision of the question of law on the facts may be excepted to, and brought under review on error."-Supreme Ct., Chambers, 1858; Stout v. People, 4 Park Cr., 132.

2. No judgment is entered.

Appeals lie to this Court from final judgments, or some final order ending the case. The decree of His Honor the Circuit Judge is not a judgment upon which an appeal may be based; and a judgment should have been entered and filed.

"An appeal from a judgment, before judgment is complete and perfect, so as to be capable of execution, is premature, and must be dismissed."—N. Y. Superior Ct., 1851; Lentilhon v. Mayor, &c., of N. Y., 3 Sandf., 721

[The counsel also cited Austin v. Kinsman, 1 S. C., 101, and cases there referred to. He then reviewed the evidence, and contended that the conclusions of the Circuit Judge were right both upon the law and the facts.]

Sept. 12, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The bill in this case was *543

exhibited by J. M. *Sullivan and others, as claimants, to part of a sum of money secured by a bond to the defendant, W. M. Thomas, as Commissioner in Equity of Greenville District, taken on the sale of lands by such Commissioner, under a decree for partition. At such sale the defendant, G. W. Tolbert, became the purchaser.

The bill prays an account as against W. M. Thomas, G. W. Tolbert as principal, and J. R. Tolbert, as security thereon, and also as executor of R. R. Tolbert, deceased, his cosurety. The parties originally entitled to the balance of the money secured by the bond, over and above that part claimed by the complainants, are made parties defendant.

The bond in question was executed by G. W. Tolbert, Robert R. Tolbert and J. R. Tolbert, payable to W. M. Thomas, Commissioner in Equity for Greenville District, and bears date, February 6, 1861. It is conditioned for the payment by G. W. Tolbert to W. M. Thomas, Commissioner, or his successors or assigns, the sum of \$15,189, "in one and two equal and successive installments," with interest from its date. It was delivered to and held by the defendant, W. M. Thomas, in his official character as Commissioner in Equity.

Two payments, endorsed upon the bond, appear to be undisputed. One is for \$676.70, made February 6, 1861, and the other for \$322, made February 10, 1863.

There are two other receipts endorsed upon

present controversy. They are, in words and figures, as follows:

"Greenville, S. C., 31st October, 1865.

"Received of G. W. Tolbert, on this bond, the sum of twenty-six hundred dollars in gold, in full payment of my interest in the matter of the shares of Hickson and wife, Collins and wife, and James M. Sullivan.

"W. M. Thomas."

"Satisfied as far as my wife's interest in this bond is concerned.

"T. Henry Stokes.

"October 31, 1865."

The questions at issue on the pleadings are, whether the bond has been paid and satisfied, wholly or in part, as between W. M. Thomas, or his successor, and the obligors, and whether W. M. Thomas is liable to account to the complainants for money received upon said bond, and not accounted for.

*544

*The decree of the Circuit Court holds that the bond has been paid, with the exception of certain specified sums which remain due to the parties.

The present appeal involves the enquiry, whether there is not due on the bond, as against the obligors, a larger sum than that ascertained to be due by the decree.

The respondents raise certain questions as to the power of this Court to enquire into matters of fact found by the Circuit Court, and also involving the regularity of the appeal, and the sufficiency of the appeal papers, that will be considered before passing to the consideration of the questions of fact raised by the appeal.

The first point made by the respondents is, that the appeal cannot be maintained because there is no case made and no judgment filed.

The respondents have cited in support of this proposition the 55th and 56th rules of the Circuit Court, and several decisions of the These authorities Courts of New York. cannot be understood in their bearing on the point made, unless a distinction, affecting the powers of this Court, is attended to, of which respondents appear to have lost sight.

The Supreme Court of this State is a Court for the correction of errors at law, having appellate jurisdiction only in cases of Chancery.—Const., Art. 4, Sec. 4.

What is meant by appellate jurisdiction as contradistinguished from jurisdiction to correct errors at law? What is the class of cases described by the expression "cases of Chancery," as employed by the Constitution?

The answer to these questions will explain matter frequently misunderstood.

The fact that a Court for the correction of errors at law, as distinguished from one possessing general appellate power, was unknown in this State prior to the Constitution of 1868, accounts for the misapprehension that has existed in many minds as to the Court.

The change that was affected in the jurisdiction of the Court of last resort was noticed in the State v. Bailey, 1 S. C., 1.

What was meant by the expression, "appellate jurisdiction," as employed by the Constitution, must be determined with reference to the fact, that such a jurisdiction was known in the State, as possessing certain characteristics at the adoption of the Constitution, and was in exercise by the Courts displaced,

*545

and had been so exer*cised for many years The jurisdiction of the previous thereto. Court of Appeals was of that character. That Court had authority to review the decision of a Circuit Judge or Chancellor, as to any matter of law or fact decided by him. It also had authority to set aside the verdict of a jury on any ground, that affords to a Court of original jurisdiction authority to set aside such a verdict. In the exercise of such jurisdiction it was governed by fixed principles. It would not disturb the decision of a Judge as to a question of fact when the determination of the fact rested upon doubtful or disputable proofs, but sustained the conclusions of fact of the Court below, unless clearly erroneous.

But, although, this and similar limitations were to be considered in the exercise of the powers of the Court of Appeals over judgments, decrees and verdicts, still so far as the question was one of jurisdiction merely, it may be affirmed that that Court had authority to set aside any conclusion of law or fact, whether made by a Circuit Judge, a Chancellor, a jury, a Referee, or a Commissioner, on the ground either of error of law or fact.

All this was embraced in the idea of appellate jurisdiction, as that term was understood at the adoption of the Constitution.

Article 4, Section 4, denies this power to the Supreme Court, in the amplitude in which it was enjoyed by the Court of Appeals, limiting it to "cases of Chancery." In all other cases, except those embraced within the original jurisdiction of the Court, such as mandamus and the like, and "cases of Chancery," this Court was to act as a Court for the correction of errors of law alone.

In order to ascertain the limits of our authority under this grant of jurisdiction, we have only to ask what are errors of law? To determine what is an error of law, capable as such of being corrected in a Court for the correction of errors at law, we must have recourse to the decisions of Courts of that class in England and the United States. It is not necessary, in the present case, to consider that question farther, for, as will be seen, the power we are called upon here to exercise is part of the appellate power reserved by the Constitution to the Supreme

precise character of the jurisdiction of this | Court in "cases of Chancery." It may be said, however, that errors of fact, or wrong conclusions of fact, drawn from proofs or evidence, are not embraced within the term "errors of law," but belong to a distinct category, namely, errors of fact.

> The jurisdiction and powers of this Court are as full as those of the late Court of Appeals and Court of Errors, as it regards

> *"cases of Chancery." It can revise any decision on the ground of errors of law or fact. It is, therefore, necessary to understand what cases are embraced within the expression "cases of Chancery."

> It must be premised that the jurisdiction of this Court, so far as it was ascertained and fixed by the Constitution, is unaffected by the provisions of the Code of Procedure or any other statute law. Again, the terms employed to mark out that jurisdiction must be taken in the sense in which they were understood at the time the Constitution was adopted. Thus, for instance, the term "cases of Chancery," at that time, meant cases of a class of which the Court of Chancery could entertain jurisdiction, although since that time the Court of Chancery has been abolished and its jurisdiction conferred upon the Court of Common Pleas, yet what was intended to be described as "cases of Chancery" then, must be determined now, not with reference to the present state of jurisdiction and forms of procedure, but by the enquiry whether any given case could have been regarded, at the adoption of the Constitution, as a "case of Chancery."

> When the nature of the right in controversy, or of the relief sought in any case is such that, prior to the Code, it would have been appropriately pursued in the Court of Chancery; it will be regarded as within the expression "cases of Chancery," and under the appeal given by the Code this Court will exercise over such case a jurisdiction to correct errors both of fact and law. The circumstance that forms of proceedings, as it regards law and equity, are assimilated under the Code, does not affect the jurisdiction of this Court as established under the Constitution; but we look to the substantial character of the controversy before us for the purpose of ascertaining the extent of our powers in relation to such case, rather than to the nature of the Court from which the case comes, in the technical mould into which the case is cast.

> To avoid confusion of terms, it is proper to remark that the term "appeal," as used in the Constitution, bears a different signification, in some respects, from the same term as employed by the Code. The Code applies the term "appeal" to the proceeding by which any judicial determination is carried from an inferior to a revisory jurisdiction. Whether the powers of the revisory tribunal

in the given case are those of a Court for defendant, the summons and complaint, or the correction of errors at law, or those of an appellate tribunal, as understood in the sense of the Constitution, the steps by which the Court is reached are, in the sense of the Code, an appeal.

*547

*As against the jurisdiction established by the Constitution, the Code could not convert this Court into an appellate Court in the sense understood by the Constitution, nor has it attempted to effect such a change.

Under the view presented above it is unimportant to refer to the fact that the present suit was commenced by bill in the former Court of Chancery, for had it been commenced under the Code, the nature of the case and of the relief sought would have brought it within our jurisdiction to correct errors of fact in cases of Chancery.

It is essential to have in view the forego-· ing distinctions as to the nature of our jurisdiction and bowers, in order to ascertain what is meant by a "case," as that term is used in Rules 55, 56, 57 and 59, of the Circuit Court.

As the use of the word "case," in its technical sense, as applied to the statement of the proceedings upon the trial of an issue of fact, is new in this State, it may be advantageous to fix the sense in which that term is used in the Rules above mentioned. term "case" is used in three distinct senses in the Rules of the Supreme and Circuit Courts, and in common speech. It is used in the most general sense as the equivalent, merely, of cause or suit, as describing the subject-matter of a proceeding in a Court of Justice. Again, in a technical sense, as employed in the Circuit Court Rules above enumerated, where it signifies a statement of the proceedings on the trial of an issue of fact. There is still a third sense in which the same term is used, an instance of which occurs in Rules 5, 7 and 8, of the Supreme Court. As used in the last mentioned Rules it describes the paper book made up for the use of the Supreme Court, containing all proceedings in the Court below necessary to the understanding of a matter to be submitted to the judgment of the Supreme Court, and the proceedings taken by way of appeal to bring the case into the Supreme Court.

It is only with the term "case," as used in the Circuit Court Rules, also enumerated, that we have to do with in the present case.

To meet the objection, that no case has been made to authorize a review, it becomes necessary to ascertain what is essential to a case, as contemplated by the 55th Circuit Court Rule. Section 354 of the Code makes it the duty of the appellant to cause a copy of the judgment roll to be transmitted to the Appeal Court. Section 315 defines what shall constitute a judgment roll, as follows: "1st. In case the complaint be not answered by any *548

copies thereof, proof of service, and that *no answer has been received, the report, if any, and a copy of the judgment. 2d. In all other cases, the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and affecting the judgment."

The judgment roll of the Court below, evidenced by the proper certificate of the Clerk of such Court, is what the Supreme Court acts upon. Nothing extrinsic to the judgment roll can be brought before this Court, as a ground of impeaching any judgment of the Circuit Court. Of course this remark is inapplicable to the case of an appeal from an order, when the matter to be considered is not evidenced by a judgment roll.

It will, therefore, be observed, that in the case of an appeal from a judgment, whatever is relied upon, in order either to impeach or support such judgment, must, in the first instance, go upon the record of the Court below, and become part of the judgment roll, and must be transmitted to the Supreme Court as part of such judgment roll.

The judgment roll being the proper evidence of the proceedings of the Court below, in the case of an appeal from a judgment, the roll should contain all that is essential to a review of the judgment.

Before the blending of legal and equitable jurisdictions, the term "case" was applied to the narrative of the proceedings on the trial of an issue of fact, at nisi prius, on which a motion to set aside or enter a non-suit, or for a new trial, either for error of law or fact, or both, or for other appropriate relief, could be made, in a Court of original jurisdiction. It embraced the testimony and any verdict found upon it, any motion for a non-suit and the order made upon such motion, and any exception taken to such order. If matter of law was to be considered, on the motion for a new trial, the rulings or charge complained of were introduced, and the fact invariably noted, in respect to each separate ruling and each specific matter charged that was a subject of objection, that the party prejudiced thereby excepted in time to such ruling or charge. If the error complained of was, that the Judge refused to charge a proposition of law to which his attention was specifically called, such fact was set forth and a note made that the party aggrieved gave notice in time of an exception to such refusal to charge.

A statement thus prepared, containing the

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evidence, or facts *proved, the rulings and charge of the Judge, and the exceptions thereto, is what is described in Rule 55 of the Circuit Court as a "case containing exwhether that judgment is supported by the ceptions."

The Code extended these modes of setting forth the matter to be reviewed to proceedings in equity. The term "case," as used in the Code, describes a statement of the proceedings on the trial of an issue of fact, whether tried before a jury, or before Referees, or before the Court; embracing proof, oral or written, and the verdict, finding, report or decision thereon.

If matters of law and fact are to be considered together upon it, then it should be what has already been described, a case containing exceptions. If matters of fact are alone to be considered, the exceptions are omitted. If matters of law are alone to be considered, then it is only necessary that it should present the rulings, charge, or decision complained of, the exceptions taken thereto, and so much of the evidence, or facts proved, as may be requisite to show the nature of the error complained of, and its effect or bearing on the finding, decision and judgment based upon it.

When an issue of fact is tried before a jury, the case prepared to review the proceedings can generally conform to the customary forms employed in such cases, of which samples are given in the standard books of forms.

Where it is tried before a Court, or Referees, the form is usually modified to represent the course of procedure, but substantially is unchanged.

While the tendency arising from the practice of a learned profession has always been towards the use of fixed forms, where that is practicable, and while the Courts have always encouraged that tendency, still it has been found impracticable to hold practitioners to artificial accuracy in this respect. If a case is a clear and intelligible history of all proceedings important to a review of a cause, it is all that can be insisted upon.

The record before us presents the bill and answers, the testimony taken before a Referee, and the decision of the Circuit Judge and his final judgment thereon. The order of reference does not appear, but, as no objection is made affecting its propriety, its absence is unimportant. It is not alleged that the proceedings in the case are not fully brought before us.

The propositions advanced by the respondent, to show that the appellant has not brought a proper case before this Court, are based upon the erroneous supposition that

*550

this Court cannot, in a case like *the present, do more than to correct errors of law committed by the Circuit Court. The whole case turns upon the decision of questions of fact. It is alleged by the plaintiff that the evidence adduced does not support the judgment. This Court is perfectly competent to examine the judgment of the Circuit Court, and to say

whether that judgment is supported by the pleadings and evidence, inasmuch as it is a case within the constitutional description "cases of Chancery."

The cases cited by the respondent from the New York Courts have generally no bearing on the present question, as they relate to the method of preparing a case when matters of law alone are to be taken to the appellate Court.

It is argued that what is brought into this Court as a case has not been duly settled and filed in the Court below. If there were any irregularity in the preparation, service or settlement of the case, the place to take advantage of that was in the Circuit Court, as it is a record of that Court, and, therefore, should be subject to its control until removed into this Court.

As to its being filed below, it is only necessary to say that the Clerk of the Circuit Court has returned it into this Court as filed in his office, and there is nothing to the contrary laid before us. If irregularities in the appeal papers are complained of, that ought to be done before the Court proceeds to hear argument on the merits.

The respondent's next objection is, that there is no judgment filed. He contends that what is presented to us as a judgment is not, in fact nor law, a final judgment in the case. It must be conceded that the judgment brought before us is not complete according to the meaning of the Code. The Circuit Judge follows the practice which has heretofore prevailed in equity in this State. He files an opinion on the questions passed upon by him, embodying with it a judgment. After stating his conclusions in the matters of fact passed on by him, his opinion concludes as follows: "It is therefore adjudged," &c. The judgment that follows these words is not complete, for it does not set forth the amount due on the bond; but to make certain its purport, in that respect, it is necessary to refer back to that portion of the opinion that ascertains the amount due on the bond. Thus the judgment is not complete without being accompanied by the opinion. Again, the judgment directs that J. R. Tolbert "pay the remaining costs in this case," but does not fix the amount of those costs. As it regards the failure to enter into the judgment the amount of costs to be paid, it must be regarded as a

*551

*want of compliance with Section 337 of the Code, that provides that the amount of the costs, allowances and disbursements, when ascertained, shall be inserted in the entry of the judgment, but as this is to be done on the motion of the prevailing party, he cannot complain of the incompleteness of the judgment, in this respect, as he had it in his power to make it complete.

This Court is perfectly competent to examine the judgment of the Circuit Court, and to say of the Circuit Judge with the reasons assign-

the judgment in a single paper, so that that portion intended to operate as a judgment, cannot be fully understood without being accompanied by the opinion at length, does not comport with the requirements of the Code. A judgment is the action of a Court, ascertaining some act to be done, or forborne by a party. The grounds and reasons upon which the Court proceeded are no part of its judgment, using that term in its technical sense. Under the Code (Sec. 304,) the judgment is to be entered in a judgment book. It was not intended that this judgment book should contain the grounds and reasonings upon which the judgment was based. When a case is tried by the Court, as this was, although heard upon evidence taken before a Referee, the conclusions of the Court upon the questions of law and fact are to be made up by the Court and filed. The reasons for arriving at such conclusions may accompany the conclusions themselves, but they should not destroy their categorical character. statement of the conclusions of law and fact is not, in technical form, a judgment, but is presumed to afford data sufficient to prepare a judgment in form. Section 291 of the Code distinguishes the separate character of the decision and the judgment. It says: "Judgment upon the decision shall be entered accordingly." Sometimes, as when there are complicated relations among the parties or collateral interests to be adjusted to the disposition made of the main controversy, it is important that counsel should be heard after all matters disputable under the pleadings are finally disposed of, and before judgment final is entered.

It is highly inconsistent in practice to embody the conclusions of law and fact in the judgment. The record is unnecessarily encumbered, the labor of examining it and the cost of transcribing it increased, without any accompanying advantage.

It is evident that the paper produced was intended as a final judgment. If it is not such a judgment in form as the party was entitled to, that is no ground for preventing the opposite party from setting it aside. It is true, that if the judgment was not in-

*552

tended *as final, it would be premature to appeal before such final judgment was entered.

The present judgment disposes finally of all questions made by the pleadings, and must be regarded as final, in the sense of the Code.

The evidence adduced gives rise to certain conclusions that will be next stated. Certain facts are undisputed, and will be first stated.

'The bond was taken by the defendant, Thomas, solely in his official character as Commissioner in Equity. While holding the

ed for arriving at such conclusions, and with | paid to J. M. Sullivan, on account of the claims of the complainants, and to the defendants, Collins and wife, and Hickson and wife, as distributees, a large sum of Confederate money, which was received by them as so much money on account of their respective distributive shares of the fund secured by such bond, the receipts taken upon such payments all bearing date February 6, 1863.

These payments were not endorsed upon the bond as so much money paid for the benefit of the obligors of the bond, but were entered in the official cash book of the Commissioner as payments made by him in that character.

These payments did not extinguish the interest of Sullivan, Hickson or Collins, but left still unsatisfied a portion of their demands against the amount secured by the bond.

These payments were not made or intended by defendant, Thomas, as an advance on account of the bond, or as satisfying the bond to any extent, as between Thomas and the obligors, but was intended by Thomas as a purchase of the bond either for the use of his father or himself.

That subsequent to such payment being made. Thomas assigned the bond in form to S. Thomas, his father, who subsequently reassigned it to the defendant, W. M. Thomas.

That at the determination of defendant, Thomas' official term as Commissioner in Equity, he did not turn over the bond to his successor in office, but retained it, claiming to hold it as his private property.

That on the 31st of October, 1865, a settlement was made between the Tolberts and Stokes' wife, by which the interest of the latter was extinguished by the payment to Stokes and wife, by the Tolberts, of a sum fixed upon by way of compromise.

That on the last mentioned day a settlement was made between the defendant, Thomas, with the Tolberts, under which the

*553

Tolberts *paid to defendant, Thomas, \$2,600 in gold, the receipt given therefor by defendant, Thomas, containing the following language: "In full payment of my interest in the matter of the shares of Hickson and wife, Collins and wife, and James M. Sullivan."

That upon such payments being made, the defendant, Thomas, delivered the bond, with the receipts of Stokes and himself endorsed thereon, to his successor in office as Commissioner in Equity.

The clear weight of evidence establishes the following facts, which will be separately stated with a reference to the evidence on which the proof of such facts respectively rests:

1. The Confederate money paid by the defendant, Thomas, to Sullivan, Hickson and Collins, as set forth in the receipts, dated bond in suit, in such official character, he February 6th, 1863, was the money of the defendant, Thomas, and was so paid for his bond could not have been assigned at the own account and benefit. bond could not have been assigned at the own account and benefit.

The answer of Thomas takes the position that the money advanced was his own. His testimony taken upon interrogatories leads conclusively to the same inference.

A return made by defendant, Thomas, as Commissioner in Equity, on the 8th of July, 1863, was relied on as evidence. By this return defendant, Thomas, is debited as follows: "February 10th, 1863, received from S. Thomas, assignee of bond, \$15,631.43."

Assuming the competency and truth of this entry, and it would appear that this bond in suit was sold at that date to S. Thomas, and the sum of \$15,631.43 received in cash on sucn sale, although the date of the entry, February 10th, does not agree with the dates of the payments to the distributees, the latter appearing from the receipts to be February 6th, yet if that amount of cash was actually received from S. Thomas, it might be fair to infer either that the money received from S. Thomas was actually paid to the distributees, or that the money advanced by defendant, Thomas, was replaced by that derived from the sale of the bond to S. Thomas.

It was very properly contended that the statement made by the defendant, Thomas, could not be employed as evidence in his favor of the facts affirmed by himself; but there is a difficulty in accepting the statement that is substantial rather than technical. The entry in question is clearly contradicted by the answer and the testimony given by defendant, Thomas.

In his answer, after stating the fact of an advance to the distributees in terms that admit of no other conclusion than that the funds advanced are his own, he says, as to the property in the bond: "Regarding himself as the sole owner of the bond, he did not

*554

trans*fer it to his successor in office, but retained it. Being in debt to his father, and desirous of adjusting his private affairs for the emergencies of the battle field, he assigned the bond, as stated in the bill, to his father, and upon settling with him, re-assigned it, as he thought he had a perfect right to do."

According to this statement of the answer of the defendant, Thomas, the consideration of the transfer of the bond was not an amount of money, representing the value of the bond, paid by S. Thomas on the purchase of the bond as so much money of the estate. On the contrary, the consideration of the transfer to S. Thomas, as here stated, is a personal indebtedness between father and son, in no way connected by any allegation or proof with the transactions the subject of the present question. The matter assigned by the answer as part of the ground of assigning the bond to S. Thomas, tends to show that the

date stated in the return of July, 1863, namely, February 10, 1863. It is stated by the answer that the assignment of the bond was in part induced by the fact that the defendant, Thomas, was preparing for the "emergencies of the battle field." As late as July. 1863, he was acting as Commissioner in Equity, and it is to be inferred from the testimony of J. P. Moore, his successor as Commissioner in Equity, that he continued so to act down to January, 1864. The improbability that defendant, Thomas, would be engaged nearly a year before the expiration of his term of office in making preparations for the "emergencies of the battle field," is converted into a clear inference to the contrary by the statements of the answer, and the silence of the evidence on the subject.

That portion of the answer above cited clearly indicates that the retention of the bond, on leaving the office of Commissioner, was an act precedent, in the order of time, to its assignment, to his father. Such a construction is essential to an understanding of the narration of events, evidently intended by the answer to be set forth in the order of their occurrence.

The answer of the defendant, Thomas, as to part of the amount of money in his hands for the purpose of paying the demands of the distributees, give an account of the mode in which it was procured irreconcilable with the fact alleged by the return, that it came, in cash, in one sum, from S. Thomas, upon a sale and assignment of the bond.

The part of the money here alluded to is that alleged to have been raised for the purpose of paying the interest of Stokes and

*555

wife. *The answer states that this money was borrowed. Defendant, Thomas, in his testimony, says as follows: "I made the arrangement with Hamlin Beattie by which the draft would be honored in favor of the Stokes'."

The date of this borrowing is sufficiently fixed by the letter of defendant, Thomas, to T. Henry Stokes, as about April 13, 1863. There is no view that can be taken of the evidence last referred to, that can reconcile it with the statement in the return of July, 1863, that the defendant had in hand, as Commissioner, in February, 1863, an amount, in cash, sufficient to pay the distributees.

There is no proof that the money paid by defendant, Thomas, to the distributees, or any part of it, came from S. Thomas, his father. Both the statements of the defendant, Thomas, and of the Tolberts, agree that it was not advanced by the latter, nor by Thomas as the agent of the Tolberts. We have already seen that the answer of Thomas is inconsistent with such idea.

The answer of G. W. Tolbert admits, distinctly, that the arrangement made with

Thomas to pay him the proceeds of cotton sold for the purpose of refunding the amount advanced by Thomas was not carried out. The settlement between the Tolberts and the defendant, Thomas, in October, 1865, shows two things: first, that no advance of money had theretofore been made by the Tolberts to Thomas on any such account; and, second, that the Tolberts regarded the defendant as holding the bond in his own right, as acquired with his own money, and not as standing to them in the relation of an agent who has advanced money for the account of his principal.

It will be necessary, in this connection, to refer to the letters or admissions of the Tolberts, for the purpose of establishing the proposition under consideration. This admission will be important, when considering how far the Tolberts are affected by the transactions of defendant, Thomas, in dealing with the bond as his private property.

2d. The amount advanced and paid to complainants and defendants, Hickson and wife, and Collins and wife, was accepted by the parties solely on the representations of the defendant, Thomas, that the money tendered to them had been paid into his hands by the Tolberts, in satisfaction of their bond, and such representations were false, and were made to induce the parties to accept the Confederate money for the benefit of the defendant, Thomas.

The defendant, Thomas, is entitled to the *556

full benefit of the alle*gations of his answers upon the issue of fact, such weight to be determined after examining them in their relation to the evidence adduced from other The answer states that the transaction as there stated was explained to Collins, acting on his own account and in behalf of Hickson and wife. It also states that defendant explained the whole matter to J. M. Sullivan. The nature of these explanations is not directly stated, and can only be inferentially made out. The answer in this respect is too vague to be entitled to much weight, even standing by itself. It is, however, directly contradicted by the testimony of Sullivan, Hickson and Collins, and no satisfactory explanation of these discrepancies is given in the testimony of the defendant, Thomas, who had an opportunity upon his examination of giving the true version of the matter.

J. M. Sullivan testifies as follows: "Thomas wrote to me that the money was paid, and that he would make Stokes take his share; that Tolbert had sold his cotton, and had paid in the money. I then took it, as he said that all had taken it except Stokes and his wife. I would not have taken the money if I had known that Tolbert had not paid the money. Thomas led me to believe that Tolbert had paid the money."

G. W. Collins testified as follows: "Thomas told me that the Tolberts had paid for the place at Ninety-Six, and that the money was in the office, and to call and get it. I received Confederate money from Thomas. I would not have taken the money had I known that the money had not been paid by the Tolberts. He told me that the Tolberts had sold their cotton for Confederate money. I told him that I would not take it at all, except for the fact that the young men were in the army. He told me that he had notified all the parties that the money was in the office. I did not receive the whole amount; there was about \$150 behind." Collins, on being recalled, repeated this testimony in a more circumstantial and stronger form.

W. Hickson, in his testimony, says: "That defendant, Thomas, stated to me that the Tolberts had paid the money on their bond for the Shaw land, and wanted me to receive it, as he desired to get it out of his hands. I told him I did not want it, and preferred they had waited till the war was over, as I did not care to take that debt in Confederate money; but he thought as it had been paid by the Tolberts, that I ought to receive it as a citizen desirous of maintaining the Confederacy. In consideration of these facts I yielded, and received it."

*557

*The defendant, Thomas, had an opportunity to contradict this testimony of Collins, for it appears, by his own statement, that he had seen that testimony before giving his own. Upon his examination he testified as follows: "Until I saw Collins' testimony the other day, I always believed that he knew all about the transaction that I advanced money for Tolbert; I believe he did know it." This is all that is said in reply to testimony involving a charge of fraudulent misrepresentation. The testimony of defendant, Thomas, involves no legal responsibility for its truthfulness, as it is the mere statement of his belief on unimportant and irrelevant matter.

It will be observed that in the testimony just recited, it is said that the money was advanced for Tolbert. This statement is contradicted by the answer of defendant, Thomas, and the well established fact that on the final settlement between Thomas and the Tolberts, Thomas was treated as the owner of some portion of the interests of Sullivan, Hickson and Collins in the bond; and according to the face of the receipts, the object of the settlement was to extinguish these interests in the hands of Thomas to such extent, and not to refund to Thomas money advanced by him as the agent of the Tolberts.

The foregoing evidence is all that has any important bearing on the second conclusion of fact above stated, and it leads to such conclusion, not upon doubtful proofs, but by

a clear and overwhelming mass of testimony, said James P. Moore, the Commissioner, and met by no contradiction such as the nature of the testimony demanded.

Even if, at the time that Thomas made the representation that the parties to the bond had paid the same, he had good ground to expect that they would do so within a reasonable period, the representation that they had done so must still be regarded as false. On the disappointment of such an expectation, had Thomas laid the facts before the parties in interest and allowed them an opportunity of rescinding or adhering to the arrangement, such action might have ignored a fraudulent motive in Thomas. On the other hand, having left the parties under the influence of the original misrepresentation, a fraudulent intent must be presumed, from the fact that the advantage to be derived from their receiving Confederate money could enure only to the benefit of Thomas.

3d. The defendant, Thomas, from the time of such payment, held the bond in suit, claiming the same as his individual property, until it was returned to his successor in office in October, 1865, notwithstanding his office as Commissioner in Equity, in the meantime, *558

had *ceased, and his successor in office had qualified and was in the discharge of his duty. The ground of this conclusion has already been stated in what was said relative to the first conclusion of fact.

4th. The settlement of the defendant, Thomas, and the Tolberts, in October, 1865, was, as between themselves, a voluntary settlement by way of compromise, intended to extinguish so much of the interest of Sullivan, Hickson and Collins, as had vested in the defendant, Thomas, in his individual right, and was not intended as a settlement between the defendant, Thomas, as obligee, and the Tolberts as obligors of the bond.

Neither the defendant, Thomas, nor the survivor and representative of the Tolberts, seek to disturb the settlement of October, 1865. On the contrary, they rest upon it as a finality

The defendant, Thomas, in his answer, insists that in this settlement he "receipted the Tolberts for his interest only in the bond, and received therefor, in gold, about what the money he advanced to Tolbert was worth." The answer of George W. Tolbert says that "he then entered upon negotiations with the said Thomas for settlement of his interest, and agreed upon the terms; and a receipt in conformity with the agreement was entered upon the bond and signed by the said W. M. Thomas, in which he acknowledges the receipt of the sum of twenty-six evidence; but it appears by the letter of R. hundred dollars in gold, in full of his in- R. Tolbert, dated February 19th, 1864, that terest in the bond, as above set forth," He the writer was aware that Moore was makfurther says: "The receipts were entered ing efforts to get possession of the bond, or

as defendant believes, with his approval. The bond was then left with the said Moore to be filed with the record. The defendant then regarded the bond paid. He is now surprised at the allegation of the bill of unfairness, collusion and fraud." Both parties to the settlement thus rely upon it as final, but differ as to the effect of the settlement-the one holding that only this interest of Thomas was extinguished, and the other that the bond was, in effect, paid.

Tolbert, in that portion of his answer just referred to, makes no other statement, as to the terms and intention of the parties, than that afforded by the receipt, and sets forth, substantially, such receipt, stating that it was in conformity to the agreement with Thomas on the subject. It has already been observed that, in speaking of the negotiation that led to this agreement, he refers to it as a negotiation in regard to Thomas' interest in the bond.

The receipts themselves sustain the conclusion that the subject-matter of the settlement was Thomas' interest in the bond, be *559

that *what it might; that there was no expressed nor implied understanding that Thomas' interest extended beyond the amount of money advanced by him, and that if Tolbert arrived at a different conclusion as to the effect of the settlement, it arose from his own understanding of the matter.

That, in making these settlements, Tolbert did not regard Thomas as acting in any official character, is evidenced by the fact that, at the time he settled with Stokes, he requested Moore, the Commissioner in Equity, to be present at the signing of the receipt, evidently relying on the presence of Moore as essential to the validity of the transaction, so far as it had any official significance, and the settlement with Thomas was subsequent to that with Stokes.

5th. At the time of this settlement, the right of the defendant, Thomas, to the possession of the bond, as regarded the Commissioner in Equity, was in contest under a rule to show cause, at July Term, 1864, why that bond should not be returned to the Commissioner's office, and that such rule was obtained by Mr. Moore, upon the representations of R. R. Tolbert of misconduct on the part of the defendant, Thomas.

These facts are testified to by Mr. Moore, who states that, after the issuing of this rule, he heard nothing more about the Tolberts' bond until October 31st, 1865, the Tolberts had distinct notice of the pending of this rule, is not shown directly by the upon the bond with the knowledge of the intended to make such effort, for he says: know, and I will come to your office and settle." The notes, here spoken of, evidently means the bond in suit, for that is the only subject to which the letter relates.

As it regards the rights of the complainants as against the Tolberts, there are certain other conclusions of fact arising from the pleadings and proofs that will next be

6th. It is not established, either by direct proof nor by any necessary inference from the matters proved, that either of the Tolberts had notice until after the payments made to Sullivan, Hickson and Collins, of the use of improper means to induce the acceptance of such payments.

7th. The defendants, the Tolberts, are chargeable with notice, at the time of the settlement, of the transactions that had previously occurred between the defendant, *560

Thomas, and Sullivan, Hick*son and Collins, and which are the grounds of the present claim for relief.

Moore testifies that previous to February 19th, 1864, R. R. Tolbert applied to him for a statement of the amount due on the bond, as he wanted to pay it. That not being able to find the bond, he so informed him by letter, in reply to which he received from R. R. Tolbert, the letter dated Feb-This letter recognizes ruary 19th, 1864. the fact that the defendant, Thomas, in making these payments, was acting in his own interest, as it denies any agency or authority in Thomas, derived from the Tolberts, to make such payments. Moore states that on the 3d of March, 1864, R. R. Tolbert tendered to him \$17,900, in Confederate currency, in payment of the bond, which he refused to receive. Moore says he "showed Mr. Thomas' account book and explained to him the entry made by Thomas, that it purported to have been done at the instance and request of G. W. Tolbert. Mr. Tolbert replied that George had not requested Thomas to do so, as he was George's agent, and he had been trying to get Thomas to take Confederate money and Thomas had refused, alleging as his reason for refusing that the parties to whom the money was going had refused to receive Confederate money from him. Mr. Tolbert was very indignant towards Thomas, and said that Thomas had no authority from George, nor from himself, to have made the arrangements he had made about the bond."

G. W. Collins says: "In March, 1865, on my way to Florida, I stopped at the house of Tolbert. He asked me if Thomas had paid off the parties for the Cambridge lands? I told him I had received \$4,500, and I presumed the others had received theirs, as Thomas had told me he had notified them that the money had been paid in and was

"As soon as you can get the notes let me , ready. He replied that Thomas had no authority for paying off the bond: that he was the agent for his sons. This was R. R. Tolbert, who is now dead."

The foregoing testimony stands uncontradicted, and shows that all the important facts upon which the complainants base their claims to relief, were brought to the notice of the Tolberts before the settlement with Thomas.

In addition to the foregoing, it is evident that the Tolberts knew, at the time of the settlement with Thomas, that the latter had no lawful right to the custody of the bond, or to represent any other interest in the transaction than his individual interests. This is evidenced by the letter of R. R. Tolbert to Moore; also by the fact that the Tolberts *561

did regard the settlement with Stokes *complete without the presence of Moore, the legal custodian of the bond.

8th. The settlement with Thomas was without the concurrence or consent of Moore, and with full knowledge of his rights in regard to the same.

Although Moore was present at the settlement of the Tolberts with Stokes, yet it must be concluded that he was not concluded, and did not authorize or consent to the settlement with Thomas, for the reasons: 1st, That fact is material to the case of the Tolberts as a means of showing payment on the bond, but is neither alleged or proven. Moore's testimony excludes such fact. states that Tolbert stated to him that he had settled with Thomas at the time he demanded the bond, on the ground of its being paid. Moore's position is disclosed in the reply he made to Tolbert's question as to what he thought about the matter. He says: "I replied I did not know what course Hickson, Collins and Dr. Sullivan would pursue in the matter. If they did nothing, it would be an end of the case."

The foregoing conclusions have been stated with more than ordinary particularity and care, for the reasons that they differ materially from those of the learned and experienced Judge who tried the cause, and for the further reason that the transactions involve the conduct of an officer holding a high position of trust connected with the administration of justice, and it is due to the Court, whose authority he has misused, that the closest scrutiny should be made with the transaction.

The conclusions of law, based upon the foregoing facts, will next be stated.

The Confederate notes tendered by Thomas to Sullivan, Hickson and Collins, were not a legal tender, and laid them under no obligation to accept them in lieu of good money. The duty imposed on Thomas was to enforce the bond, by converting its obligation into good money, and paying it to the distributees

according to their respective demands. This thold the bond and enforce it did not reside duty was not wholly preformed. In lieu of strict performance, Thomas offered them a commodity regarded by the community as money, but not possessing the character of a legal representative of money value. Confederate currency had some commercial value, because it could readily be converted into that which had intrinsic value.

If Sullivan, Hickson and Collins are to be regarded as having voluntarily accepted the Confederate currency, then their accep-*562

*tance stands on the footing of a contract, based on the value tendered as its considera-The terms of the acceptance did not, on that assumption, extinguish the whole demand under the bond, but only to the extent of the nominal value of the Confederate currency received, leaving in them a right to have the bond enforced for the satisfaction of the residue of their demand. Acceptance being in the nature of a contract, is avoided by any misrepresentations made, that induced the opposite party to accede to its terms.

The representations made by Thomas were false, and induced the parties, acting on the belief that they were true, to accept the Confederate money as pro tanto performance.

The parties misled had a right to rescind, and on tendering a return of the amount received by them, to be re-instated in their original right. Not having done so, they are to be charged with the value of the Confederate money at the time of its receipt, but are to be regarded as re-instated as to the residue of their claim as it stands at the time of their acceptance.

As affected by the settlement between Thomas, Sullivan, Hickson and Collins, the right of the respective parties stood as follows: the obligors, or their representatives, were liable to pay the full amount due on their bond, over and above the payments previously credited upon it.

The complainants, and the defendants, Hickson and wife, and Collins and wife, had the right to demand the enforcement of the bond, and to receive the balance that would be found due after deducting the actual value of the Confederate currency received by them, Stokes and wife had a like right to have the bond enforced for their benefit. Thomas had a right, as equitable assignee of Sullivan, Hickson, and Collins, to demand out of the proceeds of the bond, an amount equal to the actual value of the Confederate money paid to Sullivan, Hickson and Collins. Thomas had also, as Commissioner in Equity, authority to hold the bond, and to take measures to secure its enforcement. The right to

personally in Thomas, but in the office held by him, and at the termination of his official term that right passed to his successor in office.

The retention of the bond by Thomas was a trespass that conferred no rights upon him, and could afford no security to those dealing with him, for the bond disclosed the true *563

claims to its pos*session, and the law charged all parties with a knowledge of the legal consequences resulting from its legal character.

The Tolberts cannot be regarded in law as having dealt with, nor did they in fact deal with Thomas in any other than a personal character, and in regard, alone, to such personal rights as he might have acquired through the transaction with Sullivan, Hickson and Collins. We have seen that all that Thomas thus acquired was a claim as equitable assignee of Sullivan, Hickson and Collins, of so much of their original demand as equalled the value of the Confederate currency paid to them. The Tolberts acquired just this, and no more in their treaty with Thomas; nor have they any equity broader or more comprehensive than this; for they are chargeable with notice of the misconduct of Thomas in his dealings with Sullivan, Hickson and Collins.

The settlement with Stokes was final unless impeached on sufficient grounds, and no such grounds are presented in the present case.

The amount due upon the bond should be computed, with interest, including the demands of the complainants and of the defendants, Hickson and Collins, and including the claim of Stokes and wife, as originally established, and also including the payments endorsed on the bond prior to the payment made by Thomas to Sullivan, Hickson and Collins. From the amount thus computed must be deducted the value of the Confederate currency paid to and received by the complainants, and the defendants, Hickson and Collins, with interest to the date of judgment. Judgment must be given for the amount thus ascertained according to the respective rights of the complainants and the defendants whose claims are in whole or in part unsatisfied according to the principles of this decision.

The decree of the Circuit Court must be modified accordingly, and the cause remanded to the Circuit Court for further proceedings.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at hearing.

3 S. C. *564

*Ex parte DE HAY.

(April Term, 1872.)

[Habeus Corpus \$\sim 28.]

On and before the 9th of March, 1872, On and before the 9th of March, 1872, Fairfield County formed part of the Fourth Judicial Circuit, and its Courts of Sessions were required to be holden on the 2d Mondays of March, July and November. By an Act of that date it was annexed to the Sixth Judicial Circuit, and its Courts of Sessions required to be holden on the 1st Mondays of April, August and December. On the 2d Monday of March, 1872, being the 11th day of the month, the Judge of the Fourth Circuit opened the Court. H was indicted for escape, tried and convicted. H was indicted for escape, tried and convicted, and at a Court holden on the 1st Monday of April of the same year, by the Judge of the Sixth Circuit, he was sentenced to ten years' Sixth Circuit, he was sentenced to ten years confinement in the Penitentiary, where he was now detained in virtue of the supposed sentence: Held, on habeas corpus, that the whole proceeding was without authority of law and yoid, and H was ordered to be restored to the custody of the Sheriff of Fairfield County, to be by him safely kept until duly discharged.

[Ed. Note.—Cited in Ex parte Lilly, 7 S. C. 375; Adams v. Agnew, 15 S. C. 43; Agnew v. Adams, 26 S. C. 106, 1 S. E. 414; Hardin v. Trimmier, 30 S. C. 393, 9 S. E. 342; Riddle v. Reese, 53 S. C. 202, 31 S. E. 222.

For other cases, see Habeas Corpus, Cent. Dig. § 23; Dec. Dig. \$28.]

[Statutes =255.]

Unless it be otherwise provided by law, an Act takes effect from the time of its passage.

[Ed. Note.—Cited in State v. Mancke, 18 S. C. 85. 85.

For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. &=255.]

From the time of the passage of the Act of the 9th of March, 1872, it constituted the only law under which the Courts of Fairfield County could be held.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 208-217; Dec. Dig. ६⇒63.]

[Courts &= 63.]

The proceedings of a Circuit Court, held by the Judge of another Circuit, at a time unauthorized by law, are void.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 217; Dec. Dig. \$\simes 63.]

Petition by Theodore De Hay, to the Supreme Court, for a writ of habeas corpus, to be directed to the Superintendent of the Penitentiagy. The writ was issued and the case heard upon the petition and return. facts are stated in the opinion of the Court.

C. D. Melton, for petitioner.

Chamberlain, Attorney General, contra.

Sept. 20, 1872. The opinion of the Court was delivered by

provisions of the General Statutes, (p. 519,) | County." the Judge of the Fourth Circuit commenced

eleventh day of that month. The grand jury, which had in due form been summoned by a venire, was organized, and presented a bill against the prisoner, Theodore De Hay, for an escape, on which he was tried and convicted. Sentence not having been imposed before the adjournment, it was passed upon him by Judge Thomas, at a Court of Sessions held by him for the same County, on the first Monday in April succeeding, committing him to the Penitentiary for the term of ten years, and he now seeks a discharge by writ of habeas corpus, averring that the supposed judgment and the proceedings at the term of his alleged trial and conviction, were without warrant of law and void.

*By the 17th Section of the Code of Procedure, (General Statutes, 519,) the County of Fairfield was placed in the Fourth Circuit, and by the 21st Section, the Court of Sessions for the said County was required to be held at Winnsboro, on the second Monday of March, July and November. By the Act of March 9, 1872, (15 Stat., 146,) entitled "An Act to amend sundry Sections of the Code of Procedure relating to the Circuit Courts," it was declared that Fairfield County should constitute part of the Sixth Circuit, and that the Court of Sessions for the said County should be held on the first Monday of April, August and December, and that all writs and processes then already issued, returnable to the Courts according to the laws heretofore of force, shall be legal and valid for the Courts to be held according to the provisions of said Act, and all persons summoned, or to be summoned as jurors, witnesses, or bound or to be bound by recognizance to appear at any of said Courts, according to laws heretofore of force, shall appear at the Courts to be held according to the provisions of this

Unless the time when a statute is to take effect is fixed by some constitutional or legislative requirement, it has validity from the moment of its passage. This is the accepted rule too long recognized to be questioned .-Arnold v. United States, 9 Cranch, 119 [3 L. Ed. 671]; Matthews v. Zane, 7 Wheat., 164 [5 L. Ed. 425]; State v. The Banks, 12 Rich., 616; 1 Kent, 458. The Act, therefore, of 9th March, 1872, was the only one after its passage in force, under which the Court of General Sessions for said County could be held, unless, as is contended, "that the old Act being repealed by implication, must be allowed to operate until it comes in conflict with the Act of March 9, 1872, by some term pre-MOSES, C. J. It appears that under the scribed by the latter Act coming on in the

A statute can only be repealed by implicathe term of the Court of Sessions for the tion to the extent of its repugnancy, or so County of Fairfield at Winnsboro, on the far as the provisions of the old statute are second Monday of March, 1872, it being the incompatible with the new, and is never held repealed unless the repugnancy is plain and unavoidable, or unless the later Act takes some notice of the former, plainly indicating an intention to abrogate it. These are but conclusions from authorities so well known that they need not be referred to. To reconcile the Acts in question would test the never-ceasing exertions of human ingenuity, without avail. To say nothing of the title of the Act of March, 1872, the whole scope and effect of all its provisions in relation to writs and processes issued, and jurors and

witnesses summoned, "according to *the laws heretofore of force," shew the intention of repeal too strong to be resisted.

The Act does not necessarily involve "absurd consequences or those against common reason;" in fact, it might not be very unreasonable to suppose that a statute, passed on the 9th of the month, affecting the sitting of a Court, to be held at a Court House, only thirty miles distant from the capitol, should not be known at the County seat in which it was located, by the eleventh, for if then known, the presumption is that the Court would not be called.

There is nothing in any of the Sections of the Act to shew that it was not to go into operation until one term should be held as directed by it. A contrary intent is plain upon the face of it. It changed the composition of all the Circuits but two, and as to Fairfield County, transferred it from the Fourth to the Sixth. If it be not adjudged to supersede the direction of the Code in the particular under consideration, then Fairfield was to be at the same time both in the Fourth and the Sixth Circuits. If the two Acts were of force, Fairfield would have six instead of three terms, half of which would be helf by the Judge of the Fourth Circuit, and the other half by the Judge of the Sixth. The two enactments as to Fairfield County cannot stand. The one absolutely destroys the other. They cannot be reconciled, for the repugnancy is too manifest.

It was claimed, in the argument, that the General Statutes (which includes the Code of Procedure) are inoperative, because Section 2 of Chapter 146 declares "that they shall take effect and go into operation from and after ---," the blanks never - day of --having been filled. If there were force in the proposition, we do not perceive how it could change our conclusion, for if the Code is repealed, the Act of March 9, 1872, would yet remain-for its terms, as to change in the time of the sitting of the Court for Fairfield, are direct, positive and mandatory; and, besides this, the title of the Act shows that the Code of Procedure, in the contemplation of the Legislature, remained of force. But there is nothing in the proposition, unless we can hold that the clause—to which no effect can be given, because it is incomplete, sense-

repealed unless the repugnancy is plain and unavoidable, or unless the later Act takes some notice of the former, plainly indicating an intention to abrogate it. These are but conclusions from authorities so well known that they need not be referred to. To rectally and unmeaning—can control and supersede the direct and positive enactment of February 10, 1872, (15 Stat., 37,) adopting the General Statutes of the Statutes of Carolina, prepared, &c., as the Statutes of the said State.

But suppose it was conceded, for the sake of the argument, that the General Statutes (in which the Code is embraced) were not of *567

*force, how would that avail the argument, when the authority to hold the term for Fair-field on 2d Monday in March is derived from it?

By the 13th Section of the 4th Article of the Constitution it is provided, "that the State shall be divided into convenient Circuits, and for each Circuit a Judge shall be elected by the joint ballot of the General Assembly." The 18th Section of the same Article declares, that the Court of General Sessions "shall sit in each County three times in each year, at such stated times and places as the General Assembly may direct." It, therefore, cannot, by right, sit at any time but that fixed by the Legislature, except in extra or special session; and it was not pretended that it was so held on 2d Monday in March, 1872. If the individuals who happen to be officers of the Court, meet at a time when the Court is not required or allowed to sit, and organize themselves as the Court, with the usual machinery and ceremony attending it, their acts would be without legal force, and as much void as those of any other persons of the County who may meet to pass upon the rights and privileges of their fellow-citizens. They are void because they are without the elements which alone give validity to law. right and power. A principle so plain needs no authority to sustain it, but if it is required, Brumley v. The State, 20 Ark., 77, was referred to in the argument as ruling, "that the meeting together of the Judge and officers of the Circuit Court at the place, but not at the time fixed by law for holding the Court, is not a Court under our laws, and their acts, as such, must be regarded as coram non judice."

The whole proceeding, therefore, by which the prisoner has been convicted, is without legal authority, and there was no verdict by any jury which authorized the sentence imposed by the Circuit Judge.

While, however, we hold that the prisoner is not liable to detention by the Superintendent of the Penitentiary, under the supposed sentence, we cannot, consistently with our duty, order his discharge. We find before us a prisoner charged with a serious offence, and transferred, without a trial by a competent jurisdiction, from the custody of the Sheriff to the Penitentiary. Under these circumstances, can we set him at large? He is out of the custody of the Sheriff without warrant of law, and all that we can properly do is to

transfer him to the charge of the only officer who can by law hold him.

*568

*It is ordered that notice of this order be given forthwith by the Clerk of this Court, in writing, to the Sheriff of Fairfield County, who, within three days of its receipt, shall demand of, and receive from, the Superintendent of the State Penitentiary, the prisoner. Theodore De Hay, and him safely keep, until duly discharged, and the Superintendent aforesaid shall, on such demand, transfer the said prisoner to such Sheriff.

WRIGHT, A. J., concurred.

WILLARD, A. J. The return shows that the petitioner is held under sentence by the Court of General Sessions, that Court having jurisdiction of the offence with which he is charged by indictment, and of his person.

To entitle the petitioner to discharge, under habeas corpus, it must be made to appear that the judgment of the Court of General Sessions is void. If void, it is no authority for the detention of the petitioner, and he may be set at large by this writ.

If, on the other hand, the judgment is not void, but voidable, the proper remedy for the petitioner is, an appeal from the judgment. An appeal acts directly on the judgment. If a judgment, improperly rendered, is set aside, the case is opened for further proceedings in the Circuit Court, which may proceed to judgment, by due and orderly steps.

A discharge under this writ has not the same effect upon the judgment; it still stands as a formal obstacle, to be removed before the Circuit Court can proceed upon the indictment; it is merely its force and effect that is the subject of consideration in habeas corpus.

The ground alleged for treating the judgment as null and void is that there has been no due and legal conviction to authorize the Court to proceed to judgment. Although there was a conviction in form, yet it is alleged that the Court at which such conviction was had was convened at a term, and held by a Circuit Judge, not authorized by law.

It is not disputed that, at the time the judgment was rendered, the Court was duly convened and sitting. Upon the application of the State for sentence against the petitioner, the question, whether this had been a due conviction, was a pertinent question before the Circuit Court, and that Court had full jurisdiction and competency, and was bound to pass upon it. It must be assumed that the Court passed upon the question and determined, as matter of law, that the conviction was duly had.

*569

*If that determination was wrong, the wrong constituted an error of law, capable of being corrected in this Court on appeal.

To admit that the Circuit Court had authority to pass upon that question, and yet to hold that its action, based upon such determination, is void, and may be disregarded with impunity by those bound to execute the lawful orders of the Court, is a contradiction of the established principle governing the administration of justice.

That the writ of habeas corpus was not intended for any such purpose, is made clear by what is said in exparte Gilchrist, (4 McC., 233.) The writ was intended to protect the citizen against the exercise of unlawful authority, and not to embarrass and confuse the exercise of judicial authority lodged in the hands of the superior Courts.

It is an established principle that when a superior Court has jurisdiction of the case, and of the person, its orders and judgments cannot be treated as nullities, but, if improper, must be set aside in a direct proceeding for that purpose, and not in any collateral proceeding.—Ex parte Gilchrist, 4 McC., 233; People v. Cavanaugh, 2 Park. Cr. R., 650; Hurd, on Habeas Corpus, 334.

In Rex v. Carlisle, (19 Eng. C. L., 450,) it was held that a discharge on habeas corpus was not the proper remedy, where it was alleged that the petitioner was held under the sentence of the Court, pronounced upon a conviction had before a Court not duly constituted under the law, but that the remedy was by writ of error. This is a clear authority in support of the view of the case here taken. I cannot concur in the discharge of the petitioner, but consider that he should be remanded to the custody from which he was taken by the writ.

3 S. C. 569

McCANTS v. WELLS.

(April Term, 1872.)

[Factors \$\sim 43.]

A employed B, a commission merchant, to ship cotton by a sailing vessel from Charleston to B's correspondents in Liverpool, to be there sold on A's account. B, with A's consent, delivered the cotton to a sailing vessel then loading for Liverpool. This was in November, and in the usual course the vessel should have arrived at Liverpool in January. She did not sail until the 31st of March, arrived at Liverpool on the 22d of April, and the cotton was sold on the 5th of September, for 39 pence per pound. In January, cotton was selling at 60 pence per pound. There was no evidence of its value on the 22d of April. The action was brought by A against B to recover damages for the delay. The Circuit Judge instructed the jury that B was primarily liable, if liable at all: Held, Error.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45-57; Dec. Dig. \$\infty\$45.]

*570

[Factors \$\inser\$ 12.]

*He also instructed them that B was liable if he had not used diligence: Held, That he

should have informed them what constituted diligence in the relation of the parties.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 12; Dec. Dig. \$12; Principal and Agent, Cent. Dig. § 98.]

[Factors \$\infty\$=43.]

He also instructed them, if they found for the plaintiff, to find the difference between the value of the cotton at the time it should have arrived in Liverpool, and the price at which it was sold: *Held*, That this also was error.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45–57; Dec. Dig. ⇐⇒43.]

Before Graham, J., at Charleston, March Term, 1872.

Action by Lockwood A. McCants, plaintiff, against Edward L. Wells, defendant.

In the years 1868 and 1869, the defendant and Daniel Lesesne were partners, as commission merchants, in the city of Charleston, under the firm of Lesesne & Wells. Lesesne died in 1871, and this action was brought against the defendant, as survivor, to recover damages for the alleged negligence of the firm in the shipment of cotton from Charleston to Liverpool.

The complaint alleged that on the 14th of November, 1868, the plaintiff, through his factors in Charleston, Gaillard & Minott, delivered nine bags of sea island cotton to Lesesne & Wells, to be carried from Charleston to Liverpool within a reasonable time, and there to sell the same on plaintiff's account. That on the 3d of December thereafter he, through the same factors, delivered to the same firm one other bag of sea island cotton, to be carried and sold with the other nine. That thirty days was a reasonable time for carrying said cotton from Charleston to Liverpool. That through the negligence of Lesesne & Wells it did not arrive in Liverpool until long after that period, and was not sold until the 18th of September, 1869. That in January, 1869, during which month the cotton, if due diligence had been used, would have been received in Liverpool, such cotton as the plaintiff's was worth in Liverpool 60 pence per pound, and that plaintiff's cotton was sold for 39 pence per pound.

At the trial evidence was given tending to show that in November, 1868, the plaintiff was the owner of nine bags of sea island cotton, then in the hands of Gaillard & Minott, his factors, in Charleston. That Gaillard & Minott made a contract with Lesesne & Wells, commission merchants, to ship the cotton by a sailing vessel to Liverpool, to be there put on the market and sold on plaintiff's account; that a sailing vessel, called the Borneo, advertised as an A 1 B. R. ship, up for Liverpool with despatch, was then in the harbor loading for Liverpool. That Lesesne & Wells, with the knowledge and consent of plaintiff,

*571

contracted with the master of *the Borneo to take the cotton, and delivered it on board the

vessel on the 14th of November, 1868. That on the 3d of December one other bag of sea island cotton, of the plaintiff, was shipped on the Borneo by Lesesne & Wells, who had received it from Gaillard & Minott for shipment on the same terms. That an advance on the cotton was made by Lesesne & Wells. who drew on their correspondents, in Liverpool, for the amount of such advance. That, according to the usual course, the Borneo should have sailed within about thirty days from the time she commenced loading, and should have reached Liverpool some time in January, 1869. That the Borneo did not sail from Charleston until the 31st of March, 1869. That she arrived at Liverpool on the 22d of April. That sea island cotton was selling in Liverpool, in January, 1869, at 60 pence per pound, and that plaintiff's cotton was sold on the 5th of September, 1869, by the correspondents of Lesesne & Wells, at 39 pence per pound.

It was further in evidence, that in January, 1869, the plaintiff complained to Mr. Lesesne of the delay in the sailing of the Borneo; said "it was altogether unlooked for, and that he would very much like to get his cotton off the vessel." Mr. Lesesne replied that it was impracticable; "that the cotton had been drawn on, and that it was among the first put on board."

The charge of the Judge was as follows:

"Messrs. Lesesne & Wells are undoubtedly primarily liable, if liable at all. So as to this notice of their refusing to give an account to the plaintiff about the delay in shipping the cotton, you need not trouble your minds at all. If liable at all, they are primarily liable. Now, the question is, are they liable? The law is, that persons to whom business is entrusted are expected to use diligence in its discharge. Have these men used due diligence? In other words, have they come up to the contract madehave they complied with the usages of trade. If they have, they are not liable. You have heard the testimony, If you find for the plaintiff, you will find the difference between the price of the cotton when it ought to have got there and the price at which it was

"Mr. McCrady asked for the charge that they are responsible for the neglect of their sub-agents; that their sub-agents may be responsible back to them.

"By the Court: I have charged that they are primarily liable, if liable at all. The question is, have Messrs. Lesesne & Wells

*572

com*plied with their contract in shipping that cotton? If they have not, they are liable. If they have, they are not liable."

The defendant gave notice of exceptions to the charge as follows:

First. Defendant excepts to the portions

273

of the charge of His Honor containing the expressions "Messrs. Lesesne & Wells are undoubtedly primarily liable, if liable at all, they are primarily liable; now, the question is, are they liable?" * * * because it was not clearly stated to the jury, in connection with above expressions, for what the defendants were so liable.

Second. Because the general tenor of the charge, as given to the jury, was such as to leave on the minds of the jurors the impression that Lesesne & Wells, in their relations to plaintiff, as proven, were primarily liable to him for default of their sub-agents or of the ship.

Third. That it should have been stated to the jury, as matter of law, that an agent will not be liable for acts or omissions of his subagents, "unless in the appointment or substitution he is guilty of fraud or gross negligence, or improperly co-operates in the act or omissions."

Fourth. That His Honor erred in instructing the jury: "if you find for the plaintiff, you will find the difference between the price of the cotton when it ought to have reached Liverpool, and the price at which it was sold."

The jury found for the plaintiff nine hundred dollars.

Defendant then gave notice of a further exception to the charge, as follows:

The defendant also prays that it be noted in the Judge's minutes that defendant excepts to so much of the charge of the presiding Judge, as directed the jury "in case you find for the plaintiff, you will find the difference between the price of the cotton when it ought to have got there, and the price at which it was sold in England."

A motion for a new trial was made, and refused, and the defendant appealed.

Simonton & Barker, for appellant. McCrady & Son, contra.

*573

*Oct. 22, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. To determine the liability of the defendant, as the survivor of Lesesne & Wells, in the matter set forth in the complaint, it is necessary first to ascertain, not only the relation in which they stood to the plaintiff, but the nature of the contract between them.

It appears by the brief that Gaillard & Minott, as factors of the plaintiff, doing business in Charleston, having in hand in November, 1868, nine bales of cotton consigned to them by him, with his assent, employed Lesesne & Wells, commission merchants, of the same city, to ship the said cotton to Liverpool, to be there sold by their correspondents. That the shipment was to be made

arrival at the foreign port before the middle of January was not desirable. That the Borneo, advertised as an A 1 B. R. ship, was up for Liverpool "with despatch," and the cotton, with the knowledge of the plaintiff and Gaillard & Minott, was shipped by her, consigned to the correspondents of Lesesne & Wells, an advance by the latter having been made on account of the shipment. That on the 3d December, 1868, another bag was shipped under the same circumstances. That the Borneo did not sail until the 31st March, 1869, arriving at Liverpool on the 22nd April following, and the sale took place on the 5th of September ensuing. Complaint was made by plaintiff to Lesesne & Wells of the delay in the sailing of the Borneo. But there was no proof that it was at all imputable to them, or that they in any way could control her action. It also appeared that in January, 1869, the market value of the cotton in Liverpool was 60 pence per lb, while on the day of its sale it only brought 39 pence per lb.

There was no evidence of its value on the arrival of the Borneo. No complaint is alleged against the ship, save as to the delay in sailing; nor any against the fitness, ability and character of the consignees; nor was there any testimony to show that the delay in the sale of the cotton after its arrival, to the day it was sold, wrought any loss to the plaintiff. It is not necessary for the solution of the question before us, to determine whether Lesenne & Wells stood in the relation of sub-agents to Gaillard & Minott, or of independent contractors, undertaking for and on behalf of the plaintiff, to ship the cotton to Liverpool, and to make sale of it there.

Their obligation, in either regard, in an undertaking of the character before us, would be subject to the same rules and de*574

mands. *The exception to the charge of the Circuit Judge is, that he instructed the jury "that Messrs. Lesesne & Wells are undoubtedly primarily liable, if liable at all. If liable at all, they are primarily liable," without stating for what they were so liable. Because "the general tenor of the charge was such as to leave on the minds of the jurors the impression that L. & W., in their relation to plaintiff, as proven, were primarily liable to him for default of their sub-agents, or of the ship." "That it should have been stated to the jury, as matter of law, that an agent will not be liable for acts or omissions of his sub-agents, unless in the appointment or substitution he is guilty of fraud or gross negligence, or improperly co-operates in the act or omission." "That he instructed the jury, if you find for the plaintiff, you will find the difference between the price of the cotton when it ought to have reached Liverpool and the price at which it was sold."

By the language of the charge, as set out in they could not direct her sailing, as they had the brief, it was clearly left to the jury to say "whether Lesesne & Wells had used diligence in the discharge of the business entrusted to them; if, in the contract, they had complied with the usage of trade." While their engagement required them to use all the diligence which the law demanded of the particular undertaking, still the Court should have instructed the jury as to what constituted such diligence, and what, in the particular business, the usages of trade required. To say to the jury that due diligence was to be exercised, without defining the degree which the relation required, was to allow the jury to create the standard for themselves, and then decide whether the defendants had come up to it. Mr. Russell, in his work on Factors and Bankers, at p. 259, says: "Whenever the factor or banker has committed, in the course of his employment, any breach of duty, or has overstepped his power, or has been guilty of negligence or fraud, and the principal has suffered a loss in consequence of his factor's misconduct, the latter will be liable to the former to the full extent of such loss, and will likewise forfeit his commission."

The same rule, from the nature of the business of a commission merchant, must be applied to him. Now, if the evidence in the cause brought home to Lesesne & Wells any breach in either of the enumerated particulars, they were liable to the plaintiff to the extent of such damages as ensued from their breach of duty.

If they are to be regarded as the agents of the plaintiff, in the shipment and sale of the cotton through sub-agents, whose employment was necessary, they are not or-*575

dinarily responsible for their *default, "if the employment of the sub-agent is authorized by the principal, either expressly or impliedly, by the usual dealings between himself and his principal, and he has used reasonable diligence in his choice as to the skill and ability of such agent."

This general rule, laid down by Mr. Story, (in his work on Agency, Sec. 201,) is admitted by him as subject to exceptions, for he uses the term "ordinarily," which exempts it from the criticism of Mr. Russell, referred to in the argument for the appellees. There may be cases where the agent and the subagent would both he liable to the principal. Where, however, the very nature of the agency required the service of sub-agents, the rule above referred to must prevail, particularly where the agents were employed with the assent of the principal, as was the case here. He, the plaintiff, knew that Lesesne & Wells were not the consignees of the Borneo-that they had no interest in her freight receipts, and that some vessel must be employed for the shipment of the cotton. That

no control over her. Where an agent is held to answer for the default of his sub-agent, it is on the principle that he can govern and direct his acts-that he had a controlling power over him.

It was impossible for Lesesne & Wells to regulate the sailing of the Borneo, and her delay in starting was the cause of the loss which befell the plaintiff. If the firm of the defendant strictly performed the service for which they were employed, it would be a hard measure of justice to make it responsible for the acts of others, which by no prudence or foresight could they prevent.

We cannot concur with the Circuit Judge in holding the defendant "primarily liable" to the plaintiff. The party, to be so liable, must be the one through whose direct agency the loss has occurred. Now, surely the defendant does not come within this description.

For what is he so held "primarily liable?" Is he any more responsible for the delay in the sailing of the "Borneo" than the plaintiff himself? In regard to the instructions as to the damages: there was no evidence of the value of such cotton in Liverpool when the ship arrived.

It may be that holding the cotton over from its arrival to September was the cause of gain to the plaintiff.

If the sale on arrival would have yielded a better price than was obtained, then the liability of defendant for the loss of the difference will depend on their instructions to the foreign correspondents, and their dealings in regard to the cotton.

*For error in the charge of the presiding Judge, as herein expressed, the motion is granted, and a new trial ordered.

MOSES, C. J., concurred.

WILLARD, A. J. There should be a new trial. While the difference of market value, at the time when the vessel might be reasonably expected to arrive, and at the time when she actually arrived, is an element of the question of damages, it is clear that the instruction of the Circuit Court to the effect, "if you find for the plaintiff, you will find the difference between the price of the cotton when it ought to have got there, and the price at which it sold," is defective in excluding matters that may have affected the amount of damages.

As the remaining question arising on the charge is not likely to produce any effect on a new trial, and as a new trial must be had, I regard it as unimportant to enter upon an attempt to place a construction on the language of the charge as it regards the liability of the defendant.

It may be remarked, however, that the

of liability, on the part of the defendants. as a question of the due performance of the contract. This would seem to be placing the case in the light most favorable to the appellant.

The law of the case is so imperfectly developed by the charge, the request to charge, and the exceptions, that it will lead to no important result to discuss it from the standpoint of the view taken at the trial.

It is probable that the attention of the Circuit Court was not called, previous to the delivery of the charge, to the distinctive propositions of law on which the parties based themselves.

3 S. C. *577

*McCORD v. McCORD.

(April Term, 1872.)

[Evidence = 230.]

Where a vendor of land remains in possession after the conveyance, his declarations made during the continuance of such possession may be given in evidence against the vendee for the purpose of showing that the conveyance was made to defraud his creditors.

[Ed. Note.—Cited in Richardson v. Mounce, 19 S. C. 477, 480, 481; Garvin v. Garvin, 31 S. C. 588, 10 S. E. 507, 17 Am. St. Rep. 48; Price v. Richmond, etc., R. Co., 38 S. C. 211, 17 S. E. 732; Hobbs v. Beard, 43 S. C. 380, 21 S. E. 305; Merck v. Merck, 83 S. C. 329, 65 E. 347.

For other cases, see Evidence, Cent. Dig. § 850; Dec. Dig. \$230.]

Before Orr, J., at Abbeville, Term. 1871.

The appeal was heard upon the following case and exception:

The action was to recover a tract of land against the defendants, with damages for use. The plaintiff claimed to recover under a sale made by the Sheriff of Abbeville County, on salesday of March, 1870, at which the land was bid off by the plaintiff for the sum of thirty-six dollars, (the sale by the Sheriff having been forbidden by the defendant, John Augustus McCord,) and received from the Sheriff a deed, bearing date 24th March, 1870, of the said land.

One of the defendants, John A. McCord, claimed under a conveyance made to him by his father and co-defendant, John R. McCord, bearing date the 11th day of February, 1868, and professing to be for a valuable considera-

The plaintiff was a creditor of John R. McCord, and his surety on the debt upon which the judgment was obtained under which the land was sold, and these were subsisting debts at the date of the conveyance of John R. to his son, John A. McCord.

charge tended to leave the whole question | continued in possession of the dwelling house and appurtenances after the sale to John A.; and up to April, 1871, the son continued to reside with his parents as he had always But John R. McCord ceased to culdone. tivate the land, and worked in the country at his trade more constantly than before. The land was cultivated by John A. McCord . after the sale.

> The declarations of John R. McCord, made before the sale, that he intended to convey the land to his son, to defeat the Gordon debt, (the debt under which the land was sold by the Sheriff, when plaintiff bought,) was also proved.

> The son had no separate estate, and only attained his majority in April, 1865. He went to school most of the year 1866, and in the spring of 1867 claimed to have made and loaned his father nearly nine hundred dollars; of which sum five hundred dollars

*578

was *claimed to have been realized from sales of four bales of cotton, raised upon the farm of his father in the year 1866, by the labor of a colored woman, and with the work which he occasionally rendered. The father and family occupied the premises when the action was brought in May, 1870.

The facts proved showed, prima facie, the collusion of John R. and John A. McCord, to defraud the creditors of John R., and the deed being assailed by the plaintiff as fraudulent as to subsisting creditors, the subsequent declarations of John R., that "he had conveyed the land to his son, to defeat the Gordon debt, and to retain a home for himself for life," were received and excepted to by defendant, John A. McCord.

Exception.—Because the Judge, after objection made, admitted the declarations of John R. McCord, after the deed of 11th day of February, 1868, was made, to affect the rights of the said John Augustus McCord.

Thomson, for appellants:

"The declarations of parties in possession may be given in evidence against their subsequent grantees, but in no case have declarations made after a sale or conveyance been permitted to be given in evidence."-Mr. Justice O'Neall, in Renwick v. Renwick, 9 Rich., 53; Kittles v. Kittles, 4 Rich., 422. The reason is given by Ch. Dargan, (Head v. Halford, 5 Rich. Eq., 137,) "It is the admission of a party who has no interest in the subject-matter."

For the purpose of proving that an assignment has been made to defraud creditors, the declarations of the party at the time of his signing and executing the instrument, are admissible, in evidence, as part of the transaction against the party claiming under him; but declarations made at any other It was proved that John R. and his family time cannot be received.—4 Phil. Ev., 385; v. Scholey, 5 Esp. N. P. C., 243.

McGowan, Perrin & Cothran, contra.

The declaration of the father, John R. McCord, after the date of the conveyance to his son, John A. McCord, was properly admitted, for three reasons.

1. John R. McCord, father, and John A. McCord, son, were both defendants on the record. Admissions made ante motam litem by parties to the suit, against their interest, are admissible.-1 Green. Ev., § 171-2.

*579

*2. The question was as to the existence of a legal sale or conveyance. After prima facie case of combination and fraud shown, declarations of either party admissible. After collusion and conspiracy shown, the declarations of one are the declarations of both. -Alexander v. Gould, 1 Mass., 166; 3 Phil. on Ev., 222, and Notes; Richard v. Cartator, 5 Bin., 109; 1 Phil. Ev., 199.

3. John R., the father, remained in possession after pretended sale to John A., the Was in possession when declarations made and when action brought. The declarations of a person in possession of land as to title, are admissible against him and all persons claiming under him.-Jackson v. Bord, 4 John., 230; 1 Phil. on Ev., 196, 197. A majority of the cases are peculiarly strong that declarations of a debtor who continues in possession after a transfer, showing fraud in the transfer, are evidence against the vendee in a contest with a creditor."-3 Phil. on Ev., 222, and Notes; 1 Phil. Ev., 197.

Oct. 22, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The question in this case is whether the declarations of a vendor of land, remaining in possession after a conveyance thereof, are competent evidence against the vendor in an action by a third party impeaching such conveyance for fraud. The mere question of competency is all that is presented. If, then, it appears that the evidence admitted is either sufficient in itself to support any material averment, pertinent to the issue, or appears to constitute part of a chain of facts material for such purpose, the evidence was properly admitted.

It was certainly material to the question to show that after conveyance the vendor continued to assert ownership, and that the vendee assented to such assertion. The first of these facts, namely, the assertion of continued ownership on the part of the vendor, could properly be shown by his declarations accompanying his possession of the land. The right of the plaintiff to introduce these declarations did not depend on ability to connect the vendee with such assertion, for

Phillips v. Eamer, 1 Esp. N. P. C., 357; Pen; which the proof of acquiescence would ordinarily rest. Kittles v. Kittles, 4 Rich., 422, and Renwick v. Renwick, 9 Rich., 50, do not conflict with this view. The question considered in these cases was whether the declarations of a vendor, after parting with possession, are admissible to impeach his deed. It is true that these cases speak of declarations after conveyance, and do not distinctly *580

> mention the *fact of a transfer of possession, but as continued possession was not alluded to, it is evident that the Court used the expression conveyance as including a transfer of possession.

> In the present case, the declaration must be regarded as forming part of the res gestæ, for the allegation of fraud covered not only the act of conveyance, but the whole time of fraudulent holding under the cover of such conveyance. Although a fraudulent intent, as affecting parties united in interest, cannot be established by proof of a fraudulent intent on the part of one of the parties alone, yet the fraudulent intent of each may be the subject of separate proof. The statement that the deed was intended to defraud creditors is not simply a declaration as to the intent of a past transaction, but is to be regarded as a declaration concerning the right by which the vendor held the land at the time of making such declaration, and, as the declaration of a present intent and purpose, is within the reason of the rule as to proof of the res gestæ.

> WRIGHT, A. J., concurred. MOSES, C. J., absent at the hearing.

> > 3 S. C. 580

PALMER v. RAILROAD.

(April Term, 1872.)

Jury @m59.]

When a civil action is called for trial, the array of Jurors cannot be objected to on the ground of defect in the title to his office of the Jury Commissioner, who acted in the selection of the Jurors—as, for instance, that the appointment to the office had not been confirmed by the Senate.

[Ed. Note.—Cited in State v. McJunkin, 7 S.

For other cases, see Jury, Cent. Dig. § 269; Dec. Dig. \$\sim 59.]

[Carriers @=355.]

Plaintiff was a passenger on the cars of defendant, a railroad company, under a contract to carry him from Charlotte, N. C., to Augusta, Ga., with the privilege of stopping at Columbia. His ticket was a through ticket from New to Savannah, with coupons for the different roads—for defendant's road there being two, one from Charlotte to Columbia, and one from lumbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train detached both coupons, and gave plaintiff the proof of assertion is the foundation on a conductor's check, which by the rules of the

Company and the general usage of railroads, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train for Augusta, in charge of J., another conductor. On this train his ticket was again demanded, and on his exhibiting the conductor's check, and and on his exhibiting the conductor's check, and his ticket without the coupon, to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta or leave the train. He failed to pay, and was ejected from the train: Held, that the act of J. in ejecting plaintiff from the train, was wrongful, and that defendants were liable in damages therefor.

[Ed. Note.—For other cases, see Cent. Dig. § 1420; Dec. Dig. \$255.] see Carriers,

[Carriers \$356.]

Plaintiff's rights grew out of the terms of his contract, giving him the privilege of stopping at Columbia. He did not owe defendants the duty of giving notice of his intention to stop, or of making enquiries as to the force and *581

of the conductor's *check; failed to give such notice or make such enquiries he was guilty of no negligence of which defend-ants had the right to complain. On the contrary, the duty of taking notice of and regarding his right to stop, was owed by defendants to him, and when conductor W. detached the coupon from Columbia to Augusta, he should have delivered in its place some token having the same force and effect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409, 1410, 1423–1432; Dec. Dig. **€**356.]

[Corporations \$\sim 498.]

A corporation may be made to respond in exemplary damages for the misconduct of its agent—as, for instance, a railroad corporation for the misconduct of a conductor, in ejecting a passenger from the train.

[Ed. Note.—Cited in Quinn v. South Carolina Ry. Co., 29 S. C. 386, 387, 7 S. E. 614, 1 L. R. A. 682; Hart v. Railroad Co., 33 S. C. 436, 12 S. E. 9, 10 L. R. A. 794; Spellman v. Richmond, etc., R. R. Co., 35 S. C. 489, 14 S. E. 947, 28 Am. St. Rep. 858; Samuels v. Richmond, etc., R. R. Co., 35 S. C. 504, 14 S. E. 943, 28 Am. St. Rep. 883; Rucker v. Smoke, 37 S. C. 381, 16 S. E. 40, 34 Am. St. Rep. 758.

For other cases, see Corporations, Cent. Dig. § 1909; Dec. Dig. \$298.]

Before Melton, J., at Columbia, October Term, 1871.

This was an action by George W. Palmer, plaintiff, against the Charlotte, Columbia and Augusta Railroad Company, defendantsrailroad corporation owning a continuous line of road from Charlotte, N. C., to Columbia, S. C., and thence to Augusta, Ga.,—to recover damages for wrongfully ejecting the plaintiff from defendants' cars.

When the jury was called defendants objected to the whole array, on the ground that the appointment of the Jury Commissioner who acted in the selection of the jurors, though made by the Governor, had not been confirmed by the Senate, according to the This fact was admitted, Act of Assembly. but the Court overruled the objection, and the defendants excepted.

that early in June, 1871, he purchased from the defendants' ticket agent, in New York, a through ticket from New York to Savannah, Georgia, which, after all the coupons, except the last, were detached, was in words and figures, as follows:

"Read the contract below-baggage limited to 100 pounds—Good until

186 , inclusive, for one passage. New York to Savannah, Georgia, via Baltimore, Washington, Richmond, Weldon, Raleigh, Columbia, and Augusta.

"Coupons are good until date, after which they will be received at their par value in part payment of local fares, but will be forfeited if detached from the ticket. Passengers are privileged to stop only at points named on the coupons, and are prohibited from taking anything as baggage but their wearing apparel. Eighty pounds of baggage only allowed to each passenger. All over eighty pounds to be paid for. The company limit their responsibility for baggage to a dollar per pound, and will not be liable for any amount beyond a hundred dollars, except by special contract. Each company will be responsible for the loss and damage only on its own line. Passengers are required to *582

keep their *entire persons inside of the cars while in motion. Passengers must claim their baggage upon arrival at the point to which they have it checked. If not taken on its arrival, storage will be charged. Issued by the New Jersey Railroad."

"Augusta to Savannah, Georgia,

"Via Central R. R. of Georgia."

That when the plaintiff reached Charlotte there were, besides the coupon from Augusta to Savannah, two others on the ticket, one from Charlotte to Columbia, and one from Columbia to Augusta; that, on Friday, June 9th, the plaintiff got on the train of defendants at Charlotte, and, in a few minutes after it started, he was called on by the conductor on the train, named Wolfe, for his ticket; that he produced it, and the conductor tore off the two coupons from Charlotte to Columbia, and from Columbia to Augusta, and in place of the two coupons, delivered to the plaintiff a conductor's check, in words as follows:

"Job printing of all Charlotte, Columbia and Augusta Railroad. kinds neatly execut-Rinds hearly executive and the seats. fice, Charlotte, North M. M. Wolfe, Conductor." Carolina.

On the reverse side were stations and distances.

That plaintiff informed conductor Wolfe that he desired to stop at Columbia, and was told by him that the check would allow him to do so; that plaintiff stopped at Columbia, remained there all night, and the next day, June 10th, took defendants' train for Au-The plaintiff gave evidence tending to show gusta, and after it had proceeded about four

miles he was called on by the conductor, assuming that plaintiff intended to go to named Johnston, for his ticket; that he ex- Augusta without stopping at Columbia." Uphibited the check given to him by conductor Wolfe, and the ticket, as returned to him by that officer; that he was told they would not answer, and that he must pay the fare from Columbia to Augusta or leave the train; that he protested against being compelled to leave-said he had no money with him, that he would pay when he got to Augusta, and offered to pledge his baggage as security; that the conductor then stopped the train and compelled him to leave it in a swamp, though he asked to be taken to the next station; that his baggage was put off at the same time; that he walked back to Columbia, taking his baggage with himgot wet in a thunder storm, and became much exhausted and feverish from the exposure and weight of the baggage; that the next *583

day he again took de*fendants' train for Augusta, and was allowed to pass on his ticket and conductor's check without paying the fare.

For the defendants, evidence was given tending to show that the plaintiff did not inform conductor Wolfe that he desired to stop in Columbia, and was not told by the latter that the check would allow him to do so; that the conductors on the road were under instructions to detach, before reaching Columbia, both coupons from all through tickets to which double coupons for the road were attached, and to deliver to each passenger wishing to stop at Columbia a "layover ticket;" that the general ticket agents had been instructed to issue no tickets with double coupons for the road: that, by the usage and custom of railroads, a conductor's check was regarded as nothing but a memorandum for himself, was good only for the train on which it was given, and was never recognized by another conductor; that when plaintiff's ticket was shown to conductor Johnston the coupon from Augusta to Savannah had been torn off and was pinned to the ticket; that there was no swamp where plaintiff was compelled to leave the train, and that the day was clear, with no indications of rain; that the conduct of the conductor was not harsh, oppressive or cruel; that there was no house at the next station on the road, and that the weight of plaintiff's baggage was more than eighty pounds.

The following extract from the case containing exceptions shows the points made by the appeal:

At the conclusion of the charge, the Court proceeded to charge the jury upon the instructions submitted in writing on the part of the defendants.

2d Exception. The first instruction asked for by the defendants is in words as follows: "That, without some notice to the contrary, conductor Wolfe was justifiable in considered to have been in the wrong; but

on which the Court said: "Gentlemen of the jury, I decline so to charge, and charge to the contrary;" to which the defendants excepted.

3d Exception. The third instruction asked for is in these words, to wit: "That exemplary damages cannot be allowed in case of a passenger being wrongfully expelled from the cars of a railroad company, unless it be shown-

1st. That improper violence was used: or. 2d. That circumstances of aggravation ex-

isted; or, 3d. That there was an intent to invade or disregard the rights of the plaintiff; or,

*4th. That the expulsion did not arise from an error in judgment on the part of the conductor; or,

5th. That the plaintiff was not in any way in the wrong; or,

6th. That the expulsion was with a design wilfully to injure the plaintiff."

Upon which the Court said: "Upon the first subdivision I so charge you, and add, that if the railroad company was in the wrong, the act of compelling the plaintiff to leave the train was improper violence. Upon the second subdivision I charge you, that before you can find exemplary damages, you must find some circumstances of aggravation, and, in this connection, you will take into consideration the evidence as to the storm, the humiliation, and the force used, and all the circumstances attending the transaction. The third subdivision of this instruction does not indicate the necessary incidents to exemplary damages, I therefore decline so to charge; wrong may be done by a railroad company to a passenger without the intent on the part of the conductor to disregard or invade his rights. In regard to the fourth subdivision of this instruction, I charge you that the Railroad Company is responsible for the acts of the conductor done in the line of his duty as such. It is true the act of a conductor, arising from an error of his judgment, may carry him far beyond the line of his duty, and beyond the scope of his instructions; but there is no pretence of such an error in this case-no assumption that the wrong done by either conductors Wolfe or Johnston, arose from an error of judgment. In reference to the fifth subdivision of this instruction, I charge you, that if the plaintiff was in the wrong, and contributed to the result of which he complains. he is not entitled to any damages whatever. I have already indicated, however, that he was not in the wrong. If the plaintiff had been ejected from the train because of his seeking to carry extra baggage, and refusing to pay freight thereon, he might perhaps be

the amount of his baggage does not appear, asked for by the defendants is in words as to have been considered in the transaction at the time: and I may add, that the fact that a passenger happens to carry more baggage than is allowed by the regulation, should not subject him to expulsion from the train, without demand for extra charges. Such a doctrine this Court cannot tolerate for one instant. In regard to the sixth subdivision of this instruction, I charge you, that there may have been no wilful design on the part of this corporation, or any of its agents, to injure the plaintiff; nevertheless, you may find exemplary damages."

*585

*To the whole of which charge, on the said third instruction, the defendants excepted.

4th Exception: The fifth instruction asked for by the defendants was in words as follows: "That in case the plaintiff was wrongfully expelled from the cars, he can recover for no loss not resulting immediately from his expulsion, unless such loss has been specially laid in his complaint." Upon which the Court said: "I decline so to charge you." To which the defendants excepted.

5th Exception. The sixth instruction asked for is in these words, to wit: "That in case the plaintiff was wrongfully expelled from the cars, he can recover no damages for losses that are remotely consequential." Upon which the Court said: "If you find that this plaintiff is entitled to compensatory damages only, then you cannot take into consideration as an element of that calculation any losses which are remotely consequential; if the damages be exemplary, you may do so," To which the defendants excepted.

6th Exception. The tenth instruction asked for is in these words, to wit: "That if the jury are satisfied that by the usage and custom of railroads in the United States, a conductor's check is good only upon the train upon which it is given, then it was an act of negligence on the part of the plaintiff not to make inquiry of the conductor, who gave him the check, whether it would be good for another train." Upon which the Court said: "Gentlemen of the jury: this instruction undertakes to construct the case in hand. Ordinarily, I think it is the business of the passenger to inquire in reference to the force and effect of the conductor's check. I do not think that this has a direct bearing upon the case in hand. I charge you, that the plaintiff in this case was not bound to make an inquiry of the conductor, and was, therefore, not guilty of negligence; the peculiar contract between him and the railroad company, devolved upon the conductor, not upon the passenger to make the inquiry. I do not think that the instruction applies to this case as made out by the evidence.' To which the defendants excepted.

7th Exception. The eleventh instruction

follows: "That if the plaintiff had a separate coupon from Charlotte to Columbia, and another from Columbia to Augusta, and he intended at the time he was called upon by the conductor for his ticket to stop over at Columbia, it was an act of negligence in him to allow his coupon from Columbia to Augusta to be torn off." Upon which the Court said: "I decline so to charge, and charge the contrary." To which the defendants excepted.

*586

*8th Exception. The twelfth instruction asked for is in these words, to wit: "That if the plaintiff had a separate coupon from Charlotte to Augusta, then it was an act of negligence for him to stop over at Columbia without having been assured by the conductor that the check given him would pass him on another train." To this, the Court said: "I decline so to charge." To which the defendants excepted.

9th Exception. The fourteenth instruction asked for by the defendants is in words as follows: "That the regulation of the defendants requiring a passenger with a through ticket, who gives up his coupons to a point beyond another point, at which he wishes to stop, to obtain from the conductor a layover ticket, is a reasonable regulation." Upon which the Court said: "I decline so to charge, unless the regulation be accompanied by a further regulation, that the conductor shall inform the passenger." To which the defendants excepted.

10th Exception. The seventeenth instruction is in these words, to wit: "That in selling a through ticket to plaintiff, at New York, with two coupons between Charlotte and Augusta, in June, 1871, after orders from Mr. Dorsey, the ticket agent of the defendants, in July, 1869, to discontinue the sale of such tickets, the general agency at New York acted beyond the scope of its authority, and the defendants are not liable for any damage resulting therefrom to the plaintiff." Upon which the Court said: "I decline so to charge. I can recall no testimony to the effect that Mr. Dorsey had done any such thing. This witness did say that he requested the agents of the company to change the coupons of the Charlotte and Columbia and Columbia and Augusta Railroad Companies; but he did not order them at once to stop selling the tickets with two coupons, and that their arrangement was at an end, so far as such tickets were involved. The fact for this instruction has not been put in evidence, and it is therefore irrelevant; if it were relevant, however, I would decline so to charge." To which the defendants excepted.

11th Exception. The eighteenth instruction asked for by the defendants is in words as held liable for a failure to perform any contract imposed upon them by a through ticket, if no notice was in any way given them that the plaintiff desired them to perform that particular part of their contract." Upon which the Court said: "I decline so to charge." To which the defendants excepted.

12th Exception. The twentieth instruction *587

asked for is in these *words, to wit: "That the plaintiff having his baggage checked at Petersburg for Columbia is evidence only of the intention of the plaintiff to stop at Columbia, but not any notice to conductor Wolfe of that intention." Upon which the Court said: "This is true. Since it is desired, I will so charge. The instruction, however, has no bearing upon the case." To which the defendants excepted.

13th Exception. The twenty-second instruction asked for by the defendants is in words as follows: "That the taking up of the two coupons and the giving of a conductor's check by the conductor was sufficient to put the plaintiff, as a man of ordinary prudence and experience, upon the inquiry, if he was thereby secured in his right to stop over at Columbia." Upon which the Court said: "I decline so to charge, and charge the contrary." To which the defendants excepted.

The Court then proceeded to charge the jury upon the instructions upon the part of the plaintiff.

14th Exception. The seventh instruction asked for by the plaintiff is in words as follows: "That the plaintiff was not bound to know any regulations of the defendants which were not brought to his notice; but, on the contrary, he had a right to accept the said conductor's check as an equivalent for the original coupons, and entitling the plaintiff to the same rights and privileges: and if in consequence of the substitution of the said conductor's check for the original coupons, any injury, inconvenience, delay, or loss, occurred to the plaintiff through the subsequent action of the defendants or their agents, the defendants are answerable in damages." Upon which the Court said: "I decline to charge in the exact words of this instruction; there are certain regulations of railroad companies which a passenger is bound to know; those, for instance, which are so uniform, universal, as to become, as it were, a part of the common law of travel, which any passenger of any experience must be presumed to know. I do charge you, however, that the plaintiff was not bound to know the regulations of the defendants in regard to these coupons: that is to say, the instructions given to the conductor to tear both of them off at the same time. On the contrary, it was the duty of the conductor to inform the plaintiff, without any inquiry on the plaintiff's part, and to put in

"That the defendants cannot be his hands such evidence as would have availed to carry out the contract between them. If in consequence of the substitution of the conductor's check for the original ticket, this plaintiff was ejected from the cars, the defendants are answerable in damages." To which the defendants excepted.

*15th Exception. The eighth instruction asked for by the plaintiff is in these words, to wit: "That the plaintiff is entitled to recover damages for the loss of time, injury to his person, extra expense, injury to his feelings, and consequent illness, and bodily or mental discomfort and pain, resulting from his ejection from the defendants' cars; and of the amount of damages adequate to compensate for the injuries received, the jury are the judges, subject to the general restriction that they shall not be excessive, or out of due proportion to the injuries received." which the Court said: "I cannot directly charge upon this instruction, framed as it is. Indeed, I am at a loss to know why it is asked for. I charge you that the plaintiff is entitled to recover damages for loss of time, injury to his person, extra expense, injury to his feelings, and consequest illness, and bodily or mental discomfort and pain, resulting from his ejection from the defendants' car; and of the amount of damages adequate to compensate for the injuries received the jury are judges. If you conclude to find vindictive damages or exemplary damages, they should not be out of proportion to what, in your deliberate judgment, you may deem necessary as compensation for the plaintiff, and for the purpose of an example to the defendants." To which the defendants excepted.

16th Exception. The Court further charged the jury "that when the conductor took up both of the coupons without inquiring of the passenger if he desired to stop at Columbia, without informing him what the particular regulations of the railroad company were which required the conductor to take up both the coupons, he carried out a regulation, which regulation, without such inquiry, was unreasonable; that to take up two coupons without giving the passenger such notice as to enable him to obtain a lay-over check for Columbia, rendered the company liable in damages." To which the defendants excepted.

17th Exception. The Court further charged the jury "that in finding exemplary damages, they are restricted as to the amount only by the pleading; and if exemplary damages be found in this case the verdict may be to any amount, from one cent to fifteen thousand dollars, the limit in the pleading." To which the defendants excepted.

The jury found a verdict for the plaintiff for three thousand dollars, and judgment having been entered thereon the defendants tiff, or design to wilfully injure the plainappealed. tiff.—Wallace v. The Mayor, &c., of N. Y., 18

*589

*Rion, for appellants, filed a brief containing his points and authorities, as follows:

First Exception.—As to jury.

The Jury Commissioner "shall be appointed by the Governor and confirmed by the Senate."—Sec. 4, Act 1871, 14 Stat. 690.

Where a Statute provides how an office must be filled, there is no "color of title," nor is the person an "officer de facto," unless the form of the election or appointment provided has been followed.—People v. Alberton, 8 How. Pr., 364. And in such case all his acts are void.—People v. Carter, 29 Barb., 208.

No acts of a de facto officer are valid when it is known that he is not legally qualified.—The King v. Corporation of Bedford Level, 6 East, 356.

Could, then, the other two of the Board act? The Jury Commissioner, County Auditor, and Chairman of the Board of County Commissioners shall constitute the Board.—Sec. 4, same Act. Where a Board is composed of integral parts, it has no authority to act, unless all those integral parts are present.—A. and A. on Corp., Sec. 510; Grindley v. Barker, 1 Bos. & Pul., 236 and 242; Sedgwick on Stats., 387, exactly to the point, as, likewise, Matter of Palmer, 31 How. Pr., 51.

Third Exception.—The worst case made out by the plaintiff is, that, owing to an improper regulation of defendants, the conductor was required to take up both coupons (from Charlotte to Columbia, and from Columbia to Augusta,) at one time, and on this occasion the conductor failed to give plaintiff a lay-over ticket.

In this connection, it will be observed that conductor Wolfe positively says he did not know that the plaintiff intended stopping at Columbia.

The conduct of conductor Johnston, taking the case as he found it, in expelling the plaintiff from the train, was considered justifiable by the Court and plaintiff's counsel.

I would also remark that the question of whether the company was in the wrong at all, depends upon a matter of opinion as to whether it was Palmer's duty to inform Wolfe that he intended stopping at Columbia, or Wolfe's duty to make the necessary inquiries of him; upon which question all our expert witnesses throw the duty upon Palmer.

a. There was no improper violence.

b. Nor circumstances of aggravation.—
*590

Sedgwick on Dam., 458, *"American Cases," (520) 461, "Louisiana," (523), 462, (524), 463, (524), 464, (526) 520, (602) 522, (605) 562, (659). c. No intention to invade rights of plain-

tiff.—Wallace v. The Mayor, &c., of N. Y., 18 How., P. R. 172 (sixth a. b.) and 176; Sedgwick on Dam., 94, (101), 455, (517), 458, (520), 461, (522), 466 note, (528, 530, 531, 532, 533, 718), 547, (639), 550, (643), 552, (648); Goddard v. Grand Trunk R. R., 57 Maine, 202; Atlantic & Great Western R. R. v. Dunn, 19 Ohio, 162; Millard v. Brown, 35 N. Y., 300; [Philadelphia, Wilmington & Baltimore Railroad Co. v. Quigley] 21 How., (U. S.) 213 [16 L. Ed. 73].

d. If conductor Wolfe was in the wrong, (and I admit improper regulations are no justification,) this arose from an error in judgment in taking up both coupons at once.
—Sedgwick on Dam., 466, note, 532, fifth ed.

e. The plaintiff was in the wrong.

He had a torn through ticket, which of itself justified his expulsion.

His being exhausted by the walk was by his own wrong in having extra baggage in the passenger car over what the contract of the through ticket allowed him.

He certainly could not have distinctly informed conductor Wolfe that he desired to stop at Columbia.

To recover, the plaintiff must be without fault.—Burke v. Broadway and 7 Avenue R. R. Co., 34 How. P. R., 239, 246, 249; Sedgwick on Dam., 468, (534).

Fourth Exception.—See 4 N. Y., 130. "Damages, natural but not necessary result of the injury, must be laid, &c."

Fifth to Sixteenth Exception.—The points made in the other exceptions and the testimony show that this was not a case for exemplary damages.

Seventeenth Exception.—This charge "took the bridle off the jury."

The damages allowed ought to have been direct and natural consequences of the wrong.
—Sedgwick on Dam.; Crane v. Petrie, 6 Hill, 522.

Damages not resulting immediately from injury cannot be recovered, and cannot be proved unless specially laid in declaration.—2 Am. R. R. Cases, 378—injury was from negligence—arm broke—"must necessarily flow from principal fact"—excluded proof that plaintiff had a large family dependent upon him for support.—Foard v. Atlantic & N. C. R. R. Co., 8 Jones, 235, (N. C., 1862).

**591

*When R. R. Co. guilty of negligence in not forwarding a piece of machinery to plaintiff, whereby his mill kept idle—held that the measure of damages was not what the mill would have made if not kept idle, but the legal interest on capital, hire of hands kept idle, cost of sending for missing machinery, and other damage which was the direct and necessary result of defendants' negligence.

Chamberlain, contra:

The Jury Commissioner was an officer de facto, and as such his acts were valid.—Mc-

Bee v. Hope, 2 Sp., 138; State v. Hill, 2 Sp., gusta. The conductor, between Charlotte and 150; State v. Lyles, 1 McC., 239; State v. Hutson; Kottman v. Ayer, 3 Strob., 146; State v. Maberry, 3 Strob., 146; People v. Collins, 7 Johns, 549; Wilcox v. Smith, 5 Wend., 231; People v. Stevens, 5 Hill, 615; People v. Cook, 8 N. Y., 67; 3 Black. Com., 368. The title of such an officer cannot be enquired into collaterally.—Hill v. Luther, 13 Wend., 491.

Upon the 3d and 6th subdivisions of the 3d exception, he cited Sedg. on Dam., 34, 122, 517, 519, 520, 526 and authorities referred to; 2 Red. on Rail., 222, 224; Hays v. Caboes, 3 Barb., 42; Krom v. Schoonmaker, 3 Barb., 647; Burr v. Pettibone, 4 Comst., 300; Huckle v. Money, 2 Wils., 205. Exemplary damages may be given, though there was no intent to invade or disregard the rights of the plaintiff, or design willfully to injure him. Such intent, where it exists, may increase the amount of damages, but is not necessary to their being given.

Upon the 5th exception he cited Coleman v. Southwick, 9 Johns., 45; Southwick v. Stevens, 10 Johns., 443; and upon the 9th, Bebee v. Ayers, 28 Barb., 275.

Oct. 25, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The defendants' first exception involves the proposition that under an objection to the array of jurors, it is competent to enquire into the title of the Commissioner, by whom the jury was selected, to the office exercised by him. The existence and authority of the office are not questioned, but the title of the incumbent is the only matter in dispute. The validity of the array does not depend on the title of the Jury Commissioner to his office. While actually exercising the powers of the office, his official acts must have full force and effect.

The remaining exceptions involve these general inquiries, namely:

1st. What is the true construction of the contract expressed or implied by the passage ticket purchased by plaintiff?

*592

*2nd. Is that contract affected by any thing in proof as to the general custom of railroad travel, or the particular rules and regulations of the defendants?

3rd. Assuming the act of the conductor in removing the plaintiff from the train to be unlawful and moved by malice or recklessness, can the defendant be held responsible therefor in exemplary damages?

The plaintiff purchased a ticket of defendants' agents in New York, by the terms, entitling him to a passage over the defendants' railroad from Charlotte to Augusta, with the privilege of stopping over at Columbia. The ticket contained separate coupons from Charlotte to Columbia, and from Columbia to Au-

Columbia, separated from the ticket both of these coupons, retaining them, and giving to the plaintiff a conductor's check. stopped over at Columbia, taking, on the next day, a train under charge of a different conductor from the one whose check he held. Plaintiff was expelled from the train by its conductor, on the ground that the conductor's check held by him did not entitle him to a passage in that train from Columbia to Augusta, and of his failure to pay the proper fare from Columbia to Augusta he demanded of him.

The second exception brings up the following instruction asked for by defendants, namely: "That, without some notice to the contrary, conductor Wolfe was justifiable in assuming that the plaintiff intended to go to Augusta without stopping at Columbia." The Court refused this charge, and charged the contrary.

If this instruction had any bearing in the case it would result from the proposition that the plaintiff was bound to notify the conductor at the time he removed the coupons to Augusta that he intended stopping over at Columbia. According to the true construction of the contract, the plaintiff was at liberty to form the intention of stopping over at Columbia at any time before the train left that place for Augusta. The instruction, on the contrary, assumes that that intention should have been not only formed, but expressed, at the time the conductor removed the coupons between Charlotte and Columbia.

The conductor was bound to assume that the plaintiff intended to retain the right conferred by his contract, and in taking from him the evidence of such right, to place in his hands some token that would, under the rules and regulations of the defendants, be equivalent to the possession of the coupons removed.

*593

*The instructions asked would have tended to mislead the jury as to the nature of the rights of plaintiff under his contract, and was properly refused.

The sixth exception is directly connected with that just considered. The defendant asked an instruction, "that if the jury are satisfied that, by the usage and custom of railroads in the United States, a conductor's check is good only upon the train upon which it is given, then it was an act of negligence on the part of the plaintiff not to make enquiry of the conductor, who gave him the check, whether it would be good for another train." The Court refused this instruction, and charged "that the plaintiff, in this case, was not bound to make an inquiry of the conductor, and was, therefore, not guilty of negligence; the peculiar contract, between him and the railroad company, devolved upon the conductor, and not upon the passenger, to make the inquiry. I do not think that the enquired as to the import and value of the instruction applies to this case as made out by the evidence."

It has already been said that it was the duty of the conductor, in taking up the coupons, to place in the hands of the passenger some token that would have the force and effect, under the rules and regulations of the company, of the coupons themselves. marily, the passenger had the right to hold the evidence of his contract until it had been performed on the part of the defendants. Assuming that this right was modified, by the rules and regulations of the road, to the extent of rendering it proper for the conductor to demand that the evidence of his right, as to any portion of the journey secured by the ticket, should be surrendered before such portion was completed, the ground on which the reasonableness of any such regulation must rest, is the necessity and propriety of such a course for the protection of the company against imposition.

Having, therefore, demanded of the passenger the proper evidence of his contract for their own benefit, they were bound to put him in as good a position as if he had not parted with such evidence. The common practice is to substitute a conductor's check for the coupons taken up. This conductor's check is a mere token. It need not express the terms of the contract under which the passenger is conveyed. The passenger has the right to assume, without examination or enquiry, the due performance by the conductor of his duty in this respect.

What would be the effect, if the conductor's check contained words limiting in effect the

*594

right of the passenger, as existing under *the ticket and coupons, in the event of the attention of the passenger being called to such limitation, whether in that case it would call upon him to assert the right thus affected, or be held to have abandoned it, is not a question in this case, for it does not appear that the conductor's check in question contained words of that character. While it is true that, if a passenger claims anything under general usage, or under the rules and regulations of a particular road, in excess of what he has a right to demand under his contract, he must take it in subordination to such usage and rules. Yet, when his contract gives him a clear right, subject to no contingency, he cannot be deprived of that right, either under a rule established by general usage, or by the particular road, in the absence of timely notice of such rule. Applying these principles to the instruction asked, and the charge given in lieu of it, it is clear that the instruction asked was defective in charging the passenger with knowledge of the import of the check, upon the ground of general usage alone, and in making it a

check. It is equally clear that the view taken by the Court was correct, both as it regards the duty of the passenger and the conductor, and the inapplicability of the instruction to the case, there being no facts in proof tending to fix on the plaintiff a charge of neglecting any act essential to the preservation of rights under his ticket.

The seventh exception brings up an instruction asked by defendants and refused, which is as follows: "That if the plaintiff had a separate coupon from Charlotte to Columbia, and another from Columbia to Augusta, and he intended, at the time he was called upon by the conductor for his ticket, to stop over at Columbia, it was an act of negligence in him to allow his coupon from Columbia to Augusta to be torn off." The Court declined so to charge, and charged the contrary. The eighth exception contains an instruction, asked and declined, as follows: "That if the plaintiff had a separate coupon from Charlotte to Augusta, then it was an act of negligence for him to stop over at Columbia without having been assured by the conductor that the check given him would pass him on another train." The sixth, seventh and eighth exceptions seek to charge the plaintiff with negligence. To give any meaning to the idea of negligence thus advanced, it would be necessary to suppose that at the time when the conductor called upon the plaintiff for his coupons, some duty was imposed on the plaintiff, the negligent perform-

*595

ance *of which deprived him of his right to stop over at Columbia. According to the sixth exception, this negligence consisted in not ascertaining that he had proper evidence of his right to stop over. According to the seventh exception, it consisted in his allowing the conductor to take up the Columbia and Augusta coupon. If in either of these cases any negligence occurred, it was in respect to some duty that the plaintiff owed himself, and not as to any duty in which the defendants are concerned, and therefore, it is not a matter that can be alleged by them as enuring to their advantage. The plaintiff had rights fixed under his contract, and unless his conduct amounted to an abandonment or modification of these rights, such as the defendants would take advantage of, it is unimportant whether he was vigilant or remiss in detecting an infraction of such rights. What might have been the consequence, had it been made to appear that the plaintiff took the conductor's check with knowledge that the conductor had committed an error, is not necessary to be considered, for there is no evidence tending to prove such a state of facts. If there was negligence in stopping over at Columbia without inquiry as to his right to resume his journey on the next day, ground of negligence on his part, not to have it was not incident to any duty due to the

defendants, and they cannot therefore complain of it. It is very clear that the conductor had no right to take up the coupon from Columbia to Augusta before Columbia was reached, unless he placed the plaintiff in as good a condition as before, by giving a check or token evidencing his right to stop over at Columbia, and to take a subsequent train; but this only leads to the conclusion that plaintiff had a right to assume that the conductor's check given to him was sufficient for that purpose. Such being the case, he was not bound to protest against or resist the removal of the Columbia and Augusta coupon.

The instruction asked that is the subject of the ninth exception, is as follows: "That the regulation of the defendants, requiring a passenger, with a through ticket, who gives up his coupon to a point beyond another point at which he wishes to stop, to obtain from the conductor a lay-over ticket, is a reasonable regulation." This instruction was refused, "unless the regulation be accompanied by a further regulation, that the conductor shall inform the passenger." It will not be necessary to examine the conclusions of the Circuit Court as to this instruction, for the regulation in question has no application to the present case. It was obviously intended to cover the case of a passenger desiring to stop at some point intermediate to the initial and terminal

*596

point of a single coupon. In such a case *we must assume that the right to stop at such intermediate point would depend on the regulations of the road, and not upon the contract which allows stoppages only at the points to and from which coupons run. It cannot be construed as applying to a case where the passenger has the right, by the terms of his contract, to stop at a particular place; nor can it be applied either to the initial or terminal points of a coupon. Neither can the regulations of the road consolidate the coupons into one, as against the right of the passenger, under the terms of his contract, to treat them as distinct parts of his journey.

The tenth exception questions the authority of the agent at New York to sell two coupons between Charlotte and Augusta. But the fact that the defendants recognized the ticket, and allowed the plaintiff finally to perform the journey called for by it, was such a ratification of the act of the New York agent as to render immaterial evidence of the nature of the instructions under which the agent acted. This instruction is unimportant to the case, for this reason. The charge, were it erroneous in this respect, at large, and as covering redress of an injury could not have affected the verdict to the prejudice of the defendants.

The eleventh exception has no application to Augusta, after having stopped at Colum- Nothing would be more dangerous than to al-

bia. The entrance of the plaintiff into the train, with the portion of his ticket remaining in his hands, and a conductor's check from Charlotte to Augusta, was a clear demand for the performance of the part of the contract the breach of which is alleged.

The twelfth exception was charged as requested by the defendants, and is not before us for review.

The thirteenth exception is already disposed of by what has gone before.

That portion of the charge brought into view by the fourteenth and sixteenth exceptions, so far as it is applicable to the present case, is in conformity to the views already expressed, and is free from error.

The remaining exceptions, namely, the fifteenth and seventeenth, raise the question whether the rule of exemplary damages was appropriate to be submitted to the jury. If the defendants could, under no such circumstances, be subjected to exemplary damages for the misconduct of the conductor, or, if there were no facts in the case to characterize the conduct of the conductor as malicious,

*597

*oppressive, or reckless of the rights of the plaintiff, then the submission of the rule of exemplary damages was erroneous, as it would tend to mislead the jury as to their duty in the case.

The question, whether a corporation is liable to respond in exemplary damages for the misconduct of an agent, has not been settled in this State. It will be considered on reason and authority, so far as it affects the relations of a common carrier to his passenger, where there has been an abuse of authority over the person of the passenger, conferred by the carrier upon his agent, acting in his stead in the performance of the contract to convey with safety. The right of a common carrier to eject a person from his conveyance by personal force can have no other foundation than that which justifies the lawful occupant of a house from ejecting therefrom, in like manner, an unlicensed intruder or trespasser. It is a consequence of dominion over property. As the exercise of this right, accompanied with force, involves a restraint of the liberty of another, it is a delicate power that should be scrupulously guarded from abuse. The imposition of exemplary damages is a means peculiarly fitted to prevent abuses of this power, and when applied to cases of this character, ought to be regarded as accomplishing more than merely setting an example for the benefit of the community to the right of personal liberty distinguishable from all that class of personal grievances properly embraced within the legal rule of to this case. The position of the plaintiff is, compensatory damages. Where such powers that under their contract the defendants are delegated, the sanction under which they were bound to convey him from Columbia are exercised should not be diminished.

low such powers to be conferred on an ir-t this case, on the ground that it did not aping the person communicating such authority exempt from part of the legal consequences that ought to be attached to their abuse. If public policy allows exemplary damages, in order to deter persons clothed with such authority from abusing it, there is equal reasons for allowing them as a penalty for the delegation of such powers to an improper person.

It will be found, upon examination of the authorities, that while much difference of opinion has been called forth by the discussion of the general question of the liability of corporations, to exemplary damages, for the misconduct of agents, yet that no case is in conflict with the limited basis of the question above stated. Goddard v. Railroad, 57 Maine, 202.—In this case the general liability of a railroad company, as a common carrier, for misconduct of an agent towards a passenger under his charge, is established

to the extent of *allowing exemplary damages. The same rule was applied in Railroad v. Dunn, 19 Ohio, 162.

Ward v. Railroad, 17 N. Y., 362.—In this case the question of exemplary damages was not considered by the Court of Appeals, though it appears to have been raised by plaintiff on the trial. Railroad v. Hinds, 55 Penn., 512. This case holds that it is the duty of the railroad company to protect the lives and persons of passengers, as against riotous conduct of other passengers, so far as the means are at hand so to do. The concurrence in the common carrier of a certain right of control over the person of his passenger, with the duty of protecting him from unlawful force from third parties, is suggestive of a relation calling for the application of the rule, qui facit per alium facit per se, carried to its fullest extent, so as to transfer to the principal all the legal consequences that ought to flow from the act of the agent.

Railroad v. Jinney, 10 Wis., 383.—This case has been regarded as an authority against the allowance of exemplary damages against a corporation for the act of its agent, without proof of direct authorization or ratification; but such is not the effect of the case. The refusal to apply the rule of exemplary damages, in that case, was based on the fact that the conductor had no authority to remove passengers from the cars, the Court holding that such delegation of authority must be proved, and could not be inferred from knowledge of the general practice of railroads. This case is in strict accord with the idea that where such a delegation of authority exists in the hands of an agent, liability to exemplary damages, on the part of the principal, will follow an act of gross, malicious or wanton abuse in the hands of such agent.

rule of exemplary damages was refused in demand; for, although without money to pay

responsible person, possibly a ruffian, leav-pear that the defendant had either authorized or ratified the act of the conductor. It does not assume the position, that a special act of authorization or ratification was essential. It is entirely consistent with the idea that a general delegation of authority would support the application of this rule. On examining the report of the case, it will be observed that it does not appear, anywhere, that the conductor had authority to remove passengers from the cars. The case cannot be hostile to a proposition, that announces as the basis of its conclusion, that there must be a delegation of power of control over theperson of the passenger.

Hill v. Railroad, 11 Louis., 292.—The rule

*599

of compensatory *damages laid down in this case was strictly applicable to the case, there being no circumstance to justify the allowance of exemplary damages.

Amiable Nancy, 3 Wheat., 546 [4 L. Ed. 456].—Exemplary damages were refused in this case, as against the owners of a privateer, for an injury unlawfully committed by the privateer while under the control of the agent of such owners. This decision is based on the peculiar nature of the privateering service. It is enough to distinguish that case from the principle under consideration, that there the powers exercised by the agent were war powers, not derived from the owners of the vessel, but from the government under whose laws the vessel sailed. An abuse of such powers would lead to different consequences, from an abuse of powers belonging, of common right, to common carriers.

Railroad v. Quigly, 21 How., 202 [16 L. Ed. 73].—Exemplary damages are allowed against a corporation for the malicious publication of a libel, under authority of its Board of Di-Directors can be regarded in no rectors. other light than as agents of the corporation, and it is impossible to avoid the conclusion that this authority upholds the general proposition that a corporation may be held responsible in exemplary damages for the malicious act of its agents done in the course of its business.

Thus it will be found that the current of decisions supports the proposition under consideration.

It is clear that there were circumstances rendering it legally possible, that the jury might conclude that the conductor, in removing the plaintiff from the train, was influenced by an intent to injure, degrade or oppress Among these circumstances are the facts that the ticket and check, exhibited to the conductor, tended to show that it was a case of mistake, and not of a design to defraud the company; that the plaintiff exhibited willingness to do all in his power in or-Turner v. Railroad, (34 Cal., 594).—The der to accede to what he considered an unjust

the fare demanded, he offered to secure its payment by pledging his baggage; and the fact that the plaintiff was put off at an inconvenient place—the jury had a right to say whether the act was reasonable and wholly influenced by a sense of duty to his principal, or whether it was a harsh and tyrannical exercise of authority, conceived in a spirit of hostility or prejudice against the plaintiff, or in reckless and wanton disregard of rights respected by the humane spirit of our laws. Power to remove a pas-

senger from a public conveyance *should be lodged in the hands of the persons in charge of such conveyances. But it ought always to be regarded as the last resort, and its exercise ought not to be justified where all considerate and just minds revolt from it as an act of cruelty. All the powers of common carriers over their passengers are subject to the limit of reasonableness, and an act that offends the sense of public justice and propriety cannot be justified as a lawful exercise of the authority of a common carrier over the person of his passengers. The rule of exemplary damages was proper to the case. There being no error in the rulings or charge of the Circuit Court, the motion for a new trial should be denied, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

3 S. C. 600

CROTWELL v. BOOZER,

(April Term, 1872.)

[Executors and Administrators @=329.]

A decree for sale of decedent's real estate, consisting of his residence and the lot on which it stood, was made in April, 1868, for payment of his debts, and the sale was made by the Commissioner in November, 1868, without reservation to the widow and infant children of decedent, of the homestead exemption under paragraph 7 of the military order known as Order No. 10, which, by their answers, they claimed. Two of the debts, to satisfy which the sale was made, were for purchase money of the homestead. The widow opposed the confirmation of the sale on the ground that the residence and lot were exempt from sale under said order: Held, That the claim of the widow and children was unfounded in law, and that the sale should be confirmed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052, 1059, 1342, 1350–1364; Dec. Dig. \$\infty\$=329.]

[War \$\ighthapprox 31.]

Order No. 10 expired by its own terms when the civil government of the State was established under the Constitution of 1868. Paragraph 7 of the order conferred, proprio vigore, no vested right of homestead, and after it had expired could not be enforced by the officer making a sale.

[Ed. Note.—For other cases, see War, Cent. Dig. § 212; Dec. Dig. € 31.]

Before Moses, J., at Newberry, Term, 1871.

The case is stated in the Circuit decree, which is as follows:

Moses, J. A motion to confirm the sale of a house and lot made by the late Commissioner in Equity for Newberry, by virtue of a decretal order in this case, dated the

day of April, 1868. The defendants objected. Before entering upon a discussion of the merits of this controversy, it is important to review the facts upon which it is founded.

*601

*In March, 1867, the plaintiff filed his bill against the defendants, alleging that he was the administrator of the personal estate of one Frederick S. Boozer, deceased, whose estate in his hands was not sufficient for the payment of his debts, and praying that a certain house and lot in the town of Newberry, belonging to the estate of his intestate, might be sold to pay debts, a considerable portion of which said indebtedness grew out of two sealed notes, each for \$769, which had been given to secure the purchase money of the said house and lot.

Jane E. Boozer, the widow of the said Frederick S. Boozer, and his two infant daughters, in their answers to the bill, formally demanded the said house and lot under paragraph 7, of General Orders No. 10, dated the 11th day of April, 1867, issued by Maj. Gen. Daniel E. Sickles, as Commander of the 2d Military District; and the said Jane E. Boozer, the widow, prayed in her answer, if the claim of homestead should be disallowed, then, that she might have laid off to her, her dower ip said house and lot of land.

The cause came on to be heard before Chancellor Johnson, in September, 1867, and on the 22d day of April, next ensuing, he filed his decree, wherein he decided that the question of homestead raised by the defendants was a proper one for the officer making the sale, and allowed the widow to sue out her writ of admeasurement of her dower whenever she saw proper. This last she did. The house and lot were sold by Silas Johnstone, as Commissioner in Equity, in November, 1868, and James Y. Harris became the purchaser at the price of twenty-two hundred dollars, and complied with the requirements, taking title therefor.

The Commissioner directed the Sheriff in writing to deliver possession of said house and lot to the purchaser, James Y. Harris. The defendants refused possession; written notice was served upon them that an application would be made to his Honor Chancellor Johnson, at Chambers, in December, for an attachment to enforce the delivery of possession. To this the defendants replied by a regular return, and at the hearing, the Chancellor made the rule absolute. From this order of attachment the defendants ap-

pealed, and upon a hearing of their grounds officers without laying off homesteads, and of appeal, the Supreme Court of this State reversed the Chancellor's order making the rule of attachment absolute, intimating that the true time to canvass the question of

*602

homestead would be upon the report of *sales coming in for confirmation (a). And new this report of sales is sought to be confirmed.

The grounds relied upon by the defendants are that the homestead, under the General Orders No. 10, and General Orders No. 164, was a vested estate, and that the same cannot be destroyed, and that although their estate of homestead was not recognized by the officer making the sales, yet the same was not affected thereby, for the General Orders are imperative, not even allowing them to disclaim it.

The plaintiff contends that the General Orders, Nos. 10 and 164, were only temporary, intended merely to be of force until the State government was again restored. That by the very terms of the Act of the General Assembly of this State, "To quiet rights under military orders," it is expressly provided that the same shall be unquestioned in the Courts of this State, except when inconsistent with the Constitution. The estate of homestead cannot exist in lands where the purchase money has not been paid.

The controversy is not by any means devoid of interest. Novel, but exceedingly important results are involved. Hence very great care is devolved upon the Court in adjudicating the rights here contested.

Had the sale been made in April, 1867, after the promulgation of the "General Orders" referred to, what would have been the effect? Very clearly the homestead would have been laid off. The officer making the sales could not have disregarded it. The persons for whom it was designed could not by any act of theirs defeat it. Well, having been set apart, would the subsequent action of the State authorities in the adoption of homestead laws, now of force, have divested the estate of homestead vested under the military orders? It would be exceedingly difficult to adduce valid grounds for such a conclusion. To effect this, we must conclude that the military commanders were exercising powers not properly belonging to them: in plain language, were assuming power in the promulgation of such orders.

We must conclude that in case the homestead had been set apart by the officer making the sales, while the "General Orders" were of force as laws, that no subsequent action of our State authorities could have divested rights acquired thereby. If this be so, what difference is there between the case supposed and the one that we are considering? By the express language of the orders, no sales should be made by Sheriff or other no act of the parties could defeat the estate *603

of home*stead. While the orders were in force, this widow and her infant daughters demanded the shelter afforded by these military orders. They retained continuously the possession of that homestead. They will retain it.

But admitting, for argument's sake, that the claim of homestead set up by the defendants would be defeated, if inconsistent with the provisions of the Constitution of this State, how is it made to appear that this claim is inconsistent therewith? is not an estate of homestead therein provided. Homesteads which had no prior existence, are derived from that instrumentthey have no other foundation. How does it appear that a claim of homestead derived through a different source can be inconsistent with one therein provided? There is no provision therein made restricting the estate of homestead for heads of families in this State, to those expressly created thereunder. With this view of the law and facts. I feel constrained to refuse the motion.

It is therefore ordered and adjudged, that the motion to confirm the sale of the house and lot described in the pleadings be dismissed.

Crotwell, the plaintiff, and Harris, the purchaser of the land, appealed from the decree on the following grounds, to wit:

I. Because his honor the Circuit Judge erred in refusing to confirm a sale made by virtue of an order emanating from a Court of competent and proper jurisdiction, directing, after a full and fair hearing of the cause, such sale to be effected, from which no appeal was made.

II. Because the sale of the said lot of land, the confirmation of which has been refused by the decree herein appealed from, was made on the first Monday in October, 1868, after the adoption of the present Constitution of the State of South Carolina, and under its authority-so that, at that sale no homestead could have been allowed, or laid off to the defendants in said lot of land, under the Military Orders, Nos. 10 and 164, at that time superseded by the adoption of the Constitution; and the sale reported should have been confirmed.

III. Because, by the provisions of the Act (No. 41) of the General Assembly of the State of South Carolina, entitled "An Act to quiet rights vested under Military Orders," no rights or titles under such orders, even those that had become vested thereby, are validated, if inconsistent with the Constitu-

*604

tion and legislation consis*tent therewith; and by the provisions of said Act all rights acquired by the defendants under the Orders Nos. 10 and 164, are divested, even if they

⁽a) See the case reported 1 S. C., 271.

sistent with the Constitution, and therefore the said sale should have been confirmed.

IV. Because the assertion of a right of homestead by the defendants out of the lot of land sold under an order in these proceedings, against a creditor for the purchase money of that lot of land, is in direct conflict with the Constitution of this State, which provides that no property shall be exempt for homestead from sale for the payment of obligations contracted for the purchase money of the lands in which homestead is claimed: and also with the Act of the General Assembly (No. 41,) 1868, entitled "An Act to quiet rights vested under Military Orders;" and, therefore, the decree of the Circuit Judge, refusing the confirmation of the sale of the lot of land, as reported, because of the defendants' claim of homestead, should be reversed.

VI. Because all Military Orders, Nos. 10 and 164 included, were only temporary in their operation, and vested no rights, except such rights as were subsequently confirmed.

Baxter, for appellant. Fair, contra.

Nov. 20, 1872. The opinion of the Court was delivered by

MOSES, C. J. The Circuit Judge refused to confirm the sale of the premises referred to in the pleadings because a right of homestead therein was vested by the General Order of General Sickles, commanding the Sec-(comprising ond District. Military States of North and South Carolina,) numbered 10, and dated April 11th, 1867, in the defendants, the widow and children of the intestate, as whose property, by proper proceedings, it was ordered to be sold. It appears to be conceded that the indebtedness towards which, in part the proceeds of the sale were to be applied, arose out of two sealed notes which had been given to secure the purchase money of the said premises. As the Constitution, by the 32d Section of the 2d Article, withholds the right of homestead in property sold to meet the obligations "contracted" for its purchase, if the claim of these defendants cannot be sustained on the ground set forth in the Circuit decree, it must fail.

It is not necessary to inquire as to the ef-*605

fect of a homestead *allowed by the said order so far as relates to the duration of any exemption granted under it, for in regard to the property directed to be sold by the decree of April 22, 1868, no order had been previously made in any way conferring it. The naked question before us is, as to the effect of the said military order at the time the sale was directed by Chancellor Johnson. The order of General Camby (No. 164) only modi-

had ever vested, so far as they were incon-tiled the character of the exemption, and in no other way changed or qualified the previous order of General Sickles to which it related.

> It cannot be claimed that, by the force of its own operation, it forever exempted from sale the property in terms reserved by it, for if this concession is made, it would stand as the permanent law of the land, overriding the Constitution and all Acts which the wisdom of the Legislature might have provided in regard to homesteads. Suppose the Constitution of April, 1868, instead of permitting them, under certain restrictions and limitations, had entirely forbidden their existence, could it be contended for a moment that at a sale made after this instrument took effect, they could still be claimed and exacted by virtue of the Military Order No. 10? If it can, then the same validity must be extended to all the other provisions of the same order, and the pretence that it could do this would certainly be remarkable, at least for its boldness.

> The military order in question was only temporary in its duration. Its provisions are so expressed on its face, in the most unmistakable terms, as follows: "They will continue in force, with such modifications as occasion may require, until the civil government of the respective States shall be established in accordance with the requirements of the government of the United States." At the time when the sale was made there was no right of homestead existing save that provided by the Constitution and the Act of September 9, 1868, entitled "An Act to perpetuate the homestead," (14 Stat., 19.) The first, in express language, provides "that no property shall be exempt from attachment, levy or sale for taxes or for payment of obligations contracted for the purchase of said homestead, or the erection of improvements thereon;" and the third Section of the Act referred to repeats the prohibition almost in the same language. The constitutional inhibition would have been sufficient, but the Legislature, that it might not be lost sight of by those who would be called on to execute the Act, again brought it to their notice. The judgment of the Circuit Court treats the right of these defendants as a vested one under the order. Such is not the fact. By the terms of the *606

> *order, "the excepted property of the defendant is to be ascertained by the Sheriff, or other officer enforcing the execution, who shall describe the same and report it to the Court in each case." No title could therefore vest until the extent and character of the property designated as the homestead had been laid off and reported to the Court. This was not done in the case here, and before the sale was ever directed the effect of the military order was superseded by the Constitution. If the examination of the case had required us to hold that the provisions of

the said order, by their own force, conferred rights on the person in whose favor they were designed, it would at least be very questionable whether these defendants, the widow and children, could avail themselves of a reservation which is to be made on the sale "of the Code of Procedure, nor is it such an order as is intended within the meaning of subdivision 2 of that Section, which is as follows: "An order affecting a substantial right, made in an action where such order, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, or where

It is ordered that the order of the Circuit Judge dismissing the motion for a confirmation of the sale of the house and lot described in the pleadings be set aside, and that the case be remanded to the Circuit Court for the County of Newberry, for the proper orders to carry out the judgment now pronounced.

WILLARD, A. J., and WRIGHT, A. J., concurred.

3 S. C 606

CURETON v. HUTCHINSON.

(April Term, 1872.)

[Appeal and Error \$\sim 70.]

An order sustaining a demurrer to the complaint, with leave to amend on payment of costs, is not appealable under the Code of Procedure. Such an order can only be reviewed, on appeal, after final judgment.

[Ed. Note.—Cited in Gower v. Thomson, 6 S. C. 314; Johnstone v. Manigault, 13 S. C. 406; Trumbo v. Finley, 18 S. C. 315; Sease v. Dobson, 36 S. C. 557, 15 S. E. 703, 704; Kennedy v. City of Greenville, 78 S. C. 128, 58 S. E. 989.

For other cases, see Appeal and Error, Cent. Dig. § 369; Dec. Dig. ©=70.]

Before Thomas, J., at Lancaster, October Term. 1871.

Action against three defendants. Hutchinson, one of the defendants, demurred to the complaint on the ground, inter alia, that the assignee in bankruptcy of Cureton, one of the defendants, who was alleged in the complaint to be an adjudicated bankrupt, should have been made a party plaintiff.

The presiding Judge sustained the demurrer on this ground, and made the order which is recited in the opinion of this Court.

Cureton, the plaintiff, appealed. Moore, for appellant.

*607

*Brawley, contra, contended that the order was not appealable under the Code of Procedure.

Nov. 20, 1872. The opinion of the Court was delivered by

WILLARD, A. J. This appeal is from the following order: "It is ordered that the demurrer be sustained, and that the plaintiff have leave to amend his complaint upon payment of ten dollars costs." This order is not a final judgment, in the sense of Sec. 11

order as is intended within the meaning of subdivision 2 of that Section, which is as follows: "An order affecting a substantial right, made in an action where such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, or where such order grants or refuses a new trial." These two subdivisions, taken together, cover all the cases where an appeal may be taken to this Court from the direct proceedings in an action. Where matters, either of an independent nature or collateral to an action, arise upon a special proceeding, and where matters arise upon a summary proceeding in an action, after judgment, the remedy by appeal is provided by subdivision 3 of the same Section. In the case of an action commenced in the Circuit Court, in order to constitute a case for appeal into this Court, there must be, except as to matters arising after judgment, either:

1st. A final judgment in that Court; (See Sullivan v. Thomas, ante p. 531;)

2nd. An order affecting a substantial right, in effect determining the action, and preventing a judgment from which an appeal might be taken; (See McMillan v. McCall, 2 S. C., 390:)

3d. An order discontinuing the action; or, 4th. An order granting or refusing a new trial; (See Byrd v. Small, 2 S. C., 388.)

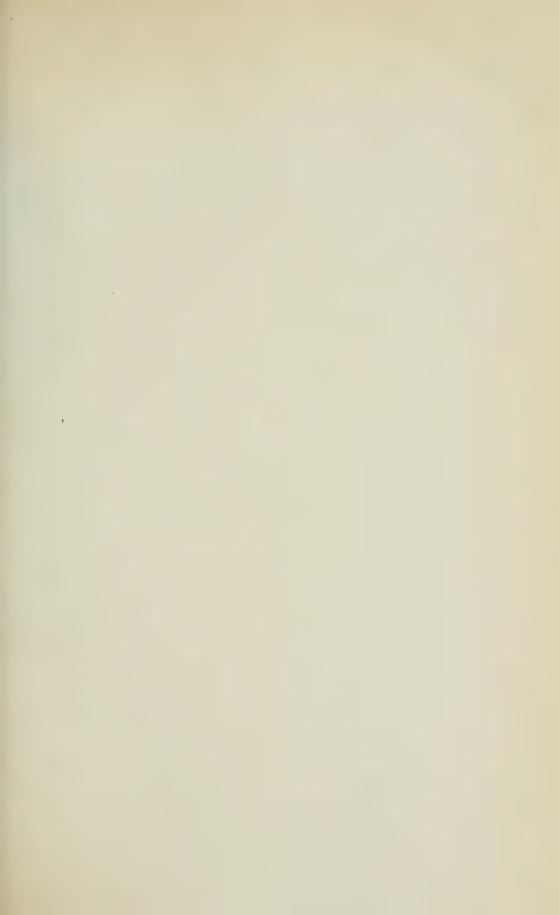
The effect of the order appealed from was to give the plaintiff an opportunity to amend his complaint. If it was not in his power to make an amendment that would obviate the objection ruled against him, or if he elected to rest his whole case on the sufficiency of his complaint, then the proper course of practice was, after sufficient time allowed for amendment had elapsed, for final judgment to have been entered, and from that judgment the plaintiff could have appealed. On appeal from such a judgment the Court could have reviewed the order sustaining the demurrer, it being, in the language of Section 11, an

*608

"intermediate order involving the mer*its, and necessarily affecting the judgment." From all that appears before us, the right to amend is still in force, and may be exercised in the Circuit Court, after judgment rendered in this Court. In such an event, it might prove, in the end, that the question submitted to us, at this time, was of no material value to the controversy. The right of an amendment must be cut off by a judgment before the case is ripe for this Court.

The order is not appealable, for the reasons stated, and the appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.









REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT OF SOUTH CAROLINA

VOLUME IV

FROM NOVEMBER 20, 1872, TO NOVEMBER 14, 1873, INCLUSIVE

BY J. S. G. RICHARDSON
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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. J. J. WRIGHT, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

1st Circuit—Hon. R. F. GRAHAM.

2D " JOHN T. GREEN.

3D " A. J. SHAW.

4TH " C. P. TOWNSEND.

5TH " R. B. CARPENTER.

6тн " **T. J. MACKEY.**

7TH " M. MOSES.

8тн " Т. Н. СООКЕ.

ATTORNEY GENERAL.

S. W. MELTON, Esq.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

TABLE OF CASES REPORTED

| Page | | Page |
|--|--|--|
| Alston v. Alston. 116 Auditor v. Treasurer. 311 | Moody v. Ellerbe | $\begin{array}{c} 21 \\ 430 \end{array}$ |
| Barber v. McAliley | O'Neall v. Hunt | |
| Chalk v. Patterson | Patterson v. South Carolina R. Co | 135 |
| Detheridge v. Earle | Reeder v. Speake | 293 61 541 |
| Earle v. Stokes. 309 Emory v. Davis 23 | South Carolina Mfg. Co. v. Price. Speake v. Kinard. Spratt v. Pierson. State v. Chairman County Canvassers. | 338 54 301 485 |
| Fox v. Savannah & C. R. Co | State v. Chapeau | 378 520 380 |
| Gordon v. Sutton Gold Min. Co | State v. Hamblin | 376 |
| Halfacre v. Whaley | State v. Simmons | 37 |
| Kirkland v. Cureton | Stewart v. Pearson | 297 16 |
| Levy v. Southern Exp. Co. 234 Levy v. Williams 515 | Terry v. Calnan | |
| McAliley v. Barber. 45 McCants v. Wells. 381 McNamee v. Waterbury. 156 | Visanska v. Bradley | |
| Marco v. County Treasurer. 96 Massey v. Brown. 85 Mayer v. Blease. 10 | Waller v. Cresswell Williams v. Caldwell. Wilson v. Hyatt. | $\frac{100}{369}$ |
| Means v. Feaster | Wright v. Charles | 178 |

4 S.CAR.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES PRESENT.

Hon. F. J. MOSES, CHIEF JUSTICE. Hon. A. J. WILLARD, ASSOCIATE JUSTICE. Hon. J. J. WRIGHT, ASSOCIATE JUSTICE.

4 S. C. *1

*STATE v. HAMBLIN.

(Columbia. April Term, 1872.)

[Larceny \$\sim 88.]

The prisoner was indicted at June Term, 1871, and tried and convicted at February Term, 1872, for stealing a cow above the value of \$20. At the Term last mentioned he moved in arrest of judgment, but the motion was denied, and he was sentenced to imprisonment for one year in the Penitentiary at hard labor. On appeal: Held, That the sentence was illegal, and judgment was arrested.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 214; Dec. Dig. ⊕=88.]

[Larceny \$\sim 88.]

After the passage of the Act of 1866, making it a misdemeanor to steal a cow of the value of \$20 or under, and before the repeal of the Act of 1789, by the General Statutes, the only law under which the stealing of a cow over the value of \$20 was punishable was the Act last mentioned.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 214; Dec. Dig. \$288.]

[Larceny \$\sim 28.]

An indictment charging that the prisoner did steal, take and carry away one cow, &c., of the value of \$50, &c., contrary to the form of the statute, &c., was good under the Act of 1789.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59, 62, 99, 101; Dec. Dig. 28.]

[Larceny \$\sim 88.]

The punishment, under the Act of 1789, for stealing a cow, was a fine of £10, or, if unable to pay, then whipping: *Held*, That the punishment, after whipping was abolished, was the fine.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 214; Dec. Dig. ⊗ 88.]

Before Orr, J., at Abbeville, February Term, 1872.

This was an indictment for cow stealing. The indictment charged: "That Jeptha R. Hamblin and George Speer, on the first day of February, in the year of our Lord one

+2

thousand eight hundred and *seventy-one, with force and arms, at Abbeville Court House, in the County of Abbeville and State aforesaid, one cow, of the value of fifty dollars, of the proper goods and chattels of Edward Roche, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute of this State, in such case made and provided, and against the peace and dignity of the State aforesaid."

At June Term, 1871, the bill was given out and found by the grand jury. At February Term, 1872, the prisoners were tried and found guilty. Hamblin moved in arrest of judgment, on the grounds:

1. Because the stealing of a cow, or any other "domesticated animal," in South Carolina, is a statutory offense, not indictable at common law.

2. Because the offense of cow stealing, as defined by the Acts of Assembly of 1789 and 1866, with distinct and substantive penalties affixed, is not grand larceny by the terms or within the meaning and intent of either of said Acts.

3. Because, under the verdict of the jury finding the defendant guilty of grand larceny under an indictment setting out in terms the offense of cow stealing, the Court cannot pass sentence at all.

The motion was overruled, and the follow-

year in the Penitentiary at hard labor."

The prisoner, Hamblin, appealed, and now moved this Court in arrest of judgment, on the same grounds taken in the Court below.

Perrin & Cothran, for appellants, cited Act 1789, 5 Stat., 139; Act 1866, 13 Stat., 407; 1 Bl. Com., 89; 4 Bl. Com., 94, 98; 14 Rich., 176; Gen. Stat., 728, 700.

Perry, Solicitor, contra.

Nov. 26, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. The indictment charges a statutory offense, and, to that end, is in perfect conformity with the established precedents.

At the time of the conviction and sentence the only statute of force in this State prescribing a punishment for the stealing of a cow over the value of twenty dollars, thereby changing the offense from larceny at common law, was that of 1789, 5 Stat., 139. It *3

*was repealed by the Act of 1866, 13 Stat., 407, so far as its provisions were inconsistent with those of the latter, and, therefore, where the charge was the stealing of a domesticated animal below the value of twenty dollars, the offense was only a misdemeanor, punishable as prescribed by the Act.-State v. Thomas, 14 Rich., 164. The Act of 1789, so far as it concerned the stealing of a cow over the said value, stood unrepealed. The fact of its repeal since, by the Act of 1872, General Statutes, could not exonerate the defendant from punishment under that of 1789, for, independent of its provisions, 6th Section, page 700, "that it shall not affect any suit or prosecution pending at the time of the repeal for an offense committed under the Act repealed," judgment having been pronounced before the repeal, the penalties of a law, though repealed, may still be enforced.-State v. Addington, 2 Bail., 516 [23 Am. Dec. 150].

The punishment under the Act of 1789 subjected the offender to a fine or penalty of £10 for each and every cow for the stealing of which he may be convicted, and in case such offender is not able to pay such fine or penalty, to be publicly whipped and personally receive not exceeding thirty-nine lashes. Punishment of crimes and offenses by whipping is abolished, (Act No. 41, 14 St. 87-160,) and, therefore, in case of the inability of the offender to pay the £10, he cannot be subjected to the corporal infliction. The punishment, it would seem, by the terms of the Act of 1789, was not an alternative one submitted to the preference either of the Court or the offender. The punishment was the fine, and it was only in the event of want of fine, and it was only in the event of want of Ed. Note.—For other cases, see Dower, Cent. ability to meet it that the party convicted, Dig. § 184; Dec. Dig. 56, 107.]

ing sentence pronounced: "Let the prisoner, in the words of the Act, "shall be subject Jeptha R. Hamblin, be imprisoned for one to be publickly whipped." If, therefore, he is not able to respond to the fine, he cannot be held liable to the corporal punishment provided in the place of its payment. have not been favored with any report from the presiding Judge, but we are to infer that his sentence "to hard labor in the Penitentiary for one year," was on the assumption that the offense with which the defendant was charged, and for which the conviction followed, was for grand larceny at common law. In this he was mistaken, for the Act of 1789, so far as it relates to the stealing of cows above the value of twenty dollars, was at the time in full force.

> The motion in arrest of judgment is granted.

> WILLARD, A. J., concurred. MOSES, C. J., absent at the hearing, but concurred in the ruling.

4 S. C, *4

*STEWART v. PEARSON.

(Columbia. April Term, 1872.)

[Dower \Longrightarrow 84.]

Where, in an action for settlement of an insolvent estate, the real estate is sold by order of the Court, it is competent for the Court to of the Court, it is competent for the Court to order one-sixth of the proceeds of the sale to be paid to the widow of decedent in lieu of dower, and this without a writ for admeasurement of dower or reference to ascertain its value.

[Ed. Note.—Cited in Jefferies v. Allen, 33 S. C. 272, 11 S. E. 764.

For other cases, see Dower, Cent. Dig. § 323; Dec. Dig. € 84.]

[Dower S5.]

Where the husband was seized at the time of his death, of the land in which dower is claimed, the sum to be assessed in lieu of dower is ascertained by the value of the land at the time of the assignment of dower.

[Ed. Note.-Cited in Phinney v. Johnson, 15 S. C. 160.

For other cases, see Dower, Cent. Dig. § 325; Dec. Dig. \$\sim 85.\]

[Larceny \$\ighthapprox 22.]

The rule that one-sixth the fee simple value of the land is the value of the widow's dower, approved and adopted as the settled practice of the State.

[Ed. Note.—For other cases, se Cent. Dig. § 49; Dec. Dig. ⊚ 22.] see Larceny.

[Larceny SS.]

Interest from the husband's death should be added. Semble.

[Ed. Note.—For other cases, see Cent. Dig. § 214; Dec. Dig. © 88.] see Larceny,

[Dower 56, 107.] [Where, on a settlement of an insolvent estate, the court allows a widow a sum in lieu of dower, it should allow, in addition thereto, onethird of the whole mesne profits since the husband's death.]

Term, 1871.

Action by Eliza R. Stewart, widow and administratrix of Robert Stewart, deceased, plaintiff, against Joseph Pearson and wife and others, heirs-at-law and creditors of decedent, defendants.

The complaint alleged that the estate of plaintiff's intestate was insolvent; that the real estate consisted of two lots in the village of Newberry-one the storehouse lot, and the other the residence of intestate; that it was necessary to sell the real estate to pay debts; and that plaintiff claimed dower in the real estate, but was willing to take one-sixth of the proceeds of the sale thereof in lieu of dower.

By an order made at Chambers, and dated March 2, 1871, the Sheriff was directed to sell the storehouse lot, and to pay to the plaintiff one-sixth of the proceeds thereof in lieu of her dower therein. This order, so far as it directed payment to plaintiff, was afterwards suspended by another order at Chambers, dated March 31st, 1871.

The Sheriff sold the storehouse lot for nine thousand dollars, and at the present term of the Circuit Court his report of the sale was confirmed without objection. The plaintiff then moved the Circuit Court for an order directing the Sheriff to pay to the plaintiff fifteen hundred dollars out of the proceeds of the sale, in lieu and bar of her dower in said lot. This order was opposed by some of the defendants, creditors of the intestate, but was granted by the Court.

The defendants appealed on grounds stated in the opinion of this Court.

Jones, Baxter & Johnstone, for appellants: 1. Dower is the right of the widow to one-*5

third of the real estate *of which her husband was seized during coverture, and is required by A. A. 1787, 4 Stat., 742, to be laid off in land, by five Commissioners to be appointed for that purpose, unless it cannot be done without manifest disadvantage to some of the parties, and in that case they are authorized to assess a sum of money in lieu of dower, the amount to depend upon the age and health of the widow.-Heyward v. Cuthbert, 2 Tr. Con. Rep., 626; Wright v. Jennings, 1 Bail., 277; 2 Scribner on Dower, 641.

The Court will not even alter the return of Commissioners in Dower, much less undertake to assess a sum of money in lieu of dower without their aid.-Douglass v. Mc-Dill. 1 Sp., 140.

Mrs. Stewart was proved to be 67 years old, and the assessment of one-sixth of the purchase money is excessive.

2. But, admitting the Court has the right to assess a sum in lieu of dower without the intervention of Commissioners or any other evidence except the amount of sale, the value of the lot at the death of the husband, and

Before Moses, J., at Newberry, September | not the value at the time of sale, made some time afterwards, is the true basis upon which the dower should be assessed.-Wright v. Jennings, 1 Bail., 277.

The parties really interested were not before the Court when the order was passed calling in creditors and allowing one-sixth of the proceeds of sale to the widow. This order was passed on the 2d March, 1871, and the creditors were not called in until 8th March, 1871, by publication.

Fair, Pope, contra:

The action, so far as the dower of the plaintiff is concerned, was entirely between the plaintiff and the heirs-at-law of the deceased husband, Robert Stewart. The land sold consisted of a small lot in the town of Newberry, forty feet front by one hundred feet back, and was incapable of an actual division, and at the sale brought the sum of \$9,000. The sale was greatly to the advantage of the heirs and creditors, as well as the widow. All were benefited.

Did the only parties to the action have a right to consent that a reference or writ of admeasurement of dower should be waived, on the widow agreeing to take a sixth of the sale value? Who was there to object? Who is injured? None. The Act (see Ch. 113, p. 485, General Statutes,) only requires the heir-at-law to be brought before the Court, which was done, and a consent decree made by all proper parties, whereby *6

everybody was benefited.—Tennant v. *Stoney, 1 Rich. Eq., 223; Keith v. Trapier, Bail. Eq., 64. "Where the value of dower is assessed, the estimate must be made in reference to the time of assessment, and not of the husband's death."

One-sixth of fee simple value in lieu of dower.-Payne v. Payne, Dud., 124; Woodward v. Woodward, 2 Rich. Eq., 23.

"One-sixth is the general rule, except in extreme youth on one hand, or of age and infirmities on the other."

Nov. 26, 1872. The opinion of the Court was delivered by

MOSES, C. J. We are not called upon to consider so much of the argument of the counsel for the appellants as refers to the want of validity in the order of March 2, 1871, because made, as it is alleged, in the absence of parties said to be necessary. We do not propose to pass upon this question, because if there were any defect of parties, the order of 31st March, 1871, suspending until the regular Term that part of it which related to the payment of the sum assessed by the Court in lieu of dower, cured it, if, indeed, it ever existed. When the case was heard at the September Term following, these appellants were before the Court, with every opportunity to resist the claim of the plaintiff, which, by her complaint, she sought 1 to enforce.

We therefore propose to confine our examination to the two grounds of exception submitted:

"First. That His Honor erred in decreeing that the respondent is entitled to one-sixth of the proceeds of sale of house and lot, when it is submitted that the assessment should be made, if at all, on the value of the house and lot at the death of Robert Stewart.

"Second. That His Honor erred in decreeing at all as to the amount of value of the respondent's dower, without a report of a Referee, or a return of Commissioners in Dower ascertaining the same."

The last it may be in proper course first to consider. It may be conceded that the practice of the Court of Equity in cases of dower has conformed to the provisions of the Act of 1786, (4 Stat., 742,) regulating its admeasurement by the Courts of Common Pleas; and this required the issuing of a writ to a certain number of Commissioners, commanding them, or a majority of them, to mete out one third of the land; and where the same cannot, in their opinion, be fairly and equally divided, without manifest injury or

disadvantage, *then, having relation and regard to the true and real value of the lands in question, they are to assess a sum of money, to be paid to the widow, by the heir-atlaw, or such other person as may be in possession.

The appellants, in making no opposition to the sale which had been ordered by the Court, and in no way objecting to its confirmation, must be deemed to have accepted the purchase money as in fact representing the land itself. Their own conduct, by the strongest implication, admitted that the "land could not be fairly and equally divided;" and when they rested, satisfied with the price it had brought at the sale ordered by the Court, they must be held to have accepted it as its full value exactly as if ascertained by pursuing all the formalities prescribed by the statute. Before a conclusion could be had as to the estimate in money of the dower, it was necessary to find the value of the whole land, and this was done probably in a more satisfactory manner by a sale than if obtained merely through the opinion of the Commissioners.

Where the purpose of the writ, so far as it was intended to ascertain the value of the land, has been as well obtained in another mode, and where, after a sale is confirmed by the Court, all the proper parties being before it, the judgment of the Court is as well informed as if a writ had issued and a return been made, as was said by Chancellor Harper, in Payne v. Payne, Dud. Eq., 128, "the measure of the complainant's renunciation may be ascertained by the proper ap- by ready access to life assurance tables, or

plication of the rules before laid down without the intervention of the Commissioners.' Chancellor Wardlaw, in Gibson v. Marshall, 6 Rich. Eq., 215, said: "Whatever may be the agency, it is the Court that assigns or assesses the dower."

Nor was the intervention of a Referee required to bring to the notice of the presiding Judge any facts necessary to his conclusion, if he was right in his assessment of the amount to which the plaintiff was entitled as the value of her dower. The seizin in the premises by the husband, during the coverture, and his death, were admitted, and we concur with him in holding that the dower is to be estimated according to the value of the land at the time of the assignment. The husband having died seized, the widow was entitled to one-third of the land for If in lieu of the assignment to her of land, a sum of money is substituted as its value, we cannot perceive the reason which would refer such value to the time of his *8

*death. The usual writ, following the language of the Act of 1786, requires the Commissioners "to have relation and regard to the true value of the lands in question: where the same cannot be fairly and equally divided without manifest disadvantage, then they are to assess a sum of money to be paid to the widow in lieu of her dower." It cannot be contended that this value is to be determined as at the death, for the language precludes such an inference. The authorities, too, point to the same conclusion.-Keith v. Trapier, Bail. Eq., 63; Hale v. James, 6 John. Ch., 260; Powell v. M. and B. Manufacturing Co., 3 Mason, 459 [Fed. Cas. No. 11.3571.

Was the presiding Judge right in his allowance of one-sixth of the proceeds of the sale of the land as the value of the plaintiff's dower in it? In Wright v. Jennings, 1 Bail., 280, one-sixth of the value of the entire fee was held equivalent to the widow's estate for life in one-third of the land. This, as the Judge delivering the opinion of the Court says, is the rule "which generally prevailed from the period when it was established in Heyward v. Cuthbert, and (as he believes) has been approved by experience." are dicta, however, to be found in the opinions of some of our Judges, "that, in extreme cases of youth, on the one hand, or of age and infirmity, on the other, something more or less, according to circumstances, may be allowed." Notwithstanding these, the general rule has been adhered to, so far either as the books disclose or our own recollection of the practice can attest

In a State like this, depending for its wealth more on its agricultural than its mercantile or manufacturing resources-where the people have not the facilities afforded

mortuary registers—where the persons, as Mr. Justice Nott remarks, in the case already referred to, "usually selected for Commissioners, would be very incompetent to apply the table of life annuities to the various causes that may arise"-it is better to adhere to a system which is known, and by which, in the transfers of real estate, an inherent and fixed value may be given to the interest of the wife, should she survive, than to "trust to results which, at last, must depend on mere speculation.'

In Woodward v. Woodward, 2 Rich. Eq., 28, Chancellor Johnson, delivering the opinion of the Court, said, "The sum assessed is one-sixth part of the fee simple value of the land, and is in exact conformity with the settled and long established rule by which the value of dower is ascertained, without reference to interest or mesne

profits."

*9

*In Douglas v. McDill, 1 Speers, 140, Mr. Justice Richardson says: "The right of dower is the same as other legal rights to property, and, as strictly regarded in law, old or young, the widow has the same estate, and, of course, is entitled to the same equivalent. Yet, there are judicial dicta that would go to allow some discretion in extreme cases of the age or youth of the widow. But, for myself, I do not recognize any such qualification."

The rule, allowing the one-sixth of the whole assessment, as is said in the above case, proceeds upon the principle "that seven years' use of land being the measure of the value of a life estate, it naturally follows that seven years' lawful interest of the money value of the land is the equivalent of the life estate. One-third of seven years' interest is so nearly equal to one-sixth of the whole assessment, that such one-sixth is taken in practice as the true measure of the value of dower."

It is certainly clear that whatever sum was allowed the plaintiff in lieu of her dower, it should have been increased by the value of one-third of the whole mesne profits (or interest in the place of it.) since the death of her husband.

This, it appears, was not done, and no complaint is made for the omission. Doubtless, full justice has been rendered between the parties, and in an estate so much favored by the law we are not disposed to weigh with the most delicate scales the amount awarded as the value of the dower, with the view of discovering whether, by the most exact forms, a trifling and inconsiderate diminution of the sum might not be required of her.

The motion is refused and the appeal dismissed.

WILLARD, A. J. and WRIGHT, A. J., concurred.

4 S. C. *10

*MAYER v. BLEASE.

(Columbia. April Term. 1872.)

[Attorney and Client \$\sim 93.]

An attorney at law has no power, merely as attorney, to assign his client's judgment to a third person.

[Ed. Note.—Cited in Gilliland, Howell & Co. v. Gasque, 6 S. C. 409; Sullivan v. Latimer, 38 S. C. 171, 17 S. E. 701; Ludden & Bates v. Sumter, 45 S. C. 188, 22 S. E. 738, 55 Am. St. Rep. 761; Ex parte Jones, 47 S. C. 396, 25 S. E. 285.

For other cases, see Attorney at Cent. Dig. § 179; Dec. Dig. © 93.] and Client,

[Appeal and Error \$\sim 1009.]

In an equity cause the conclusion of the Circuit Judge upon a question of fact will not be reversed unless clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. 1009.1

[Attorney and Client \$\simes 81, 93.]

Authority to compromise a debt does not authorize its assignment to a third party.

[Ed. Note.—For other cases, see Attorney and lient, Cent. Dig. §§ 142, 179; Dec. Dig. Client, 81, 93.]

[Judgment \Longrightarrow 842.]

Under a bill by a judgment creditor, against the assignee, to set aside an assignment of the judgment held by defendant, the Court cannot order property of the judgment debtor to be sold, he being no party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1538; Dec. Dig. \$22.]

[Attorney and Client \$\sim 76.]

[As a general rule, the attorney's authority terminates with the judgment.1

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 130; Dec. Dig. &—76.]

[Attorney and Client \$\sim 100.]

(An attorney may receive his client's money on the execution.]

[Ed. Note.-For other cases, see Attorney and Client, Cent. Dig. § 205; Dec. Dig. \$200.]

Before Moses, J., at Newberry, September Term, 1871.

Bill in equity by E. P. Mayer & Brother, plaintiffs, against Henry H. Blease, defendant, to set aside an assignment to the defendant of two judgments recovered by the plaintiffs, one against Basil M. Blease and the other against Thomas W. Blease. The case is stated in the decree of the Circuit Judge, which is as follows:

MOSES, J. On the 23d October, 1859, the complainants in this case recovered, in the Court of Common Pleas for Newberry District, two judgments, one against Basil M. Blease, and one against Thomas W. Blease, each in the sum of (\$339.88) three hundred and thirty-nine dollars and eighty-eight cents. The suits in which these judgments were obtained were founded upon a promissory note.

judgments executions were lodged in the Sheriff's office, and afterwards renewed, to wit: On the 10th day of October, 1866. In these suits Messrs. Summer & Chapman were the attorneys of record.

At the time the judgments were obtained Thomas W. Blease was the owner of a house and lot in the town of Newberry, which he afterwards sold and conveyed to the defendant, Henry H. Blease, who, at the time, had actual notice of the above mentioned judgments and executions. In the year 1868, negotiations were opened between the parties for the compromise of the debt upon which these judgments were founded, but they failed: and the plaintiffs themselves ordered a levy to be made upon the house and lot above mentioned, which was advertised by the Sheriff to be sold on the first Monday in December of that year. A few days before the sale was to take place the defendant procured from Henry Summer, of the firm of Summer & Chapman, attorneys *11

at *law, an assignment of said judgments and executions, in consideration of his paying therefor the sum of three hundred dollars, and immediately withdrew said executions from the Sheriff's office, whereby the sale of the property levied on was prevented. The complainants refused to accept this arrangement of their debt, and returned the draft, which had been remitted to them for the amount, which Henry Summer had agreed to take in payment thereof. The defendant, when called upon to do so, refused to restore to the complainants their executions upon their offer to deliver to him said draft, and now insists that, "from the circumstances of the case, and the law applicable thereto," the assignment of the judgments and executions made by Henry Summer to the defendant is good and valid.

The facts hereinbefore stated are derived from the pleadings, and are not controverted. Upon the hearing of the case I allowed testimony, which was offered by the defendant. to be introduced upon the question of Henry Summer's authority to compromise complainants' debt and assign their judgments and executions to the defendant. But the defendant failed to shew that Henry Summer had any authority in these suits beyond that of attorney at law. It is true that he said to the witnesses that no other attorney than himself had any control of the cases, and that he had the right to compromise and settle them; but the proof was very clear that he referred to his general authority as attorney at law. He did not say that he had any special authority either to compromise or assign the cases, and the assignment itself was executed by him as attorney at law. The question at issue, therefore, is one of

of which Basil M. Blease was maker, and law: whether Henry Summer, by virtue of Thomas W. Blease was endorser. Upon these his general authority, as plaintiff's attorney in the suits referred to, could execute a valid assignment of the judgments and executions obtained therein. I have no hesitancy in deciding that question in the negative. The general rule is, that the authority of an attorney at law is determined by the judgment, and the only exception to the rule, which has been very rigid by the Courts, is the one which allows the attorney to receive his client's money on an execution, and which has been put upon the ground of convenience in practice. The point made in this case is expressly ruled in the case of C. Noonan v. Executors of A. Gray, 1 Bail., 437; see also cases of Commissioners v. Rose, 1 DeS., 469; Marshal v. Nagel and Thompson, *12

1 Bail., 308; The Treasurers v. *McDowell, 1 Hill, 184 [26 Am. Dec. 166]; Markley v. Amos, 8 Rich., 468. The principle is too well settled to be now disturbed.

The defendant, by possessing himself of the executions, and claiming to hold them by virtue of said assignment, has put it out of the power of the plaintiffs to enforce them or to keep them alive by renewal. The assignment executed by Henry Summer being invalid and inoperative, the plaintiff's rights should not be prejudiced by the act of the defendant in withdrawing the executions from the Sheriff's office and retaining possession of them.

It is, therefore, ordered and decreed that the assignment executed by Henry Summer to the defendant of the judgments and executions obtained by the complainants against Basil M. Blease and Thomas W. Blease be set aside; that the defendant do forthwith return said executions to the office of the Sheriff of Newberry County, and that, unless the executions in said cases be fully satisfied by payment of the amounts due thereon by the first Monday in December next, the Sheriff of said County do sell the house and lot mentioned in the pleadings, and heretofore levied on, on the first Monday in January next, after having duly advertised the same, and apply to said executions so much of the proceeds of said sale as will be sufficient to satisfy the same.

It is further ordered that defendant pay the costs of this case.

The defendant excepted to the judgment, and moved this Court to review and reverse the same on the following grounds:

First. Because His Honor the Circuit Judge erred in deciding that Henry Summer, one of the attorneys who obtained the judgment assigned in this case, had no authority to compromise and assign the said judgment and execution thereon at law, when it was proved that he told the appellant, at the time, that he was fully authorized to do so, which is corroborated by the fact he made the same compromise that the respondent of Gray, 1 Bail., 437; Marshall v. Nagel, ibid, had previously authorized other parties to make.

Second. Because His Honor erred in ordering the assignment made by Henry Summer, attorney, to be set aside, when it was made in good faith, and in accordance with the previous instructions of the respondent.

Third. Because His Honor erred in not requiring the respondent to give credit for the proceeds of the check for three hundred dollars mentioned in the decree, if the same has been collected, and, if it has not been collected, in not ordering the same to be returned to the appellant.

*Fourth. Because His Honor erred in ordering the house and lot to be sold when the respondents should have been left to their rights under the judgment, and execution restored to them by the decree ordering the cancellation of the assignment.

Jones, Baxter and Johnstone, for appellant:

- 1. The evidence clearly shows that H. Summer was authorized to compromise the judgment in this case. Blease proves that he told him, when the compromise was made, that he had the right to compromise, and that he made the same compromise that the respondents had authorized other parties to make in this case.
- 2. The compromise was made in good faith, by an intelligent attorney, and the same amount received as the respondents had previously agreed to take, and should not, therefore, be set aside, particularly as it was supposed then that old debts would be repudiated.-Holker v. Parker, 2 Curtis U. S., 615.
- 3. The check for \$300, given in compromise of this case, should either be credited on the judgment or returned if the assignment is set aside.
- 4. Setting aside the assignment of the judgment in this case restores to the respondent all his rights, and the Court had no right to order the house and lot sold, particularly as the defendant, in the case of the judgment, had property out of which the money could be made.

Garlington, Suber & Caldwell, Fair, Pope,

1. The authority of an attorney at law in a case is restricted to the prosecution of the action and the receipt of the amount of the judgment for his client. The attorney has no right, unless expressly empowered, to compromise and assign the judgment and execution.—Commissioners v. Rose, 1 DeS., 469, "He is to sue and recover the debt. After judgment and execution, his authority is at an end. * * * From the whole train of authorities it is evident that he must actually receive the money, and that an ideal payment, or the receipt of anything in lieu of it, will not bind his client."-Noonan v. Ex'rs.

308; Treasurer v. McDowell, 1 Hill, 184; Markly v. Amos, 8 Rich., 468; Shaw v. Kidder, 2 How. Pr. Rep., 244.

2. The Court of Equity, having taken jurisdiction of the case, had power to administer full and complete justice by ordering the

*14

*sale of property which was under levy under the judgment and execution, when relieved by the fictitious assignment of the judgment and execution.—Story Eq., Sec. 64, k. "The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief." See also Fonblanque Eq., B. 1, Ch. 1, § 3; ibid B. 6, Ch. 3, § 6.

- 3. The real estate mentioned in the appeal was, at the time of the assignment of the judgment and executions, bound by them, and under actual levy. The rescission of the assignment restores it to that condition, unless it is shown that there is other property to satisfy the judgment,
- 4. It was never denied that the appellant was entitled to a return of his draft. It was tendered to him before suit, and refused. He has never attempted to obtain possession of it.

Nov. 27, 1872. The opinion of the Court was delivered by

MOSES, C. J. So much of the decree of the Circuit Court as determines that an attorney at law, by virtue of his mere power in that relation, cannot execute a valid assignment, of a judgment and execution obtained by him for his client, is sustained by the authorities therein referred to. The conclusion, too, can be vindicated on principle, irrespective of a regard to the duties and obligations which result from the relation. The right to assign follows from the possession of the legal title, unless the interest is only of an equitable character. A plaintiff holds his judgment by a legal title, and this he can only transfer directly by himself or a duly constituted attorney in fact. The exercise of the power by Mr. Summer was not ascribed to any authority save that claimed for him as the attorney at law in the case.

His right to compromise depended on the facts and circumstances proved on the trial, and the conclusion of the Circuit Judge from them must stand, unless shown to be so entirely erroneous as to justify our interference by impressions from the evidence altogether contrary to his own.

Even assuming, as is claimed by the argument for the appellant, that Mr. Summer was authorized to compromise the case, in point of fact he did not carry out the purpose which it is said he was to effect. A compromise implied a settlement with the defendants on the executions, by a discharge or satisfaction, in consideration of a receipt from them of a lesser sum than the amount of the #15

debts. *The act of Mr. Summer in attempting to assign to a third party, so far from accomplishing the object of the plaintiffs, was in direct opposition to it, for the mere transfer in no way benefited the defendants in the judgments by accepting from them an amount less than the full sum due, but merely transferred the whole debt to a new creditor.

The judgments for their full face value still remained open against them, with no change except that they were to be held for the benefit of a third party, who was to profit by the arrangement.

The claim of the appellant to have a credit on the fi. fa. for the amount of the check is inconsistent with the position which he asserts as assignee. If he is the owner of the debt, a reduction of it by the credit is against his interest. There is not a particle of proof that he advanced the amount at the request either of B. M. Blease or T. W. Blease, with the understanding that the judgments were to be left open to that extent for his benefit. On the contrary, he alleges he paid the money in consideration of the assignment of the debt, and now contends that, by reason thereof, he is the legal owner.

The defendant is entitled to the draft. It appears, by the pleadings, to be in the hands of the plaintiffs' solicitors, delivered to them by Mr. Summer, to whom it was returned. It is but equitable that if the plaintiffs are remitted to their original position in regard to the judgments, it should be restored to him. The tender of it by the plaintiffs, and the relief prayed on their part, repudiates its ownership by them.

There was error in so much of the decree as directs the sale of the house and lot by the Sheriff. Neither he nor the defendants in the executions were parties to the proceeding. When the assignment was ordered to be set aside the judgments were under the control of the plaintiffs, subject to any objections which the defendants, B. M. Blease and T. W. Blease, or either, might lawfully interpose, or to any rights growing out of the equities of third persons. The decree must be modified

It is, therefore, ordered and adjudged that so much of it as sets aside the said assignment, and requires the return of the said executions to the office of the Sheriff of Newberry, be confirmed. It is also ordered that the plaintiffs, by themselves, or their solicitors or agents, return to the said defendant, H. H. Blease, the draft referred to, and that so much of it as directs a sale of the house

and *lot be set aside, without prejudice to the rights of the plaintiffs under their executions.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. 16

SWANN v. POAG.

(Columbia. April Term, 1872.)

[Wills \$\sim 855.]

Devise of a tract of land to testatrix's son, E., for life, and, at his death, to his "legal heirs;" but if he should "die without such heirs, as above mentioned, at his death," then, "I do bequeath the above mentioned land to my nearest heirs-at-law, forever" E. survived the testatrix, and was her only heir at her death. He died without issue, having first sold and conveyed the land: Held, That the fee was vested in E., and passed to the purchaser from him.

[Ed. Note.—Cited in DuBose v. Flemming, 93 S. C. 184, 76 S. E. 277.

For other cases, see Wills, Cent. Dig. § 2171; Dec. Dig. &== 855.]

Before Thomas, J., at York, September Term, 1871.

Action of trespass to try title by John M. Swann, plaintiff, against Anna H. Poag, defendant.

Mary H. Swann, by her last will and testament, dated the 15th September, 1838, devised the tract of land in dispute to her "two sons, Joseph Addison and Edward Eaton." The will then described the land, and proceeded as follows: "At my death, I do allow my two sons above named an equal share of the above land, divided by lot, if both be living; if only one be living, the other to hold said land for life. At one and both their deaths, I do bequeath said lands to their legal heirs. If one son only should have legal heirs, I allow such heirs to hold all of said land forever; but if both my sons should have legal heirs. I do allow the land to be divided as above, and each son's heirs to hold their father's part of said land forever; but if both these, my two sons, should die without such heirs, as above mentioned, at their deaths, I do bequeath the above mentioned land to my nearest heirs-at-law forever."

Joseph Addison Swann died without issue in the life-time of his mother; she died in the year 1858, leaving her son Edward Eaton Swann her only heir her surviving. On the 19th November, 1858, after the death of the testatrix, Edward Eaton Swann sold and conveyed the land to Samuel G. Poag, deceased, who was the husband of defendant. Edward Eaton Swann died on the 30th of July, 1864, without issue.

*17

*The plaintiff is the nephew of the testatrix, and became her heir-at-law on the death of Edward Eaton Swann. He claimed the land under the limitation to the testatrix's "nearest heirs-at-law forever." The defendant claimed under the conveyance to Samuel G. Poag.

His Honor ruled that the plaintiff was not entitled to the land, and granted a motion for a non-suit.

The plaintiff appealed.

Hart, for appellant:

The term "legal heirs," as explained by "take their father's share," means heirs of the body, (Fearne on Rem., 202, § 386,) and there being no such heirs at the death of Edward Eaton Swann, the limitation to the "nearest heirs-at-law" of the testatrix took effect, and the plaintiff, as her only heir, is entitled. He cited McMakin v. Brummett, 2 Hill Ch., 638; Brailsford v. Heyward, 2 Des., 291; Fronty v. Fronty, Bail. Eq., 517; Dill v. Dill, 1 Des., 237; Lawton v. Hunt, 4 Rich. Eq., 233; Fraser v. Boone, 1 Hill Ch., 360; Act 1853, 12 Stat.; Curry v. Sims & Jeter, 11 Rich., 490; Gillam v. Caldwell, 11 Rich. Eq., 73; Cloud v. Calhoun, 10 Rich. Eq., 358; Seabrook v. Seabrook, 1 McM. Eq., 206; Fearne on Rem., 331, § 653, 383, § 697.

Williams, Allison, contra, cited Seabrook v. Seabrook, 10 Rich. Eq., 495; Sealy v. Laurens, 1 Des., 137; Pressley v. Davis, 7 Rich. Eq., 105; McCorkle v. Black, 7 Rich. Eq., 407: Moore v. Paul, 7 Rich. Eq., 358; Adams v. Chaplin, 1 Hill Ch., 265; Mazyck v. Vanderhorst, Bail. Eq., 48; Martin v. Quattlebaum, 3 McC., 205, 302. Edward Eaton Swann was the nearest heir of his mother at her death, and, if not entitled to the fee under the direct limitations of the will to the two sons and their "legal heirs," was clearly vested with it under the contingent limitation to her "nearest heirs-at-law," and, being so vested, had the right to convey the land.

Nov. 27, 1872. The opinion of the Court was delivered by

MOSES, C. J. The non-suit granted by the Circuit Judge must be sustained. The action is trespass to try title, and before the plaintiff can recover it devolves upon him to show a title to the premises vesting in him. He claims to derive it from the will of Mrs. Mary H. Swann, as representing the person who is to take as her nearest heir-at-law, in the event of a failure of the conditions on which a fee simple estate was to pass under

it to her son, Edward *Eaton Swann, who survived her, and in his life-time, after her death, conveyed the land to Samuel G. Poag, who was the husband of the defendant, Anna H. Poag, who has survived him.

It may be necessary, first, to determine what estate the said Edward Eaton Swann took on the death of his brother, Joseph Addison Eaton. By the terms of the will, an estate for life was devised to him, with remainder to his legal heirs, which would confer upon him an estate in fee. This is on the assumption that a technical definition is to be given to the word "heirs" for, if so, it must be held a word of limitation, and not of purchase, according to the recognized rule in Shelly's case.—Fewell v. Fewell, 6 Rich. Eq., 138.

Where technical words, however, are used. if there is a clear intention on the part of the testator, to be collected from the context. not to employ them in their legal sense, they should be accepted in the sense in which they appear to have been designed .- 2 Williams on Executors, 778, 779; 2 Jarman on Wills, 744.

It is apparent, from the language of the will, that the testatrix used the term "legal heirs," in the sense of children, for she directs "each son's heirs to hold their father's part of said land forever," and in the event of the death of both sons dving without such heirs, "as above mentioned," to use her language, she bequeaths the land to her "nearest heirs-at-law forever." It is in the character of her "nearest heir" that the plaintiff asserts his legal title. Where, however, there is a devise to the testator's heirs, they do not take under the will, but by descent.-Seabrook v. Seabrook et al., 10 Rich. Eq., 495. John M. Swann, the plaintiff here, is not the heir-at-law, in any view, of the said Mary H. Swann, for at her death her son, Edward Eaton Swann, through whom the respondent claims, was alive, and, as her sole heir, was entitled to take.

The motion is refused, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. *19

*HARRIS v. STILWELL.

(Columbia. April Term, 1872.)

[Executors and Administrators 509.]

A Court of Ordinary has no jurisdiction to surcharge and falsify settled accounts. therefore, legatees have a voluntary settlement with the administrator with the will annexed, they cannot impeach it, in the Court of Ordinary, on the ground of fraud or mistake.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2209; Dec. Dig. &=509.]

[Executors and Administrators 516.]

Where an administrator with the will annexed has a final settlement with legatees, and then dies, a suit against his administrator, to impeach the settlement, on the ground of fraud or mistake, cannot be sustained by an administrator de bonis non of the testator, for the benefit of the legatees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2199–2207, 2220–2232; Dec. Dig. 516.]

Before Johnson, Ch., at York, June, 1868.

James M. Harris died early in the year 1857, leaving a considerable estate and a last will and testament. The will was proved in the Court of Ordinary for the District (now County) of York, and letters of administration, with the will annexed, granted to F. H. Harris, a son of the testator.

On March 27, 1857, the administrator sold | Limitations, upon which the case turned bethe whole personal estate on a credit of one year. On March 18, 1859, he made his first annual return to the Ordinary, in which he charged himself with the amount of the sale bill, \$34,081.14, and interest, and on July 18, 1860, he made a second return.

By the provisions of the will the estate was distributable between eight legatees, of whom the administrator himself was one. On June 6, 1861, he made and filed in the office of the Ordinary a statement of the estate, showing the amount due to each legatee, and during the same month he made settlements, according to that statement, with six of the seven legatees, taking their receipts in full. The statement showed the seventh legatee was indebted to the administrator for purchases at the sale to more than the amount of his share.

F. H. Harris died intestate in the year 1866, and Alfred Stilwell and Martha Harris sued out letters of administration on his estate. H. C. Harris sued out letters of administration, de bonis non, cum testamento annexo, on the estate of the testator, and on May 8, 1867, he filed his petition in the Court of Ordinary against the administrators of F. H. Harris, wherein he alleged, specifically, a number of errors and mistakes in the settlement of June, 1861; that, in consequence thereof, there remained in the hands of F. H. Harris, as administrator, a large balance which was still due to the legatees of the testator, and prayed that the defendants may *20

be required to ac*count for the estate of the testator, left unadministered by F. H. Harris, and pay the same to the petitioner.

On May 20, 1867, the Ordinary made a decree, in which he found that a balance remained in the hands of F. H. Harris at the time of the settlement, amounting, with interest to the date of the decree, to \$3,004.67, which he ordered the defendants to pay to the petitioner.

The defendants appealed to the Circuit Court of Equity, upon the grounds, inter alia, (1) that the petition was barred by the Statute of Limitations, and (2) that if there was error in the settlement, the legatees, and not an administrator de bonis non of the testator, are the parties to complain.

His Honor the Chancellor sustained the defense of the Statute of Limitations and reversed the decree.

The petitioner appealed

Clawson, for appellant. Wilson, contra.

Nov. 29, 1872. The opinion of the Court was delivered by

WILLARD, A. J. It will not be necessary to consider the question under the Statute of

low, as a conclusive objection to the decree of the Ordinary underlies that question. The true question in the case is, whether the Ordinary, in the final accounting of the administrator, is bound by a settlement made between the administrator and the distributees, or whether such a settlement having been made, it may be impeached before the Ordinary, on the ground of fraud or mistake, so as to open the whole accounting thus closed by the voluntary act of the parties.

The right to open a settled account forms a distinct branch of the jurisdiction of the Courts of Equity. -- McDow v. Brown, 2 S. C., 95. Where parties having a right to call an administrator to an account voluntarily close the account, by a settlement, the right to an accounting is gone, and can only be restored through the intervention of a Court administering equity. The right and jurisdiction of the Ordinary to take and state the accounts of an executor or administrator does not, necessarily or properly extend to reviving a liability to account that has been lost by

*21

the act of *the parties, for the object of the jurisdiction of that officer is to accomplish precisely what the parties themselves have done. If they seek to get rid of the consequences of mistake or imposition, they must go into equity and obtain the right to falsify or surcharge the account.

The account acted upon by the Ordinary was clearly a settled account. The administrator had made a report purporting to embrace all the matters proper to a final accounting. The distributees, instead of disputing that return, and insisting on what might result from a final accounting, came to a final settlement on the basis of such return.

The Ordinary was, therefore, bound to settle the administrator's account in conformity with the settlement, unless prevented by proceedings in equity. His successor in office was under like obligation.

But, even had the distributees a right to open the account before the Ordinary, yet that would not confer on the successor of the administrator such a right for the benefit of the distributees. If the distributees had the right to open the account, it would be purely a personal right in themselves, as resulting from facts and circumstances attending their personal act of settlement, and as to such right the administrator and his successor have no right of representation under which they can initiate a proceeding to disturb the settlement.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., con-

4 S. C. 21

MOODY v. ELLERBE.

(Columbia. April Term, 1872.)

of the chattels, and before the right of redemption is barred by lapse of time or otherwise, an assignable interest under the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 216, 450, 505; Dec. Dig. ©=129, 203, 240.]

Before Green, J., at Marion, February Term, 1872.

For a full understanding of this case, reference should be had to Moody v. Hazelden, as reported 1 S. C., 129. Under the judgment *22

*of the Supreme Court in that case, it was ascertained that the value of the mortgaged slaves was equal to the amount due on the mortgage, and thereupon the bill was dismissed. E. J. Moody, the plaintiff, then commenced this action against Edward B. Ellerbe, the party who had assigned to him the notes and mortgage of Hazelden. The seizure of the slaves by the Sheriff was made in December, 1861, and the assignment to the plaintiff was made on the 22d of October, 1863; the consideration thereof being \$5,000, paid by the plaintiff for the use of Ellerbe, and at his request. The plaintiff claimed that the seizure of the slaves satisfied the mortgage, and that being satisfied at the time of the assignment, the consideration of the contract between plaintiff and defendant had failed, and plaintiff was entitled to recover back the money he had paid for the notes and mortgage.

The Circuit Court held that there was no such seizure of the slaves as was contemplated by the Act of 1712, and, even if there was, as the right of redemption, under the provisions of that Act, was not barred when the assignment was made, that the mortgage was a subsisting lien at the time of the assignment; that there was therefore no failure of consideration, and gave judgment that the complaint be dismissed.

The plaintiff appealed.

Sellers, with whom was Warley, for appellant, contended that the seizure, by the mortgagee, of the mortgaged chattels ipso facto, worked a satisfaction of the mortgage debt.-Wolfe v. O'Farrell, 1 Tread., 151; Peay, Administrator, v. Fleming, 2 Hill. Ch., 97; Davies v. Barkley, 1 Bail., 140; Mazyck & Bell, v. Coil, 2 Bail., 101. That being so, it is clear there was no mortgage when the assignment was made, and consequently the consideration of the assignment failed.

Harllee, contra, contended that the seizure of the slaves did not extinguish the mortgage; that the Act of 1712 allowed the mort-

gagor two years from the time of the seizure within which to redeem. When the assignment was made the two years had not expired, and plaintiff could have enforced the lien by a sale of the slaves. It is clear, therefore, that there was no failure of consideration. The loss of the debt arose from plaintiff's own neglect in not proceeding to foreclose the mortgage after the assignment.

*23

*Dec. 3, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The only question presented by the plaintiff's exceptions to the Referee's report is, whether a mortgagee of chattels has, after seizure of the mortgaged chattels, and before the right of redemption is barred by lapse of time, or otherwise, an assignable interest under his mortgage. It is impossible to discover any solid reason for denying this proposition. The right of the mortgagee to the mortgaged chattels, after seizure, is derived under his mortgage. That instrument is not only the source of his title, but the measure of its character. An assignment of a chattel mortgage by a mortgagee in possession, places the assignee in the same position, as it regards the title to the property and the right of redemption of the mortgagor, as that occupied by the mortgagee before assignment,

The judgment should be affirmed, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 23

EMORY v. DAVIS.

(Columbia. April Term, 1872.)

[Appeal and Error \iff 151.]

Appeal lies, by the Sheriff, from an order made upon return to a rule to shew cause, making the rule absolute, and directing attachment to issue against the Sheriff unless the money due on plaintiff's execution be paid by a day named.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 948; Dec. Dig. —151.]

[Appeal and Error \$\sim 864.]

Appeal and Error \$\iiint 864.]

A proceeding by rule against a Sheriff, touching the return of process, is a "special proceeding," and a final order thereon is in the nature of a final judgment, on appeal, from which the Court may revise any intermediate order in the same proceeding involving the merits and necessarily affecting the judgment.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 205, 27 S. E. 52.

For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. \$\simega\$864.]

[Sheriffs and Constables \$\sim 90.]

claiming them as his own, and the Sheriff demands a bond of indemnity, which the plaintiff fails to give.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 130; Dec. Dig. 😂 90.]

[Sheriffs and Constables =119.]

Where a plaintiff in execution allows goods, levied on by the Sheriff, to remain in the possession of the debtor, under an arrangement with him that he will sell the goods and pay the debt with the proceeds of the sale, he cannot hold the Sheriff responsible for consenting to the arrangement, nor for the subsequent loss of the goods without the fault of the Sheriff.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 200; Dec. Dig. \$ 119.]

Before Graham, J., at Orangeburg, October Term, 1871.

This was a proceeding, by rule, against Harpin Riggs, Sheriff of the County of Orangeburg; all the orders and other proceedings being entitled in the case of Arthur Emory v. John Davis.

The first order was as follows:

*24

*"On motion of Messrs. Glover & Glover, plaintiff's attorneys, it is ordered that Harpin Riggs, Sheriff of Orangeburg County, do shew cause, on Wednesday, May 3d, 1871, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, why he has failed to make the money in the above stated case."

To this rule the Sheriff made the following return:

"The answer and return of Harpin Riggs, Sheriff, to the rule which has been served on him, requiring him "to show cause on Wednesday, May 3d, at 10 o'clock, or as soon thereafter as counsel can be heard, why he has failed to make the money in the above stated case," which said rule was served on him on the 27th day of April, 1871, respectfully shows that he paid to plaintiff's attorneys the sum of ninety dollars on said case, less the costs; that on the 4th day of June, 1870, being ready and willing to proceed on the execution in this case, he levied on certain goods and merchandises belonging to the defendant, in his store on Russell street, in this town; but that an arrangement was entered into by the defendant, with the consent of the plaintiff's attorneys, by which the sale was suspended under said levy, and the goods were left in the possession of the defendant; that, subsequent to this arrangement, the time for making return of the execution having arrived, (to-wit: sixty days,) the Sheriff, as required by the execution, returned the same to the Clerk, with an endorsement of his action thereon; since which time there has been no execution in the Sheriff's office upon which he could take action in the premises until the 29th day of April, 1871, and subsequent to the rule aforesaid, when a second execution was lodged in his office.

"And thus answering, Sheriff prays rule be discharged with costs."

On hearing the return the rule was discharged, and the following order made, dated May 17, 1871:

"The Sheriff having been served with a rule to show cause why he has failed to make the money in the above stated case, and it appearing by his return to said rule that he levied, during the month of June, 1870, upon certain goods and merchandise of the defendant, and having returned the original execution to the Clerk, according to law, without having sold the goods levied on, and a new execution having been lodged.

*25

in his office April , 1871, it is ordered *that the Sheriff proceed, without delay, to sell property levied upon, and to pay out the proceeds of sale in satisfaction of said execution."

At the next Term of the Court, the following notice, signed by plaintiff's attorneys, and dated September 26th, 1871, was served on the Sheriff:

"To H. Riggs, Sheriff of Orangeburg County:

"Please to take notice that the undersigned will move His Honor Robert F. Graham, Judge of the First Circuit, at Orangeburg, S. C., on the fourth day of October, 1871, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for a rule requiring you to shew cause why an attachment should not issue against you for having failed to comply with an order of this Court, made at May Term, 1871, requiring you to sell the property levied upon in the above stated case, and to pay out the proceeds of sale in satisfaction of said execution."

In support of the application the plaintiff read two affidavits, one by T. H. Cooke, Esq., sworn to on May 12th, 1871, which stated "that some time during the last fall, to the best of his knowledge and belief, during the month of October, he received a message from Mrs. W. R. Treadwell to come to John Davis' store, and that John H. Renneker and Davis were moving the goods privately or secretly out of Davis' store, and that she wished him to stop them; that he went to said store and discovered Renneker removing all of the goods and merchandise out of the store; that, from all the attendant circumstances, he considered that Renneker was attempting to remove the goods secretly. This occurred about eleven o'clock at night."

And the other, by Malcolm J. Browning, which was sworn to on May 13th, 1871, and stated "that one night last fall, to the best of his knowledge and belief, during the month of October, he was returning to Treadwell's Hotel about eleven o'clock. When he passed John Davis' store he saw there Mrs. Treadwell and one Mr. Renneker. Mr. Renneker was removing the goods out of the store and

sending them, by means of a wheelbarrow, somewhere up the street. Mrs. Treadwell was protesting against the removal of the goods, because, said she, 'Davis owes me rent.' She reproached Renneker for this clandestine proceeding, telling him it looked badly, being at night and in so secret a manner. Renneker, under her reproaches, consented to stop removing the goods until Davis

*was sent for. Davis was sent for. When he came he settled with Mrs. Treadwell for his rent by giving her accounts and notes. Renneker then continued removing the goods. Deponent left. Deponent noticed that the whole transaction on the part of Renneker was clandestine and secret. He kept the door of the shop closed, only opening it for a moment when he brought the goods out to put them in the wheelbarrow."

The Sheriff made answer to the notice. It was sworn to September 30th, 1871, and is as follows:

"This deponent swears that the first execution in the said cause was lodged in his office on the 20th day of May, 1870, by virtue of which a levy was made on the 4th day of June, 1870, upon certain goods in the store house and possession of the defendant, John Davis.

"That shortly after the levy, and before the sale of the said goods so levied on as aforesaid, the said defendant paid a part of the said debt, to wit: Forty dollars, and afterwards the sum of fifty dollars, both of which amounts were applied to the judgment in said case. That, thereupon, the attorney for the plaintiff, in consideration of the said payment, agreed to and with the said defendant, Davis, to suspend the sale of the goods aforesaid by this deponent, as Sheriff, and also in consideration further that the said defendant should keep and sell the said goods himself, and out of the proceeds thereof to pay and satisfy the balance due on the said judgment. And the said defendant, Davis, then and there, in consideration of the suspending the sale aforesaid, by the Sheriff aforesaid, under the said execution, agreed to sell the aforesaid goods, and out of the proceeds thereof, from time to time, to pay and satisfy the said judgment in full. And in accordance with said agreement, the attorney for the plaintiff then and there consented to leave, and did leave, the aforesaid goods so levied on as aforesaid in the possession and keeping of the said defendant, to sell and dispose of the same, from time to time, and for the purposes aforesaid. That afterwards, and before any further notice, the sixty days having expired, the execution aforesaid was returned by this deponent to the office of the Clerk of the Court, as required by law. That some months after the said levy, and after the expiration of the said sixty days, and the return of said execution, as aforesaid, this deponent was in-

formed that the said goods had been *removed from and out of the store house of defendant, and from his possession, and were in the possession of one J. H. Renneker. That this deponent, though having no execution in his office, applied to the said Renneker for the said goods. That the said Renneker refused to deliver up the same to this deponent, and defied deponent to take the same; he, the said Renneker, claiming the said goods as his own property by purchase in open market from the said Davis, the defendant, and tendering to this deponent his bond of indemnity in the usual form. That this deponent then informed the plaintiff's attorney of these facts, and stated that he could not proceed to seize the goods in the possession and on the premises of a third party, (Renneker,) who claimed them as his own by purchase, without making himself, deponent, liable as a trespasser, and demanded of the said attorney a bond of indemnity. by which he could be saved harmless, which said bond the said attorney refused to give to this deponent. That no other execution was lodged in the office of this deponent until the 29th April, 1871. That under this execution, and under the others subsequently issued, he had made diligent search for the property of defendant, and for the goods aforesaid, and has been unable to find any, and has so returned the executions to the office of the Clerk of the Court. And this deponent, answering the notice aforesaid. prays that the rule be discharged with his costs."

The cause was then argued by counsel, and the Court made the following order, dated October 19th, 1871:

"Harpin Riggs, Sheriff of Orangeburg County, having been served September 26, 1871, with a rule to shew cause, on the 4th day of October, 1871, or as soon thereafter as counsel could be heard, before His Honor Robert F. Graham, why an attachment should not issue against him for having failed to comply with the annexed order of this Court, and, on the return of the rule, having failed to show sufficient cause, and the plaintiff, Arthur Emory, having filed affidavits in reply to the rule, and after hearing W. J. DeTreville, Esq., for the Sheriff, and Mortimer Glover, Esq., for the plaintiff, it is ordered that the rule be made absolute, and that an attachment do issue against the said Harpin Riggs, Sheriff of Orangeburg County, at any time after sale day in January next, unless the said Harpin Riggs shall, on or before the said sale day in January next, pay over to the plaintiff, Arthur Emory, or his

*28

at*torneys, the sum of two hundred and forty-seven 71-100 dollars, the principal in said case, with interest from April 29, 1871, and the costs of these proceedings."

From the above order the Sheriff appealed.

DeTreville, for appellant:

- 1. This case, coming up from an order, is contained in the motion papers and returns as set forth in the brief, and we cannot go outside of these.
- 2. This being true, from these papers we contend: 1st. That the first rule on the Sheriff having been discharged by order made May 17, 1871, the Sheriff was exonerated from all liability antecedent to the date of that order, and was, therefore, not responsible for any default in not selling under the first execution.
- 3. The Court, having released the Sheriff from responsibility under the first execution, virtually declared the lien of that execution was lost, when, by the order of May 17, 1871, it is said: "A new execution having been lodged in his office April, 1871, it is ordered that the Sheriff proceed without delay to sell the property levied on, and to pay out the proceeds in satisfaction of said execution;" besides which, the first execution had expired, and had been returned by the Sheriff to the Clerk's office, as required by law, long before the said order and second execution.

The Sheriff's liability, if any, commenced then from the date of the order, May 17, 1871, and the lodgment of second execution. And the question is, was it in the power of the Sheriff to have obeyed this order and execution? If he could not, through whose fault was it? If he was hindered by the plaintiff's own act, then the Sheriff is not in default, and the rule should have been discharged.

4. But if the order of discharge, 17th May, 1871, did not destroy the lien of the first execution, so as to relieve the Sheriff from liability in not selling under it, in point of fact, the agreement between plaintiff and defendant, as admitted, by which the goods were taken out of the Sheriff's hands and control, and left with the defendant to sell and dispose of as his own, by the plaintiff, in order to realize the execution debt, did destroy the lien of the first execution, and amounted to a "supersedeas" of that execution.—Barnes v. Billington, 1 W. C. C., 29; Berry v. Smith, 3 W. C. C., 60.

In fact, to hold that the lien is valid and good, so as to bind the Sheriff, when the plaintiff interferes with the levy, stops the *29

sale, *and takes charge of the property levied on, is a manifest absurdity. Under such circumstances the levy and its effect must necessarily be destroyed, and the Sheriff's responsibility lifted from him.—Donham v. Wild, 19 Pick., 520; Rice v. Wilkins, 21 Maine, 558; Shearm, & Red, on Neg., 590, and authorities cited; Humphrey v. Hathorn, 24 Barb., 278; Mickles v. Hart, 1 Den., 548.

5. Either by the order of discharge then, or by the plaintiff's own act, the lien of the first execution and levy was destroyed, certainly was waived; and if the Sheriff be responsible at all, it is for not selling under the second execution, as ordered May 17, 1871.

But on this execution he returns "nulla bona," and on all the subsequent executions. And in addition to that return he sets forth, on oath, facts which go to show that that return was caused by the plaintiff's own act. That return is uncontradicted. It shows conclusively that the power to sell under the first execution was taken from him; and the power to sell under the second execution was a nullity, because, between the lodgment of the first and second executions, the plaintiff's own agent had put the goods out of his reach.

It is clear that the Sheriff was relieved from acting under the first execution. It is equally clear that, this having expired and been returned, he had no power to act until the second execution was lodged.—4 Johns., 450, Lewis v. Livingston.

From the time of the levy until the second execution the goods were in the control of the plaintiff's agent, Davis, and the Sheriff was not responsible for their disposition.

The responsibility was shifted from the Sheriff to Davis:

- 1. When the plaintiff, while the goods were in the Sheriff's hand and custody, stopped the sale, and left them with Davis, in order to realize the debt by sale in his store.
- 2. When the plaintiff, preferring the proceeds of the goods, as realized by Davis, to the goods themselves in the Sheriff's hands, entrusted them to Davis to sell, without limit or restriction to his agency.
- 3. When the plaintiff, by a regular contract with Davis, for a consideration, employed him as his agent, and empowered him to sell and account with plaintiff for proceeds.

If, then, prior to the time when this agency was revoked—prior to the time when the Sheriff was again empowered to act—Davis, the agent, had disposed of all the goods, it

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was the plaintiff's own *fault, and not the Sheriff's. And, if the Sheriff could find no goods of defendant's on the lodgment of the second execution, the return "nulla bona" was proper therein and conclusive.

Davis being the agent of plaintiff, and not of the Sheriff, the plaintiff was responsible for all his acts done within the scope of his agency, and in the course of his employment, though done contrary to or without orders.—Hoe v. Alexander, 1 Cr. C. C., 98.

And even if he acted improperly and unlawfully but within scope of his authority.—Parkinson v. Wightman, 4 Strob., 366.

Davis, the agent, was empowered to sell

convey title to his vendees .- Story Agency, (4th Ed.,) 202, § 169.

What were Davis' powers? Davis having authority to sell the goods at any time or place, (for there was no restriction as to either,) the goods being under his entire control in his store, in his place of business, the Sheriff having been relieved of the duty of selling, the latter had no power whatever to interfere with any sales made by Davis, nor had he the right, qua Sheriff, to inquire into the "bona fides" of any sales made by Davis; and having no execution in his hands, nor any notice of any revocation of the agency of Davis from the plaintiff, nor any other instructions from plaintiff, he was powerless to seize these goods from, or stop their transfer to, Renneker, as set forth in the affidavits of Cooke and Browning, or to any other purchaser.

This being true, the affidavits of Cooke and Browning amount to nothing more than that Davis was exercising a power delegated to him by the plaintiff, with which the Sheriff had nothing to do.

So far as the merits of the case go, they If there be are clearly with the Sheriff. any conflict at all, as to the facts, the Court should have ordered an issue.-Dawson v. Dewan, 12 Rich., 499; 1 M. Con. Rep., 145; 2 Rich., 530.

But there was no wilful default on the part of the Sheriff. All the facts negative the idea that he is in contempt, and the rule should have been discharged.-Mongie v. Cheney, 1 Hill, 142.

Circumstances show the plaintiff did not consider Sheriff wilfully in default. rule was not moved for until after two Courts had passed, and more than nine months after execution had been returned. The Sheriff was in no manner responsible, and the Court erred in making the rule absolute, and more particularly so, when he holds the Sheriff liable for the amount of the judgment, *31

*when the goods out of which the Sheriff was to have made the money were taken from his hands, and no proof whatever made of the amount of the same disposed of by Davis, their agent, either to Renneker or to any one else, or at any time or times, or that the goods moved by Renneker were those levied on as Davis'.—Sedg. on Damages, 588, 592, 5th Ed.

The Sheriff has sworn that he could find no goods of defendant. The Sheriff's sworn return to the facts is conclusive, and he is entitled to have the rule discharged.

Glover & Glover, contra:

1. The Sheriff having refused to obey the peremptory order of May 17, 1871, which was final, and from which he did not appeal, can-

in his own name, in his own store, and could 1871, which is merely directory.—S. C. Code, Sec. 11.

> 2. A Sheriff is liable to be attached for a contempt, or for neglect of duty.-XI Stat., 30; Ex parte Thurmond, 1 Bail., 605.

> 3. Permitting the property to remain in possession of the defendant in execution, with his consent, is not an abandonment of the levy, but a continuance of the officer's possession.-Moss v. Moore & Adams, 3 Hill, 276; Voorhies' Code, 9th Ed., 539, (b;) 2 Tilling. & Shear., 786.

> 4. "The binding quality (or lien) of an execution, like that of the judgment, continues until it is satisfied, or until length of time furnishes sufficient ground for presuming satisfaction."—Brown v. Gilliland, 3 DeS., 539; S. C. Code, § 317; Vance & Davis v. Red & Young, 2 Sp., 90; Snipes v. Sheriff, 1 Bay., 294; Greenwood v. Naylor, 1 McC., 414.

> Dormant executions are never postponed but for actual fraud.—1 Smith's Lead Ca., 80; Lynch v. Hanahan, 9 Rich., 186; 2 Tilling. & Shear., 786, 787.

> 5. It was the duty of the Sheriff to sell under the peremptory order of May 17, 1871, especially as he was protected by that order. -Gibbes v. Mitchell, 2 Bay., 120; Toomer v. Purkey, 1 Mill, 323; Pitman v. Clark, 1 McM., 316; Greenwood v. Colcock, 2 Bay., 67; Adair v. McDaniel, 1 Bail., 158.

> 6. The Sheriff having admitted in his return of May, 1871, that the goods were levied on as the goods of Davis, is estopped now from setting up that they did not belong to Davis. It is the duty of the Sheriff to return executions satisfied, after having made a levy.—S. C. Code, § 315; Voorhies' Code, 9th Ed., 538, (i.)

*7. If Davis was the agent of any one, he was the agent of the Sheriff; but the Sheriff will not be permitted to assist Davis in committing a fraud. Renneker has taken no legal steps in this case to obtain the goods, and the question is only between the plaintiff and the Sheriff.—Hooks v. Byrd, 10 Rich., 120.

8. The Sheriff is responsible for the amount of the execution and interest.-Bowman v. Cornell, 39 Barb., 69; Humphrey v. Hathorn, 28 Barb., 278; Connor v. Archer, 1 Sp., 89.

Dec. 4, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The order appealed from is, in substance and effect, a final order, adjudging the Sheriff in contempt for disobedience of an order made by the Court relative to the due execution of final process, in the action above entitled.

The order in respect to which disobedience is alleged is dated May 17, 1871, and is as not appeal from the order of October 19, follows: "The Sheriff having been served

with a rule to show cause why he has failed A subsequent execution was lodged in the that he had levied, during the month of June, 1870, upon certain goods and merchandise of the defendant, and having returned the original execution to the Clerk, according to law, without having sold the goods levied on, and a new execution having been lodged in his office April, 1871, it is ordered that the Sheriff proceed, without delay, to sell property levied upon, and to pay out the proceeds of sale in satisfaction of said execution.'

The disobedience alleged consisted in the failure of the Sheriff to seize and sell certain goods, as the property of the execution debtor, that where held, or had been disposed of, by a third person, not a party to the suit, named Renneker, claiming title to the same as his own property.

The order adjudging the Sheriff in contempt, in effect, decides that it was the duty of the Sheriff, under the order above recited, to seize the goods in question in the hands of Renneker, and against his will and claim of ownership, and without being indemnified for so doing by the plaintiff in the execution, or to make good the value of such goods in the event that they could not be found.

This view of the duty of the Sheriff is urged upon two grounds: first, by the fact that these goods had, previously to their coming into the hands of Renneker, been levied upon by the Sheriff in the hands of the execution debtor as his property, and that, subsequently

*33

*to such levy, they had been improperly transferred to Renneker by the execution debtor in fraud of the levy; and, second, that such seizure was imperatively commanded by the order of May 17.

The facts, as alleged by the affidavit of the Sheriff, and not contradicted, are, that the goods in question were levied upon under an execution issued on the judgment in question in May, 1870; that, shortly after the levy, an arrangement was made between the attorney for the plaintiff in the execution and the defendant, by which the defendant was to pay a certain amount on account of the debt, and in consideration of such payment, "the defendant should keep and sell the said goods himself, and out of the proceeds thereof to pay and satisfy the balance due on the said judgment." The Sheriff alleges that this arrangement was carried into effect, and that, in accordance with such agreement, "the attorney for the plaintiff then and there consented to leave, and did leave, the aforesaid goods, so levied on as aforesaid, in the possession and keeping of the said defendant, to sell and dispose of the same, from time to time, for the purposes aforesaid:" that, subsequently to the arrangement, the Sheriff returned the execution under which such levy had been made. inability of the Sheriff to find and sell the

to make the money in the above stated case, Sheriff's office in April, 1871. The Sheriff and it appearing by his return to said rule further alleges "that under this execution, and under others subsequently issued, he had made diligent search for the property of the defendant and for the goods aforesaid, and has been unable to find any, and has so returned the executions to the office of the Clerk of the Court."

> The statement of the Sheriff being uncon tradicted, it must be taken as a fact that he was unable to comply with the order of May 17th, assuming that, by the proper construction of that order, he was bound to seize and sell the goods delivered by the execution debtor to Renneker, inasmuch as, after due search, such goods could not be found after the delivery to the Sheriff of the execution of April, 1871.

> Under these circumstances, in order to bring the Sheriff into contempt, it must be made to appear that such inability was the consequence of some wrongful act or default on the part of the Sheriff, amounting to a dereliction of his duty under the process of the Court. No such dereliction of duty is disclosed by the case, as it stands before us, either in the proceedings of the Sheriff prior to the first execution, in the fact of return-

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ing that execution unsatis*fied, or in the proceedings subsequent to the return of such execution and prior to the issuing of the second execution.

The Sheriff was justified in leaving the property in the hands of the execution debtor under the arrangement made between the parties. If that arrangement was regarded by the parties as beneficial to themselves, the Sheriff was under no obligation to interfere with it, although he would have been justified in securing provision for the payment of his fees. There is nothing tending to show that the goods in question were removed out of the possession of the execution debtor prior to the return of the first execution. The affidavit of Cook and Browning would appear to fix the time of the transfer of the goods to Renneker, in October, 1870, while the statement of the Sheriff would make it appear that the return of that execution was made as early as July or August of that year.

It thus appears that the property in question remained in the same position in which it was placed under the arrangement between the plaintiff's attorney and the execution debtor until after the return of the first execution under which the levy had been Accordingly no dereliction of duty made. can be ascribed to the Sheriff down to the time of returning the first execution. was the return of the first execution unsatisfied a dereliction of which the plaintiff is entitled to complain, as the cause of the

goods under the second execution. If the to it, and the right of the Sheriff, under the plaintiff regarded the return of that execu- levy, became so far qualified as to become tion unsatisfied as injurious to his right, subject to title made under sales made by his proper course was to proceed against the Sheriff as for a false return. Instead of so doing, he recognized and acted upon the fact of a return, by issuing a new execution, and obtained the order of May 17th in aid of such second execution. The order of May 17th cannot be regarded as, in effect, ascertaining that the return to the first execution was false, its whole import and bearing having regard to the new execution. It is, therefore, not within the power of the plaintiff to bring forward any supposed delinquency in returning the first execution as ground for charging the Sheriff with failure to perform the duties imposed by the second execution and the order of May 17th.

Nor can the facts brought to notice as occurring subsequent to the return of the first execution, and prior to the issuing of the second execution, warrant the conclusion that the Sheriff was guilty of any official dereliction, to which his inability to execute the second execution, as against the property

in question, can be ascribed. It *appears that after the return of the first execution the Sheriff obtained information that the goods in question were in the possession of Renneker. He thereupon demanded them of Renneker, who refused to surrender them, claiming them as purchased from the execution debtor. Renneker tendered his bond of indemnity to the Sheriff. The Sheriff then informed the plaintiff's attorney of the facts, and demanded a bond of indemnity from the plaintiff, which was refused.

At the time embraced in the foregoing statement of facts, the Sheriff had no execution against the property, the first having been returned, and the second not yet issued, and accordingly he was not in a position to interfere with the possession of Renneker.

But had he held an execution, the refusal of the plaintiff to furnish a bond of indemnity would have justified a refusal on the part of the Sheriff to take the goods out of Renneker's hands.

The Sheriff is not bound to seize goods claimed as the property of the judgment debtor in the hands of third persons making claim to the same. The practice at common law of calling a Sheriff's jury not prevailing in this State, he has an absolute right to demand indemnity in such cases.

The fact that the Sheriff had once levied upon the goods did not authorize him to interfere with them in the hands of Ren-The latter claimed title under a sale made by the execution debtor, under the authority of the arrangement allowing the execution debtor to make sales. By this arrangement the plaintiff and the Sheriff the execution debtor. Renneker, not being a party to the action, or to any proceeding connected with it, was unaffected by all such proceedings.

If the sale to Renneker was fraudulent, that was a fact only to be ascertained, properly, in a proceeding to which Renneker was a party. Thus it appears that down to the date of the issuing of the second execution the Sheriff was guilty of no dereliction of duty that occasioned his liability to execute the order of the 17th of May, as it regards the goods in question.

But it is contended that that order imperatively required the Sheriff to sell the goods in question, and must be regarded as having adjudicated the question of the duty and liability of the Sheriff in view of the situation of the property at the time. It is con-

*36 tended *that, as that order was not appealed from, the Sheriff was bound to perform its requirements, and that the question of his ability to perform must be regarded as one of the matters adjudged by the order. This is, in effect, the position assumed by the respondent in regard to the force and effect of the order of May 17th.

This order will not bear the construction contended for, but, if that was its true construction, we have authority, and it would be our duty, under the present appeal, to modify it so as to bear a construction more in consonance with the rights of the parties. According to the construction contended for, the order in question would have to be regarded as having adjudicated certain facts and propositions hostilely to both the Sheriff and Renneker. The terms of the order import no such effect. The direction of the order is simply to proceed in execution, and it cannot be extended by construction to the detriment of the rights of a third person not a party to it. We are bound to regard it as not intended to prejudice any right of the Sheriff or of Renneker in respect to the goods levied upon.

But, if the order of May 17th admitted of a different construction, and one that would sustain the respondent's proposition, it would be proper to modify it under the present appeal.

A proceeding by attachment against the Sheriff for misconduct touching the service or return of process is a special proceeding, in the sense of sub-division 3, Section 2, of the Code of Procedure. It is not necessarily an incident to an action, for it may arise out of an ex parte or summary proceeding.

Although the order appealed from is entitled in the original action, that is not in conformity to the practice at common law, were both bound, the latter having assented and is not decisive of the character of the proceeding. The parties to the attachment S. C. 58, 45 S. E. 132; Ex parte Gantt, 75 S. proceeding are not necessarily identical with C. 368, 55 S. E. 292. proceeding are not necessarily identical with the parties to the action or other proceeding out of which it has arisen. It is generally a collateral proceeding in aid of a remedy prosecuted by action or otherwise, but it so far independent that a final order in such proceeding is in the nature of a judgment, and may be appealed from at any time, without regard to the state of proceedings on an action to which it may be collateral.

The effect of appealing from a final order in such proceedings is, in a respect, important to this case, similar to the effect of appealing from a final judgment in an action. Upon such an appeal the Court may revise any intermediate order involving the merits and necessarily affecting the judgment.-Code, Sec. 11, Sub. 1.

*37

*The order of May 17th, if entitled to the construction contended for by the respondent, would necessarily be regarded as involving the merits and affecting the judgment, for, on that construction, the case of the Sheriff could stand as substantially adjudicated under that order.

The order of May 17th, not being final in its relation to the proceedings against the Sheriff, could not be appealed from. It is only after the proceeding against the Sheriff had culminated in a final adjudication that this Court could look into the merits of the controversy. Having the whole case before us, we are permitted to look through the whole proceeding to see that errors of law have not been committed.

The order appealed from should be set aside, and the cause remanded for further proceedings in Circuit Court, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 37

STEWART v. BLEASE.

(Columbia. April Term, 1872.)

[Dower Con (19.]

The Probate Court is not ousted of its jurisdiction in cases of dower, because questions of fact are involved. The Probate Judge has of fact are involved. The Probate Judge has power to decide all such questions, and the remedy is to appeal to the Circuit Court, and apply in that Court for an issue to be joined under the direction of the Court and tried by a jury, as provided by Section 28 of the Act of 1868, and Section 62 of the Code of Procedure. If no such issue is demanded, the Circuit Judge hears the appeal upon the copy of the proceedings, certified by the Probate Judge and filed in the Circuit Court.

For other cases, see Dower, Cent. Dig. §§ 240, 246; Dec. Dig. ©=69.]

[Dower \$\infty 79.]

Plaintiff in dower may give in evidence a copy of a deed of the United States Marshal purporting to convey to detendant the land in which dower is claimed as the property of her husband, and this without notice of her inten-tion to offer the same, or to produce the original deed.

[Ed. Note.-For other cases, see Dower, Cent. Dig. § 302; Dec. Dig. \$\sim 79.]

Before Moses, J., at Newberry, September Term, 1871.

This case will be understood from the decree of the Circuit Judge, which is as follows:

Moses, J. The petitioner, Eliza R. Stewart, filed her petition in the Probate Court for the County of Newberry on the 2d day of November, A. D. 1869, against the defendant,

Henry H. Blease, *for the recovery of dower in a certain tract of land therein described. By the answer of Henry H. Blease, her right to dower was denied.

The cause came to be heard by the Probate Court, and on the 7th day of February, 1870, John T. Peterson, Esq., as Probate Judge, pronounced his decree, wherein he sustained the petitioner's claim of dower, and ordered a writ for its admeasurement to issue.

From this decree the defendant appealed, on the following grounds, to-wit:

First. Because the Probate Judge erred in allowing the petitioner to offer in evidence a paper, purporting to be a copy of a deed from the United States Marshal to the defendant, for the land described in the petition, without notice of her intention to offer the same, or to require the production of the original.

Second. Because the Probate Judge erred in not sustaining the objection to the jurisdiction taken by the defendant upon the ground that a question of fact had been made by the evidence so important and material as to require the verdict of a jury, which the Probate Judge had no right to empannel.

Third. Because the Probate Judge erred in deciding that the petitioner could not be barred of her dower in consequence of any promise, either expressed or implied, which she may have made before, or even after, the death of her husband.

Fourth. Because the weight of the testimony clearly established that the petitioner did consent and promise to relinquish her dower in the lands described in the petition upon certain conditions, with which the defendant fully complied.

In the trial before me, copies of all the [Ed. Note.—Cited in Tibbetts v. Langley Mfg. Co., 12 S. C. 466; Ex parte White, 33 S. C. 446, 447, 450, 12 S. E. 5; Ex parte Apeler, 35 S. C. 420, 14 S. E. 931; Ex parte Jackson, 67 ert Stewart, who, in his lifetime, was seized | in fee of a valuable plantation of land, lying in this County, containing about nine hundred and thirty-two acres; that, on the 17th day of February, 1869, the United States Marshal, under a fieri facias, sold the lands, at public auction, to Henry H. Blease, the defendant, at the price of sixteen thousand dollars; and, that, on the same day, but prior to the United States Marshal's sale, Robert Stewart, by deed, conveyed the said lands to the defendant at the price of twelve thousand five hundred dollars. That, by the testimony of the defendant, an arrangement was entered into by Robert Stewart and the defendant that he should purchase the land at the United States Marshal's sale, and when this con-

*39

versation *occurred between them, Mr. Stewart said "there were judgments against him for which the lands now to be sold were to satisfy." Stewart said, "if the lands sold for more than the judgments, certain persons would enter suit against him in the Bankrupt Court, and never let the money come into his hands." He asked me (Blease) "to first help him make the land bring its true value, and then to put the overplus in his (Stewart's) hands, saying he would make a perfect title."

That soon afterwards, and before the arrangement between the defendant and Robert Stewart was consummated, A. C. Garlington, as the administrator of the estate of J. M. Young, deceased, holding a large claim against Robert Stewart, as surety for the late Hon. J. B. O'Neall, as guardian of the estate of his intestate, filed his petition in the United States Court for this State in Bankruptcy, praying for the involuntary bankruptcy of Robert Stewart. That both Robert Stewart and Henry H. Blease were much disturbed by this act of Garlington, which sought to have the amount of the purchase money at the United States Marshal's sale, after paying the judgments, paid into the United States Court. That, subsequently, the defendant, by an order of Court, in case of A. C. Garlington, as Administrator, v. Posey and wife and others, obtained the assignment of the bond to himself. That consultations were being had from time to time, respecting the relinquishment of dower by the demandant to Blease; and here there is a discrepancy between the testimony of the defendant, on the one hand, and that of the demandant and other witnesses, on the other hand—the first insisting that a parol promise was made by the demandant to him that if he purchased the bond and assigned it to her, she would relinquish her dower in said lands. The other parties insist that no such promise or agreement was made by her. That the bond was paid for out of the purchase money of said land, at the price agreed upon by the defendant and Robert Stewart, except

two thousand dollars, which have never been paid, but for which the defendant gave his obligations. My judgment, made upon the law and facts, is very clear as to the demandant's right of dower, as established by the decree of the Probate Judge. Yet, as remarked by Chancellor Wardlaw, in the case of Church of Advent v. Farrow and Wife, 7 Rich. Eq., 381, "as it is always satisfactory to a litigant to be enabled to know that his claim or defense has been deliberately considered by the tribunal determining his rights," I will briefly review the positions assumed by the defendant in this case, in the order indicated by him.

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*As to the error charged in the first ground of appeal: It does not seem to have been necessary to introduce the copy of the deed objected to. It was no part of the husband's title, and could only have been introduced to show the time and possession of the defendant, both of which were abundantly established by other testimony. But, even if it had been a part of her husband's title, if we follow the decision in the case of Forrest v. Trammell, 1 Bail., 77, copies would have been admissible. In Reid v. Stevenson, 3 Rich., 67, and Smith v. Paysinger, 2 Mill., 59, the Court held that the demandant in dower was not required to show title in her husbandpossession was sufficient. In fact, in the present case, the defendant, in his answer, admits that he purchased the lands of her husband and made an exhibit of a copy of the deed of conveyance, and also admits that he purchased the lands at the United States Marshal's sale at the price alleged in the pe-

I am satisfied that no injury has resulted to the defendant thereby.

As to the second ground of appeal: The Probate Court is clothed by the Constitution of this State, and by the Acts of the General Assembly, passed in pursuance thereof, with jurisdiction as to petitions of dower. No exception is there made. Under such circumstances, I am satisfied with the action of the Probate Judge.

The third ground of appeal refers to that part of the decree where he decides that the petitioner could not be barred of her claim of dower by any parol promise, express or implied, before or after the death of her husband.

"Dower is a right favored in law," and its relinquishment under the law, as it existed prior to the adoption of the present Constitution of the State, was guarded in the most solemn manner. But it is insisted, in this case, that, admitting the severe restrictions heretofore guarding the relinquishment of dower, as the law was changed by the 8th Section of the 14th Article of our new Constitution, a married woman can, by a parol promise or agreement, convey her dower in

estate, and as if she were a feme sole.

While I am not, by any means, prepared to subscribe to such a broad statement of the new rights vested in her, still I do not conceive that I am called upon to decide such questions in this case, for I am aware of no law relating to the alienation of lands which compels a deed to be made upon a disputed parol promise to convey without consideration even where a party is "sui juris."

*In this case there is a discrepancy in the testimony relating to the alleged parol promise to convey and no consideration established. From a consideration of the situation of the parties at the time A. C. Garlington filed his petition, praying for the involuntary bankruptcy of Robert Stewart, both the defendant and Stewart were in jeopardy, for Stewart might have been financially ruined, and Blease might have been compelled to pay the difference between the judgment, some \$7,000 or \$8,000, and his bid, \$16,000, into the U. S. Court, or he might have been forced to lose the money he had paid, and also forfeit his claim to the land. The provisions of the 39th Section of the Bankrupt Act of the United States are exceedingly stringent. that, from the circumstances, leaving out of consideration for the time the denial of the parol promise, it does not appear that the defendant was induced to purchase the bond in question, in reliance upon any promise of demandant, and that any reliable consideration moved her in the transaction.

And now we are left to consider the fourth and last ground of appeal. An extended notice of this position is rendered useless by the consideration I have just given, and conclusion announced relative to the third ground of appeal, for, clearly, if the alleged parol promise to convey be enforced, even admitting its having been made, it will not be necessary to deal at length with that objection which pertains to the "weight of testimony" relied on to establish its existence. It involves the decision of an immaterial issue.

It is ordered and decreed that the appeal be dismissed, and that the decretal order of the Probate Judge, dated the 7th day of February, 1870, be sustained as the judgment of this Court, and that this decree be certified by the Clerk of this Court to the Probate Court for such other proceedings as may be necessary to enforce the same.

It is further ordered that the costs of this appeal be taxed against the defendant. Henry H. Blease.

The defendant appealed to this Court on the grounds:

First. Because His Honor the Circuit Judge erred in his decision sustaining the Probate Judge in allowing the respondent to offer in evidence a paper purporting to be a

lands as fully as she can any other separate | copy of a deed from the United States Marshal to the appellant, for the land described in the petition in which dower is sought, without notice of her intention to offer the same, or to require the production of the original.

*42

*Second. Because His Honor the Circuit Judge erred in his decision in concurring with the Probate Judge in not sustaining the objection to the jurisdiction of the Probate Court, taken by the appellant, upon the ground that a question of fact, involving title to real estate, had been made by the evidence so material and conflicting as to require the verdict of a jury, which the Probate Judge has no authority to empannel.

Third. Because His Honor the Circuit Judge erred in deciding that the respondent could not be barred of her dower in consequence of any promise, either expressed or implied, which she may have made before or even after the death of her husband.

Fourth. Because the weight of the testimony clearly established that the respondent did consent and promise to relinquish her dower in the lands described in the petition, upon certain conditions, with which the appellant fully complied.

Baxter & Johnstone, Jones, for appellant, cited, upon the first ground, Gist v. McJunkin, 2 Rich., 153; Pickering v. Myers, 2 Bail., 118; Executors of Grey v. Kernahan, 2 Mill., 65; Lowry v. Pinson, 2 Bail., 324; Steph. N. P., 1524; 2 Stark Ev., 43; O'Neall v. Isbell, 9 Rich., 369. The case of Forrest v. Trammel, 1 Bail., 77, was decided before the Act of 1843, (11 Stat., 255,) was passed. This Act required notice to be given before an office copy of a deed can be given in evidence, and, besides, in Forrest v. Trammel, the copy was given in evidence not to show title, as here, but merely to show extent of possession. Upon the second ground they contended that the Probate Court has no jurisdiction where, as here, there is a disputed question of fact to be decided upon conflicting evidence, (2 Scrib. on Dow., 149;) and upon the third and fourth grounds they contended that a widow may bar herself of dower by encouraging one to purchase under a promise, express or implied, to release her dower, (2 Scrib. on Dow., 251, 253, 255, 149, 597; Douglass v. Tapping, 4 Paige, 94; Daniels v. Davison, 16 Ves., Jr., 253; Cory v. Geitchin, 2 Mad., 40; Heth v. Coke, 1 Rand., 344; Stoney v. Bank of Charleston, 1 Rich. Eq., 275; Wood v. Seely, 32 N. Y., 5 Tiff., 105; Lawrence v. Brown, 1 Seld., 394, 401; Wood v. Keyes, 6 Paige, 478; Lawson v. Morton, 6 Dana, 471;) and that the evidence shows that defendant was induced by plaintiff to purchase under the expectation that she would release her dower.

Fair, Pope & Pope, contra.

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*Dec. 14, 1872. The opinion of the Court was delivered by

MOSES, C. J. By the 20th Section of the 4th Article of the Constitution the Probate Court is vested "with jurisdiction in business appertaining to minors and the allotment of dower." The Act of 21st September, 1868, 14 Stat., 77, defines its extent and regulates its exercise.

The material objection to the decree submitted by the appellant in this case, ordering the allotment of dower, is raised by his second ground of appeal to the Circuit Court, and brought here by him from that Court for our revision, to wit: "Because the Probate Judge erred in not sustaining the objection to the jurisdiction taken by the defendant, upon the ground that a question of fact had been made by the evidence so important and material as to require the verdict of a jury, which the Probate Judge had no right to empannel."

If this proposition is sustained there would be an end to the jurisdiction of the Probate Court in cases of dower. The determination of all questions in Courts of Justice depend on the facts through the existence and virtue of which rights are claimed, and these facts must appear before the principles of the law can be interposed to ascertain what benefits they confer, or what duties they impose.

In every case of dower it must be shown that the demandant is the widow of the husband who, during the coverture was seized of the premises to which the defendant, either by possession or otherwise, asserts a title in bar of her recovery. The objection, it seems from the language of the appeal, was made after the testimony had been heard.

The Probate Judge, even if it was conflicting, was obliged to decide without the intervention of a jury, for he had no authority to summons or empannel one. His judgment must be formed from his solution of the facts and his understanding of the law. The appellant was not without remedy, and if he failed to pursue the course by which his claim to a jury could have been secured, the fault is his.

By the Act of 1868, (14 Stat., 21st Section, p. 78.) "The Circuit Court shall have appellate jurisdiction of all matters originally within the jurisdiction of the Probate Court." The 26th Section requires "a certified copy of the *44

record of the proceedings appealed *from to be filed in the Circuit Court." The hearing of the case in the Circuit Court is strictly on appeal, (except as will be hereinafter referred to,) limiting the presiding Judge to a review of, and judgment on the evidence taken below. His conclusion is final, unless reversed by the Supreme Court,

It was the default of the appellant which deprived him of a finding on the facts by a jury in the Circuit Court. By the said Act of 1868, Section 28: "When such certified copy shall have been filed in the Circuit Court, such Court shall proceed to the trial and determination of the question according to the rules of law; and, if there shall be any question of fact, or title to land, to be decided, issue may be joined thereon, under the direction of the Court, and a trial thereof had by a jury." This, as well as the 26th Section of the same Act, is repeated in the Code of Procedure, Sections 60, 62. No application was made for an issue to be joined "on any question of fact or title to land to be decided, and a trial thereof had by a jury," and in the absence of it the issues were to be taken as submitted to the sole determination of the Judge. The grounds of appeal make no exception, because the case was heard without a jury in the Circuit Court, where the appellant might have moved for and obtained one, but object, because it was heard without a jury in the Probate Court, which was without power to provide such a body.

There was no error in admitting the copy deed of the United States Marshal by which the land was conveyed to the defendant. "The demandant in dower is not required to make out a regular chain of title in her husband,"-Forrest v. Trammell, 1 Bail., 77. To show prima facie seizin in the husband, it has been held enough to prove "that the defendant went into possession under one to whom the husband had conveyed."-Plant v. Payne, 2 Bail., 319. Even proof that the husband was in possession during coverture, claiming title is sufficient evidence of seizin in him.-2 Scribner on Dower, 200. In the case before us, no evidence was necessary to establish the title of the husband during the coverture, for the defendant, in his answer, admits that he purchased the land as the property of the husband, at a sale by the Marshal, at the price stated in the petition, and actually filed, as an exhibit, a copy of the deed by which it was conveyed.

It is not necessary to discuss the general question made by the third ground, whether

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a widow can be barred of her dower in *consequence of a parol promise made before or after the death of her husband, for the weight of the testimony, in the judgment of the presiding Judge, disproved the allegation by the defendant of any such promise by the demandant, and we concur in the result which he expressed in this regard. We can find nothing in the testimony that constitutes an estoppel in pais.

The motion is dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

McALILEY v. BARBER.

(Columbia. April Term, 1872.)

[Injunction \$\sim 26.]

Where land is sold under a decree for partition between heirs, and is afterwards sold under a judgment against the ancestor, the purchaser under the sale for partition has no equity chaser under the sale for partition has no equity to restrain the purchaser under the judgment from prosecuting an action to recover the pos-session of the land, upon the mere ground that the fund arising from the sale for partition is sufficient to satisfy the judgment, and is under the control of the Court, and that the owner of the judgment stood by and did nothing to prevent the sale for partition.

[Ed. Note,—Cited in Latimer v. Ballew, 41 S. C. 521, 19 S. E. 792, 44 Am. St. Rep. 748; Kiryen v. Virginia-Carolina Chemical Co., 77 Kirven v. Virginia-Carc S. C. 507, 58 S. E. 424.

For other cases, see Injunction, Cent. Dig. § 54; Dec. Dig. \$\infty 26.1

[Injunction 64.]

Nor does an allegation that there are personal assets in the hands of the administrator of the ancestor, which may be sufficient to satisfy the judgment, give rise to such an equity.

[Ed. Note.—Cited in Hardin v. Melton, 28 S. 50, 4 S. E. 805, 9 S. E. 423.

For other cases, see Injunction, Cent. Dig. §§ 131–133; Dec. Dig. €=64.]

[Execution \Longrightarrow 225.]

A judgment creditor has the right to select what property of his debtor shall be sold under his execution.

[Ed. Note.—Cited in Wagner v. Pegues, 10 S. C. 262.

For other cases, see Execution, Cent. Dig. §§ 618, 640; Dec. Dig. \$\infty\$225.]

[Injunction \$\sim 64.]

Where a defendant has an equitable defense the proper practice is, not to bring a cross action in the nature of a bill for injunction, but to allege the matter in the answer as a defense or counter claim.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 131-133; Dec. Dig. &=64.]

[This case is also cited in Barber v. McAliley, 4 S. C. 49, as to facts.]

Before Thomas, J., at Chester, April Term, 1872.

Action by Samuel McAliley, plaintiff, against Osmond Barber and Furguson H. Barber, defendants, for injunction to restrain the defendants from prosecuting an action of trespass to try title brought by them against the plaintiff, and for other relief.

The facts of the case, as alleged by the complaint, and admitted by the answer, were

as follows:

Henry Macon, Sr., confessed a judgment on January 24th, 1844, to Alexander Barber, for the sum of \$344.16, on which there was a payment of \$400, of date of October 31st, 1855. He died in the year 1855, possessed of a large personal estate, and of a tract of land situate in Chester County, containing 570 acres. Ad*46

January, 1856, to his sons, *Benjamin W. Macon and Henry Macon, Jr., who sold the personal estate at public sale in January, 1859, for the sum of \$18,148.24.

Alexander Barber died in 1858, and letters of administration on his estate were granted to O. Barber and Mrs. Sarah J. Barber in the same year, and by a private arrangement between the heirs of Alexander Barber, the judgment was transferred to his son, F. H. Barber, immediately after the death of his father. The parties were near neighbors, but this judgment was never presented to the administrators of Macon for payment, though the administrators knew that said judgment was unsatisfied.

The real estate was sold in December, 1859, under a decree of the Court of Equity, for partition among the heirs-at-law of Macon, on a credit of one, two and three years, with interest—the purchase money being secured by mortgage and bond, with personal sureties, of whom plaintiff was one. No objection was made to this sale by any of the Barbers, and no notice given of the judgment aforesaid.

The purchase money not being paid when due in 1866, a bill was filed to foreclose the mortgage, and under a decree in that case the land was sold in January, 1867, and bought by the plaintiff for the sum of \$700, which was paid into the office of the Commissioner of the Court of Equity, and remains in the hands of the Clerk of the Court for Chester County undisposed of, and subject to its control. This sum is more than sufficient to satisfy the judgment.

The judgment was renewed by sci. fa. in 1868, and under a new fi. fa. issued thereon, the land was sold on December 7th, 1868, and bought by the defendants for the sum of twenty-five dollars, who at the next term of the Court commenced an action of trespass to try title against the plaintiff to recover the land.

It was alleged in the complaint that Osmond Barber, one of the defendants, was present at the sale for partition, and did not forbid the same, but this was denied by the answer.

The plaintiff demanded judgment:

1. That it be ordered, adjudged and decreed, that the lien of the judgment of A. Barber v. Henry Macon, Sr., on the lands of the latter, was divested by the judicial sale of the same as hereinbefore described.

2. That the defendants seek satisfaction of their execution from the administrators of Macon, and in case of failure of personal as-

*sets, now in their hands, that they be compelled to apply for the proceeds of the sale of the real estate now in possession, and under the control of this Court, if their claim ministration on his estate was granted in be adjudged to be valid and subsisting.

3. That said defendants be enjoined from further proceedings at law against this plaintiff, and those holding under him, on account of said real estate, and for such other and further protection and relief as to this Court may seem just and proper.

The case was heard upon the pleadings, and His Honor refused the motion for injunction and dismissed the complaint.

The plaintiff appealed on the grounds:

- 1. Because His Honor the presiding Judge erred in not holding that the defendants should seek payment of their execution out of the proceeds of the sales of the land in controversy, then and now in Court, and admitted to be more than sufficient to satisfy the same.
- 2. Because His Honor erred in not holding that the lien of the defendants' execution was transferred from the land to the proceeds of the sale thereof, then under control of the Court.
- 3. Because His Honor erred in holding that the plaintiff, who had bought said land at a judicial sale for a valuable consideration, had no right to compel defendants to seek satisfaction out of the moneys arising from such sale, then in Court, upon which their execution was the first lien; their refusal to seek such satisfaction exhibiting so manifest a disregard of the rights of the plaintiff that he was entitled to the protection of this Court.

Brawley, for appellants. Hemphill, contra.

Dec. 14, 1872. The opinion of the Court was delivered by

WILLARD, A. J. This was a complaint in the nature of a bill in equity to restrain the action at law brought by the defendants against the present plaintiff in which judgment has been given. (See next case).

The complaint presents no equity that would warrant an interference with the legal rights of the defendant, as purchaser, under the judgment against H. Macon.

*48

*The only fact alleged in support of an equity in the plaintiff to restrain the suit to enforce the legal title of the defendants is, that O. Barber was present at the sale for partition and did not forbid the same. This fact was denied by the answer, and, if material, should have been proved. But it is wholly immaterial, for, standing by itself, it does not warrant the conclusion that the plaintiff seeks to draw from it. This question, as well as all the other questions properly arising on the complaint and answer, are

conclusively ruled by Moore v. Wright, (14 Rich. Eq., 132).

That case holds, distinctly, that a purchaser under a partition among distributees has no equity to restrain a judgment creditor of the ancestor of the distributees from enforcing such judgment against any portion of the estate bound by such judgment, on the mere ground that it can be satisfied out of other assets, without prejudice to the plaintiff's right, which would otherwise be defeated, and that an allegation that the party stood by and did nothing to prevent this sale did not give rise to such an equity.

The judgment creditor has a right to select as to what property of the judgment debtor shall be sold under his execution.-Longworth v. Screven, (2 Hill, 298 [27 Am. Dec. 381].) Unless, therefore, there is a general equity between the parties, or such an abuse of the right of selection as shall amount to a fraud on the rights of third persons, that legal right cannot be restrained on equitable grounds. Whatever equity the plaintiff might have been entitled to before the sale under the judgment, to require the application of the proceeds of the foreclosures to the satisfaction of the execution, he lost, as to the defendants, by his laches in not moving before title vested in him. A question was made below, whether the complaint was properly brought to restrain the action for the recovery of the land. The proper course of practice, where a defendant has rights, upon grounds that formerly authorized the filing of a bill to restrain an action at law, which he desires to oppose to a recovery in an action brought against him, is to interpose such rights by way of answer or counter-claim. He may, in this way, not only take advantage of them by way of defeating the plaintiff's judgment, but may seek and obtain affirmative relief appropriate to the case thus made by him.

If the Circuit Court should, instead of allowing a defendant to amend his answer, so as to bring forward matters proper for a bill in equity to restrain an action at law, allow *49

the party to prose*cute a cross action in the nature of such a bill, we are not prepared to say that such subsequent proceeding would be without jurisdiction or liable to reversal on that ground. But as the present suit was dismissed as to the merits, that question does not come before us at present.

The judgment below should be affirmed and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 49

BARBER v. McALILEY.

(Columbia. April Term, 1872.)

[Partition 117.]
A sale of land under a decree for partition between heirs does not divest the lien of a judgment against the ancestor; the purchaser takes subject to the lien.

[Ed. Note.—Cited in Anderson v. Cave, 49 S. C. 513 27 S. E. 179 513, 27 S. E. 478.

For other cases, see Partition, Cent. Dig. § 454; Dec. Dig. \(\subseteq 117. \)]

[Trespass to Try Title = 19.]
An equitable defense cannot be made in an action to recover the possession of land under an answer merely denying the plaintiffs' legal title. It should be alleged in the answer.

[Ed. Note.—Cited in Stokes v. Murray, 87 S. E. 73.

For other cases, see Trespass to Try Title, Cent. Dig. § 22; Dec. Dig. = 19.]

[This case is also cited in McAliley v. Barber. 4 S. C. 45, as to facts.1

Before Thomas, J., at Chester, April Term,

This was the action of trespass to try title of Osmond Barber and Ferguson H. Barber, plaintiffs, against Samuel McAliley, defendant, mentioned in the last preceding case of McAliley v. Barber.

By agreement of the parties the facts of that case were regarded as proved in this.

and need not be here repeated.

His Honor ruled that the lien of the judgment of Alexander Barber against Henry Macon had not been divested by the sale for partition, and was not affected by the fact that the plaintiffs might have obtained their money from the proceeds of that sale; and he instructed the jury to find a verdict for plain-

The defendant excepted to the ruling and instruction, and appealed on the following grounds:

1. Because the lien of the plaintiffs' judgment on the lands of Macon was divested by the proceedings and sale in partition, and attached to the proceeds of said sale, which were under the control of the Court, and amply sufficient to satisfy said judgment.

2. Because the judgment, being a first lien in equity on the moneys in the Court made from the sales of the land under judicial

*50

pro*cess, could not be a lien at law on the same land, and the sale thereunder was void.

Brawley, for appellant:

The lien of a judgment upon land is divested by a judicial sale thereof, and attaches to the proceeds of the sale, which stand in lieu of the land itself, subject to the same legal priorities. Such a lien is not, strictly speaking, jus in re or jus ad rem; it does

self, or a specific claim upon it, but only a general right to be satisfied out of the property of the debtor.

The plaintiffs in this case can claim no more than that their judgment should be satisfied, and when they stood by and permitted the land to be sold, their claim upon the land was gone, and attached to the fund, which is still in Court, and more than sufficient to satisfy their debt.-Keckley v. Moore, 2 Strob. Eq., 21; Burris v. Gooch, 5 Rich., 6; Codwise v. Gelston, 10 John., 508; Story Eq. Juris., § 553; Garvin v. Garvin, 1 S.

If it be true that plaintiffs have a lien upon the fund in Court arising from the sale of the land, then it is manifestly unjust that they should also have a lien on the land itself, which was sold, with their acquiescence, by order of Court, and bought by an innocent purchaser for valuable consideration. But, admitting that the plaintiffs have a claim upon both, is it not a uniform principle, founded in natural justice, that if a creditor has a lien upon two funds or two parcels of land, he should be compelled to resort to that which can satisfy his claim without detriment to the rights of others, particularly when the relief required is specially pointed out to him, and is certain, prompt and efficient?-Story Eq., § 633 et seq.; Foub. Eq., B. 3, Ch. 2, § 6; Lanoy v. Duke of Athol, 11 Atk., 446; Aldrich v. Cooper, 8 Ves., 388-396; Clowes v. Dickinson, 5 John, Ch. R., 240, S. C.; 9 Cowen, 403; Bank of Hamburg v. Garmany, 1 Strob. Eq., 173; Gadberry v. Mc-Lure, 4 Strob. Eq., 178; Felder v. Murphy, 11 Rich. Eq., 60.

Hemphill, contra:

An injunction cannot be allowed to stay proceedings in another action in the same Court.-1 Tilling. & Shear., Pr., 677; 1 Whitaker's Pr., 454, 461.

*Judgments and executions in this State have an indefinite lien, except in case of presumption of payment after the lapse of twenty years, or actual payment.-State v. Laval, 4 McC., 336.

The lien of judgments and executions against the ancestor is not divested by a sale under proceedings in partition between the heirs.-Moore v. Wright, 14 Rich. Eq., 132; Walton v. Copeland, 7 Johns. Ch., 140; 2 Van Sanf. Eq. Pl., 14.

The lien or claim of a judgment against one of the heirs may be divested under such proceedings for partition; but the title of the heirs is only inchoate, and is qualified and limited by the right of his co-distributees.-Rabb v. Aiken, 2 McC. Ch., 125; Burris v. Gooch, 5 Rich., 6; Keckley v. Moore, 2 Strob. Eq., 23.

The lien of the judgment and execution not give a right of property in the land it- extends to all the defendant's real and personal property, without distinction, and the cred-, the parties as they would be presented in itor has the option to enforce his execution against either; and he is not compellable to resort to the personal assets, or to any pecuniary fund under the control of the Court, for the satisfaction of his debt.-Jones v. Wightman, 2 Hill, 580, 581, 583; Longworth v. Screven, 2 Hill, 298; Vernon v. Chalk, 2 Hill Ch., 259, 260; Fowler v. Barksdale, Harp. Eq., 165; Moore v. Wright, 14 Rich. Eq., 134.

The defendant in the first action, and the party under whom he claims, are not injured by the act of the judgment creditor, as they had express as well as implied notice of the existence of the lien.-Ellis v. Woods, 9 Rich. Eq., 19.

Dec. 16, 1872. The opinion of the Court was delivered by

WILLARD, A. J. The action was trespass for the recovery of land purchased by the plaintiff under execution upon a judgment recovered against H. Macon, brought against a purchaser of the same land, under a partition between the distributees of H. Macon. The only question presented by the case is, whether the sale under partition divested the lien of the judgment against the ancestor.

The proposition that a title, made under a decree for partition among distributees, does not divest or impair the lien of a judgment against the ancestor of the distributees, must be regarded as substantially settled by Moore v. Wright (14 Rich. Eq., 132.) Title under such a decree can have no greater force and effect than that of the distributees out of which it was derived.

The title of the distributees being subject

to the lien of a judg*ment against their ancestor, that derived through their partition must be so subject.

The judgment creditor of the ancestor was not a party to the partition, and therefore could not be bound by the decree. Walton v. Copeland (7 Johns. Ch., 140,) holds that the judgment creditor would not be a proper party to the partition.

The second ground of appeal has no application to the case. The issue made by the pleadings, as appears by the brief, is simply as to the legal title to the land. If the defendant had an equity as affecting the plaintiff's legal right, that was the proper subject of an equitable defense, under the Code. but cannot be considered under a general issue denying the plaintiff's legal right to the land. In fact, the plaintiff's case, so far as it involves grounds of equity, was presented in the suit of McAliley v. Barber, ante, p. 45, and was decided under that case.

We are bound to regard the present case

the common law action of trespass to try title. Viewing the case in this light, there was no error in the directions given to the jury, inasmuch as the plaintiff's verdict was a necessary consequence of an undisputed state of facts, leaving nothing for the jury to determine.

The appeal should be dismissed without prejudice to the defendant in this cause in any course he may be advised as to the fund in Court.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 52

GORDON v. SUTTON GOLD MINING COMPANY.

(Columbia. Nov. Term. 1872.)

[Attachment &=236.]
A Circuit Judge has no power at Chambers to dissolve an attachment under a writ in foreign attachment sued out in 1867.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 804–806; Dec. Dig. €==236.]

Before Thomas, J., at Chambers, Chester, January, 1870.

R. B. Gordan and six others, plaintiffs, sued out, in August, 1867, in York District, separate writs of foreign attachment against The Sutton Gold Mining Company, defend-*53

ant, a corporation *chartered by the State of New York, and doing business in said District. Property, real and personal, of defendant was attached by the Sheriff of York under said writs. Declarations were filed, pleas put in by defendant, and the cases were on Calendar No. 1 for trial.

On January 11th, 1870, the defendant moved His Honor Judge Thomas, at Chambers, at Chester, for an order in each case "that the attachment be dissolved upon defendants' entering into bail to the action before the Clerk of the said Court."

The motions were granted, and the plaintiffs appealed on the ground, inter alia:

1. Because His Honor erred in hearing the motion at Chambers, notwithstanding the objection of plaintiffs.

Clawson & Thompson, for appellants. Smith, contra.

Dec. 16, 1872. The opinion of the Court was delivered by

MOSES, C. J. In these cases we propose to consider only the question raised by the first ground of appeal. The brief includes matters entirely disconnected with what we regard the single point we are called on to determine. Some incidental propositions are submitted, upon which the Court has passed as one involving merely the legal rights of in Clawson v. Sutton Gold Mining Co., (3 S. G [419]). The order from which the appeal in that case was taken dissolved the attachment. Here it was to "be dissolved upon defendant's entering into bail to the actions before the Clerk of the Court."

Prior to the case of Williams v. Haselden, 10 Rich., 55, the practice in regard to dissolution of a writ of foreign attachment by entering special bail, founded as it was on the 18th Section of the Act of 1744, 3 Stat., 620, did not extend the right of the defendant beyond the expiration of the year and the day within which he was required to plead. That case, however, considered the proviso to Section 4 of the Act of 1785, 7 Stat., 214, "that all attachments should be replevisable by appearance and putting in special bail, if by the Court ruled to do so," as enlarging the power of the Court, and permitting a dissolution of the attachment at any time before the filing of the plea.

*54

*The dissolution depended on the order of the Court; if the bail had not been entered within the year and the day, and it is questionable, if it had been given within that period, whether the order of the Court would not even then have been required. Where, however, as in these cases, it was not given within the period fixed by the Act of 1774, the order of the Judge is indispensable.

In the case of Clawson, (already referred to) we held that the Circuit Judge had no power at Chambers to dissolve the attachment.

The conclusion there extends to the order so made by him here, and it necessarily follows that the appeal must be sustained, and the motion granted, and it is so ordered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. 54

SPEAKE v. KINARD.

(Columbia. Nov. Term, 1872.)

[Bankruptey €=268; Dower €=45.]

Land of a testator was sold by his executor and purchased by K., who was afterwards adjudged a bankrupt, and then died. After K.'s death, the widow of testator filed her petition in the Court of Probate, against the heirs of K., claiming dower. Pending the petition the land was sold under an order of the Bankrupt Court and purchased by H. The petition was then amended, and H. made a party defendant thereto: Held, That the sale in bankruptcy was no bar to the application for dower. (a)

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 376; Dec. Dig. \$268; Dower, Cent. Dig. § 144; Dec. Dig. \$45.]

(a) As the Court concurred only in the result of the decree, and neither the provisions of the will, nor the facts in reference to Kinard's payment of the purchase money and the supposed election, are clearly stated, the case would seem to be of little value as an authority upon any other point.

Before Moses, J., at Newberry, September Term, 1872.

The appeal in this case was heard upon the decree of the Circuit Judge and grounds of appeal. The decree is as follows:

Moses, J. This case was commenced by petition of Rebecca Speake, filed August 27, 1869, claiming dower in a certain tract of land in Newberry County, of which her late husband, George Speake, was seized at the time of his death, in 1861, but which was sold by his executor, John L. Speake, soon afterwards, to Henry H. Kinard. Kinard died during the first half of the year 1869,

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and this petition *was filed against his widow and children, and his heirs-at-law. Pending the suit, however, the tract of land in question was sold by the United States Marshal under proceedings in bankruptcy, and purchased by Thomas F. Harmon. Harmon was then added to the parties defendant, and the suit being brought to a hearing, the Probate Judge gave a decree in favor of the petitioner; and Harmon, as the only party feeling really aggrieved, appealed to this Court.

The grounds of appeal, although stated in four separate paragraphs, are reducible to two: First, that the petitioner had elected to take a provision under the will of her husband in lieu and bar of dower, or what was equivalent to it, and was thereby concluded from a claim to dower; and, second, that Harmon deserved to be protected, as an innocent purchaser, against any claim from her. And, as to the first ground, it is said that Rebecca Speake was allowed, by her husband's will, a valuable tract of land and certain personal property, and that she received and enjoyed such devise and legacy, and made no claim to dower, when she might properly have done so. It does appear that she continued to reside at the old homestead, (which was the tract devised her by her husband,) and that slaves and other personal property remained there in her hands; and it further appears that she interposed no claim of dower or other objection to the sale of the land by the executor to Kinard. The question is, was this such an election as precluded her from such a claim as she here makes. It is not necessary for me to discuss the point, whether she accepted such a share of her husband's estate as would bar her dower, but it may be said, in passing, that her husband's will did not state that the provision it made was in lieu and bar of dower. The main point is, however, as to the fact of election between dower and the provision of the will. According to the evidence, she remained passive on the homestead place, where the executor also lived, and the slaves and other property willed her remained there also. It is stated, however, per contra, that she never receipted for her devise and legacy, but refused positively to do so; that she conducts us to the second real objection raisnever signified any assent to the sale to ed by the appellant to the claim of dower, Kinard, and that, at the Marshal's sale, when Harmon purchased, she gave notice by attorney that she claimed dower in the tract of land here in question.

The claim of dower is one which is highly, it is sometimes said, extravagantly, favored by the Courts. The right is so absolute *56

and *certain in itself, and, in general, the person in whom it resides is so helpless, and so entitled to the sympathy of mankind, that the Courts have felt bound to allow the claim, in all cases where there is not very satisfactory evidence of intention not to claim. The evidence must be very strong, either that the dowress expressly abandoned her claim, or that she was guilty of such negligence and tardiness as fully warranted a presumption of such abandonment, and induced other persons to commit themselves to such a course as they would suffer from in case she was allowed to assert her claim. It has been decided that bare acquiescence, unless it reaches the period which the statute makes a bar, does not conclude her, especially if she was in possession of the condition of her husband's estate; and, that if she even makes an election under a misapprehension of the real state of the estate, she will not be bound by it. She has frequently been allowed to retract when she had elected and enjoyed benefits under a will, which were utterly inconsistent with the claim of dower; and the Courts have gone so far as allow her to follow a fund, when, by her own act, she caused the sale of real estate, and thereby an alienation and removal of the only property in which, according to the strict rule of law, she had her right of dower. The choice must be between two plainly inconsistent rights, and must be voluntary, unequivocal and intelligent, and the Court will not rashly presume her to have the requisite information.

In the case of Ward v. Wilson, (1 Desaus., 401,) the widow was allowed dower five years after the death of her intestate, on the forfeiture of her marriage settlement; and in the case of Gist v. Cattell, (2 Desaus., 54,) on the resumption of a legacy to the widow, she was allowed to set up her claim for dower, although twenty-three years had elapsed since the death of the testator. In this case, the mere occupation of the homestead tract by the widow was at least equivocal, and, as decided in the case of Dillon v. Parker, (1 Swanston, 359,) was referable to either the right of dower or the right of devise under her husband's will. And whatever Kinard might have said on the subject of election, it is very certain that Harmon was well enough informed, before he purchased the land, that the widow claimed dower in it. She does not seem to have waived her right by any act of her own. But this and it is inferred that if she fails to avail

viz.: That he is an innocent purchaser, for valuable consideration, and therefore entitled to protection. He must occupy such a position, if he occupies it at all, in one of three ways:

*57

*First. He must have purchased for a valuable consideration and without notice of the claim of this dowress; or, second, he must have purchased from some other person who occupied that position; or, third, he must have purchased under such judicial proceedings as warranted the title to the land. He can scarcely claim under the first head; for it is not denied that there was pending, at the time of the Marshal's sale at which he purchased, a suit between Rebecca Speake and the heirs of Kinard, for dower in this tract of land, which was notice to all the world of Rebecca Speake's claim; and, moreover, it is equally undeniable that notice was publicly and formally given at the sale that the land was subject to that claim of dower. Is Harmon's case such an one as can be embraced under the second head? I think not. It is true that if Kinard were protected as a purchaser for valuable consideration without notice, Harmon could protect his purchase from Kinard under the same shield, whether he himself had notice or not. But two well established doctrines of equity militate against him in this case. Kinard could scarcely have been safe himself, for it is said, generally, that the plea of purchase without notice will avail only against equitable and not legal rights, and that, even whether this be true or not, the claim of dower is expressly exempted from the operation of the rule in favor of the innocent purchaser.

But leaving that question out of the case, Kinard could never have claimed for himself, nor can Harmon now claim for the protection of the innocent purchaser, because it does not appear that Kinard ever paid the purchase money for the land. Indeed, it is in evidence, that Kinard never did pay for the land. The rule is imperative. No one can claim protection as a purchaser for valuable consideration without notice, unless he had paid the purchase money. Harmon. therefore, can never defend himself under the title derived from Kinard, for Kinard himself was not an innocent purchaser for valuable consideration. But it is claimed for Harmon that, having purchased the land at the sale of Kinard's property by the United States Marshal, under order of Court in Bankruptcy, he bought a title guaranteed by the United States Court. The principal reason given for this view of the subject seems to be that the Bankrupt Law gives a dowress the means of asserting her claim,

herself of the privilege she forfeits her | District Court of the United States for the right. The conclusion by no means follows. It were quite as correct to say that, because *58

the Statute of 1786 al*lowed the widow to bring her claim for dower before the Court of Common Pleas sitting within ten days of the time, when she may apply to a justice, it requires her to make her application in that time after the death of her husband. Under a sale of a bankrupt's effects, only that bankrupt's estate and his title is sold. The Court can limit and control the liabilities of creditors, but it cannot dispose, in such summary way, of adverse claimants to the property.

It is here, as in all other judicial sales, the title of the individual concerned in the proceedings is all that is sold; the Court does not and cannot undertake to make any warranty of title against outsiders. It would be an act of despotism and inhumanity if it were otherwise.

It is ordered and decreed that the appeal be dismissed, and that the decretal order of the Probate Judge, dated the sixteenth day of June, 1870, be sustained as the judgment of this Court; and that the decree be certified by the Clerk of this Court to the Probate Court for such other proceedings to enforce the same.

It is further ordered and decreed that the appellant, Thomas F. Harmon, do pay the costs of these proceedings.

The defendant, Thomas F. Harmon, appealed on the following grounds, to wit:

- 1. Because His Honor erred in affirming the judgment of the Probate Court, it appearing by the report of the Probate Judge that the plaintiff had received, and is still enjoying, under her husband's will, more than one-third of his lands, and that she has never been disturbed in the possession of the same.
- 2. Because His Honor erred in affirming the judgment of the Court of Probate, although it appeared by the report of the Probate Judge that the debts against the estate of her husband can be more than satisfied out of the remainder in the lands given to her for life without disturbing her life estate, and that it did not appear that she had ever offered to renounce her life estate in the lands which she holds under her husband's will, and has never made any election to take dower in lieu and bar of the same.
- 3. Because His Honor erred in deciding that the defendant, Thomas F. Harmon, was liable to be proceeded against in this action, it appearing that he became the purchaser of the lands in which the plaintiff claims dower, at the sale of Henry H. Kinard, *59

*deceased, who had been adjudged a bank rupt in his life-time by the Honorable the conceded that the respondent was, at the

District of South Carolina, which sale was made by the United States Marshal, under an order of said Court, and he has paid the purchase money for the same, there having been no reservation made by said Marshal on the day of sale as to this claim.

4. Because His Honor erred in deciding that the adjudication in bankruptcy did not carry the plaintiff's claim for dower into the United States Court, that Court having first obtained jurisdiction under the adjudication of bankruptcy, as to all claims or liens against the estate of said bankrupt.

Fair, Pope & Pope, for appellant:

The widow must relinquish or be dispossessed of the land she takes under her husband's will, before she can claim dower, otherwise she might take both-must be put to her election.-Villa Read v. Lord Galway, Amb., 68; Arnold v. Kempstead Amb., 466; Jones v. Collier, Ibid., 730; Key v. Griffin, 1 Rich. Eq., 67.

A party will not be allowed to retract an election once made, unless upon grounds of equity, shewn to exist by evidence inherent in the circumstances or intrinsic.-Buist v. Dawes, 3 Rich., 281; Cunningham v. Shannon, 4 Rich., 135.

The husband, by his will, gave to his wife a life estate in certain real estate: Held that, as to that, she was bound to elect whether she would take the interest under the will or claim her right of dower.

The appellants rely on the case of Tennant v. Stoney, 1 Rich. Eq., 223; and also the case of Stoney v. Bank of Charleston, 1 Rich. Eq., 275; also Caston v. Caston, 2 Rich. Eq., 1.

May come in by petition and take part of proceeds, but not disturb the purchase.

The third and fourth grounds involve the right to have the property of bankrupt's estate relieved of incumbrances-to ascertain the validity, priority and amount of the several claims.-McLean v. LaFayette Bank, 3 McLean, 587.

Attachments existing under State laws were discharged in cases where the demand in suit could be proved under the bankrupt law .-- Peyton v. Peyton, 1 Mass., 200; Flagg v. Taylor, 6 Mass., 36; Harrison v. Sterry, 5 Cranch, 301.

The Bankrupt Act gives the District Court of the United States jurisdiction in all cases and controversies arising between the bank-*60

*rupt and any creditor: to the collection of all assets of the bankrupt; to the ascertainment and liquidation of all liens and other specific claims thereon; to the adjudication of the various priorities and conflicting interests of all parties, &c.

Suber, Caldwell, Baxter, contra:

1. In support of the judgment it must be

titled to dower in all the lands of which he was then seized.

- 2. The burden then rests on the appellant to show how the respondent has been divested of her right of dower in the lands of which George Speake was so seized, and of which the land purchased by the appellant formed a part.
- 3. The United States Marshal sold Kinard's title to Harmon, who can claim nothing to which Kinard was not entitled, and this is, then, substantially, a controversy between the respondent and Kinard. If Kinard claimed as a purchaser for valuable consideration, his claim could not be recognized, for he never paid the purchase money.-2 Atk. Rep., 241; 2 Lead. Cases in Eq., Pt. 1, p. 59; Snelgrove v. Snelgrove, 4 DeS. Rep., 287.
- 4. The respondent was no party to the proceedings in bankruptcy, in re. H. H. Kinard, of whose estate she was no creditor on account of her claim of dower, and there is authority in the bankrupt Act for requiring her to set up her claim in the United States Court,-Perry v. Williams, Dud., 46; Jones v. Burr, 5 Strob., 47; Bankrupt Act., Sec. 25, General Clause, 113.
- 5. There is no case of election here, between the respondent's interests as dowress and as devisee of her deceased husband, as the provisions of the will were not in lieu and bar of dower; and, if there were a case of election, she was not bound to elect until fully informed of the condition of the estate; and any election actually made in ignorance could be rescinded.-Cunningham v. Shannon, 4 Rich. Eq., 135; Snelgrove v. Snelgrove, 4 DeS., 274; Hall v. Hall, 2 McC. Ch., 269; Pinckney v. Pinckney, 2 Rich. Eq., 218.
- 6. In reply to the position in the appeal that the respondent has not been disturbed in her devise under the will, the Court is referred to the case of J. J. Reeder v. J. L. Speake, et al., now pending.

*Dec. 17, 1872. PER CURIAM. In this case the Court concurs with the Circuit Judge in the result of his decree, and the motion is dismissed.

4 S. C. 61

ROOF v. RAILROAD COMPANY.

(Columbia. April Term, 1872.)

[Railroads \$=441.]

The rule in Danner's case, 4 Rich., 329, that negligence is to be presumed from the killing of cattle by a railroad train, and that proof

death of her husband, George Speake, en- | company, sustained upon the principle of stare decisis.

[Ed. Note.—Cited in Rowe v. Railroad Co., 7
S. C. 170; Jones v. Columbia & G. R. Co., 20
S. C. 256, 257.

For other cases, see Railroads, Cent. Dig. § 1578; Dec. Dig. \$\square\$ 441.

[Courts (10.]] [If former decisions have erroneously construed a statute, or a contract, or other instruand the rights and obligations of individuals have become conformed to such construction, the strongest possible reasons can alone justify a subsequent diminution of such error, but such is not the case where a rule of evidence has been misconceived or misapplied so as to impair a fundamental rule on which all rights of person and property rest.]

[Ed. Note.-For other cases, see Courts, Cent. Dig. § 320; Dec. Dig. € 90.]

This was an action by Jesse Roof, plaintiff, against the Charlotte, Columbia and Augusta Railroad Company, defendant. The only point of law made by an appeal and decided by the Court is stated in the opinion of the Court. (a)

Dec. 18, 1872. The opinion of the Court was delivered by

WRIGHT, A. J. The exception relied on seeks to reverse the rule in the case of Danner v. The South Carolina Railroad, 4 Rich., 329 [55 Am. Dec. 678].

It establishes a rule of evidence in holding that the killing of cattle by a railroad train is prima facie evidence of negligence, throwing upon the company the onus of showing that it was not only unintentional but unavoidable, and without the least fault on the part of the engineer. It may be that it is not in exact consistency with the rule generally adopted either in England or many of the States of the Union. In fact, no uniform rule has been recognized, for, while all the cases admit the liability of the railroad companies for injuries, either to person or property, caused by negligence in running their trains, on the one hand, it has been held, in Pennsylvania, that, independent of statutory provisions, they are not bound to run with any reference whatever to the possibility of cattle getting on their track .-New York and Erie Railroad Company v. Skinner, 19 Penn. R., 298. On the other. *62

"in California, it seems to be *considered, that the custom of the country to suffer domestic animals to go at large on the com-

⁽a) The two opinions delivered in this case are the only papers with which the Reporter has are the only papers with which the Reporter has been furnished. He is unable, therefore, to show, by a statement of the facts, or the evidence, the ruling of the Circuit Court, and the exception, how the question of law arose, but this is hardly necessary where the Judges themselves say that the case involved an abstract question of law and state in clear and unmisof the fact of killing throws the onus upon the takable language what that question is.

law, obliging the owner to restrain his cattle within enclosures, and that, consequently, no negligence is imputable to the owner on account of his suffering his animals to go at large."-1 Redfield on Railways, 478.

In this State, it is to be remembered that cattle are allowed by law to range at large, and the decision, therefore, sought to be reversed should be shown to be obnoxious to every principle of common right and inconsistent with the general rule which governs the use of property, before its reversal should be ordered by the Court. If it violates no fundamental right of the citizen, or imposes no additional restriction in the enjoyment of his property, it should not be changed, because, as a mere rule of evidence, it may not be in accordance with the principles applied by other states in the regulation of railroad companies.

Where the requisition of State Court in regard merely to a rule of evidence has prevailed for over twenty years unchallenged and unchanged by the legislative department of the government, its result may well be accepted as the common law of the State.

Danner's case was decided in January, 1851, enforced in 1857, in Murray v. South Carolina Railroad Company, 10 Rich, 227 [70 Am. Dec. 219], and recognized in Wilson v. Wilmington and Manchester Railroad Company, Ibid, 52.

In Morse v. Adams, 2 S. C., 56, we expressed our disfavor of the reversal of the decisions of the appellate tribunal of the State which for years had been accepted by its citizens as the law, unless some obviously practical reason showed the necessity of a change.

In Gage v. City Council of Charleston, (3 S. C., 492,) which involved the consideration of a point theretofore decided, the Court said: "We have rather held it our duty to consider whether any controlling policy has been shown which should induce us to overrule it." Omnis innovatio plus novitate perturbat quam utilitate prodest, is a precept long accepted and recommended, as well by the good sense on which it is founded as its beneficial effects in maintaining the permanency of rules after once fixed, established and known to the community.

Mr. Broom, in his legal maxims, at page 149, well says, "it is then an established rule to abide former precedents, stare decisis, *63

where *the same points come again in litigation, as well to keep the scale of justice even and steady, and not be liable to waver with every new Judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter

mons, will override the rule of the common; ments, he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one, jus dicere et non jus dare."

> The difficulty on the part of the owner, from the absence generally of himself or third persons from the place in which the injury is inflicted, to show how it occurred, and the facility of the company, from its many employés present, to prove that it was accidental and unavoidable, makes it neither unreasonable nor unwise, when cattle are killed by the passing trains, to hold that prima facie the fact of negligence is established, throwing the onus of rebutting it on the company.

> It is not necessary to consider the other points made, for the counsel of the appellant stated that unless the judgment was reversed on the first exception he did not desire the case to be sent back on either of the other grounds which he submitted.

The motion for a new trial is refused.

MOSES, C. J., concurred.

WILLARD, A. J. The principal question in this case involves a reconsideration of the point ruled in Danner v. The South Carolina Railroad Company, 4 Rich., 329 [55 Am. Dec. 678]. The question is, it appearing that straying cattle had been killed by passing trains, whether the presumption of negligence in the conduct of the train, as the proximate cause of the injury, arises as a legal consequence, devolving upon the defendants the onus of showing that there was absence of negligence. The rule contended for by the plaintiff, and applied by the Circuit Court to the case, is supported by Danner's case. It is clear, upon all the authorities, that if that rule is sound, it is to be regarded as one exception to the general rule that requires a party alleging negligence to prove it, or that there is something in the circumstance of a railroad train running over a straying animal that carries with it evidence of negligence.

*If we are bound by Danner's case, the plaintiff is entitled to his verdict. Is there ground to question the conclusion arrived at in that case? That decision received the support of judicial names that command respect. Its conclusions are entitled to be approached with caution and consideration. This Court has invariably paid a scrupulous regard to the maxim stare decisis, unwilling either to weaken the weight of judicial authority or to unsettle the foundations on which legal certainty rests.

The principles that should govern a Court in reconsidering a question once judicially or swerve from according to his private sentiacted upon, are clear in their application to the present case. If an erroneous construc-, tion has been put on a statute, or upon a form of expression employed in a contract, will, or other instrument, and such construction has become woven into a course of judicial decisions, and the rights and obligations of individuals have become conformed to it, the strongest possible reasons can alone justify the subsequent diminution of such error. If, on the other hand, a rule of evidence has been misconceived or misapplied, so as to impair the logical and practical value of one of the fundamental rules on which all rights of person and property rest, then a greater latitude of correction is allowed consistently with the maxim stare decisis.

The reason of this distinction is obvious. In the class of cases first referred to, the effects of the error are generally limited to the particular subject of the judicial decision in which such error occurred, while in the last named class, fundamental rights being affected, it is impossible to set a limit to the consequences or effects of the error.

The case under consideration belongs to the class last named. It is a fundamental principle of our law that no man shall be charged with wrong, unless such wrong is duly established by proof. Corporate bodies, as well as private persons, are entitled to the benefit of this rule. The case of one charged with damages by reason of negligence imputed is within the rule.

An allegation of negligence presupposes a duty calling for the exercise of care. If a failure in the performance of such duty is alleged, it cannot be presumed without proper proofs. If difficulty of proof in a particular case, or class of cases, or the introduction of novel features in some known relation, as the result of physical discovery or invention, can constitute an exception to this universal and fundamental rule, its conservative value

*65

to society is lost. It *would be impossible to predict, in that event, that human society would not outgrow its fundamental truths.

The most dangerous mode of attacking the integrity of a great principle of personal right or immunity is to bring to bear upon it an artificial presumption of law that has no foundation in human reason.

If it be found that the decision in Danner's case stands in such a relation to that great principle that shields the citizen against unproved charges, then reason must condemn it, and our duty to declare the rule in consonance with right reason is imperative.

The fact that the killing of an animal was occasioned by a passing railroad train does not tend to prove negligence on the part of the persons conducting the train. To assume the contrary we must also assume one of two propositions—either that the killing an animal under such circumstances is, in itself, negligence, or that the killing could not have

occurred without negligence. No one will affirm either of these propositions. It is not enough to justify such a presumption that, as a general rule, the probability is on the side that negligence existed. This would be, in effect, balancing legal conclusions on a calculation of chances, depriving the law of its scientific character and certainty.

The result arrived at in Danner's case is founded on two conclusions, which appear, both on reason and authority, to be unsound. The first is, that on an action of trespass against the engineer, the fact of killing would, in itself, tend to establish negligence on the part of the engineer; the second is, that the same presumptions ought to arise out of the fact of killing in an action against the company for the negligence of its engineer that would be allowed in the case of trespass against the engineer.

It is to be observed that although the distinction between trespass vi et armis and case is no longer of importance as a test of the form of action proper to be brought, yet it is a substantial distinction, that, as to pleadings, evidence and presumptions therefrom must still be regarded as inhering in the very ground of right and redress.

If an action had been brought against the engineer, the ground of relief would have been a trespass vi et armis.

In such action the proof of the fact of killing by immediate force, and of the relation of the defendant to such act, would have been sufficient to establish the plaintiff's right to

*66

judgment, but *such sufficiency would not have resulted from the idea that such killing tended to prove negligence on the part of the engineer. The question of negligence is not at issue upon pleadings, on the one hand charging a damage and injury by direct force on the part of the defendant, and on the other hand denying such force and injury.

The ground of the action for a trespass vi et armis is damage and injury resulting directly from physical force originated, directed or set at large by the defendant. If the damage and injury is not direct, but a consequential result, the act of wrong is not a trespass vi et armis, but an injury, formerly redressed by an action on the case.

Leame v. Bray, (3 East, 563): In this case there was an injury resulting directly from force under the direction of the defendant. The defendant, driving at night upon the wrong side of the road, came in contact with plaintiff's vehicle, causing the injury complained of.

The plaintiff was non-suited on the ground that "the injury having happened through negligence, and not wilfully, the proper remedy was an action on the case, and not trespass vi et armis." The non-suit was not set aside, and it was held by Lord Ellenborough as follows: "If the injurious act be the im-

mediate result of force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis, by all the cases, ancient and modern. It is immaterial whether the injury be wilful or not." The other judges concurred in the conclusion thus stated. The enquiry into either the wilfulness or negligence of the act was thus judged irrelevant to the true issue of an action of trespass vi et armis.

Wenver v. Ward, (Hob., 134): It was attempted in this case to excuse the trespass vi et armis on the ground that the act of defendant that caused the injury was unintentional, as it regarded its effect on plaintiff, or, in other words, that the injury was the result of accident alone. It appeared that the injury was the result of defendant's misfortune in discharging his piece so as to injure the plaintiff, and not of plaintiff's misfortune in happening into a position of danger. It did not appear that the act was inevitable, or the consequence of superior force, and it was therefore adjudged that the defendant was liable.

That case goes a step further in the direc-

*67

tion indicated by the *case last cited, and holds the enquiry, whether the injury was caused by accident, apart from the idea of wilfulness or negligence, to be irrelevant, though conceding that it might have become pertinent to enquire whether it resulted wholly from inevitable accident. It also recognizes the fact, that if inevitable accident is alleged, an issue of negligence may arise. In such case, the question of negligence is important solely as affecting the question whether the accident is to be regarded as inevitable.

Scott v. Shepherd, (3 Wills., 403): This was an injury from force originated and set at large by the defendant. A lighted squib was thrown into a market house, and fell near A., who, to save himself and his property from injury, threw it in the direction of B., who, for the same reason, threw it unintentionally in the direction of plaintiff, with whom it came in contact, causing the injury complained of. The injury was occasioned by the fire lit by the defendant, and set at large by him, by throwing it into the market house. The case was discussed by Blackstone as if the injury had resulted from the force exerted by B., in throwing it to the point where the plaintiff was; but that does not appear to have been the proximate cause of the injury. Regarding the fire as the cause of injury, it was undoubtedly a force imputable to the defendant, as he lit it and set it at large in a place where it might do damage. Taking this view of the case, it is fairly within the principle illustrated by the case of turning at large a ferocious animal, stated by Nares, J., and is not well illustrated by the instance

mediate result of force originally applied by cited by Blackstone of an injury resulting the defendant, and the plaintiff be injured by from the throwing of a ball.

Nares, J., defines the ground of the action as follows: "If the injury done be not inevitable, the person who doth it, or is the immediate cause thereof, even by accident, misfortune, and against his will, is answerable in the action of trespass vi et armis."

In this statement there is no room to interpolate negligence as an element of the question at issue.

The foregoing cases develop the whole doctrine relating to trespass vi et armis, and show that the question of negligence cannot properly enter into the case, unless it is claimed that the injury resulted from inevitable accident, and, in that case, it is only of importance as refuting the idea that the accident was inevitable.

It cannot, therefore, be affirmed that in an action of trespass vi et armis any such rule is operative as that laid down in Danner's case, namely: That the proof of the fact of *68

injury, *arising from the act of the defendant, gives rise to a presumption of negligence on his part.

The second proposition drawn from Danner's case, namely: That the same rule of presumptions applicable to trespass vi et armis as against the servant should obtain in an action against the master for the negligence of the servant, besides being inapplicable to the present case, for the reasons above stated, is in itself unsound. It assumes that the same ground and measure of liability affects the master that exists against the servant.

If the master was liable for the consequences of the act of wrong of his servant to the same extent as the servant is liable to a person injured by it, there would be a reason for the application of such a rule; indeed, the relation would, in that case, clearly resemble that of principal and surety. But this is not the measure of the master's liability. The servant is liable for all the damage and injury resulting from his act; the master is liable only so far as these consequences can be imputed to the negligence of his servant. If, therefore, the servant has acted wilfully, the act cannot be referred to negligence, and the ground work of the action, as against the master, is disproved.-McManus v. Cricket, 1 East., 106; Wright v. Wilcox, 19 Wen., 342.

The measure of liability, just stated, is inapplicable to the case of a trespass committed by a servant by the command or direct participation of the master, for, in that case, the act is, as to all its consequences, to be regarded as the act of the master, and he may be sued as for a trespass vi et armis.—1 Black. Com., 405; Sanignoe v. Roome, 6 Tenn. R., 125.

Where the trespass of the servant is not

the trespass of the master, as where it is done, inference of law from a general state of by his direct command, the master's liability depends upon the concurrence of two circumstances: First, that the injury is attributable to negligence; and, second, that it was done in the course of his master's business.

Blackstone says, (Com., Vol. 1, p. 431:) "If a servant, lastly, by his negligence, does any damage to a stranger, the master shall answer for his negligence." The rule, as applied by the adjudicated cases, is to the same effect.-Turbeville v. Stampe, 1 Ld. Raym., 264; McManus v. Crickett, 1 East., 106; Muley v. Gaisford, 2 H. Bl., 442; Craft v. Alistree, 6 Eng. C. L., 528; Wright v. Wilcox, 19 Wen., 342.

Piggot v. Railroad, 54 Eng. C. L., 228; Al-

bridge v. Railroad, 42 *Eng. C. L., 272; and Chester v. Griggs, 2 Camp., 79, were noticed by Judge Trest as supporting the proposition that negligence can be presumed from the naked fact of damage done. They do not, however, support the proposition as stated and applied in Danner's case, nor as charged in the present case.

Piggot v. Railroad: In this case it was held that the fact that the locomotive engines of the defendants emitted sparks that were likely to cause damage to surrounding property was, in itself, ground for presuming negligence. This conclusion is based on the idea that such emission of sparks might and ought to be prevented, and therefore, per se, ground for inferring negligence.

It should be borne in mind that the negligence to be inferred, on such proofs, was negligence in the construction and equipment of the engines, and, therefore, was capable of being imputed directly to the defendants. It was not negligence of the servant imputed to the master, under the rule of respondeat superior. That ruling has, therefore, no bearing on this case.

The only other point ruled in Piggot v. Railroad is that where premises near to a railroad on which locomotive engines were accustomed to run were burned, it was competent to show that other engines employed by the defendants on the same road were accustomed to throw sparks and cinders, as tending to show a possibility that the fire originated from such a source. The Court declined to examine the admissibility of this evidence in any other point of view.

This authority does not, therefore, support the proposition that the proof of damage by killing animals warrants a presumption of negligence as its proximate cause.

Albridge v. Railroad: The only point ruled in this case is that presumption of negligence. when drawn from the circumstances of a case, is a conclusion of fact to be drawn by a jury, and, therefore, on a case made for the opinion of the Court, the Court could not, as a conclusion of law, draw such an as the facts and circumstances of the killing

facts.

It will be interesting to notice the fact that the doctrine of Danner's case was advanced by Channel, Sergeant, in the case of Albridge v. Railroad, and was combatted, during its presentation, by Tyndal and the other Judges, and was actually abandoned by Channel before the conclusion of his argument, nor was it afterwards noticed by the Court.

Chester v. Griggs, (2 Camp., 79): This was ***70**

assumpsit, and not case. *The action was by a passenger against a common carrier, on a breach of his contract to carry with safety. The plaintiff showed, as a breach, an injury received by the breaking of the coach, and it was held that the defendant was bound to disprove negligence. The plaintiff was not seeking to recover on the ground of negligence, but on a contract which, prima facie, had not been performed. The defendant attempted to excuse his failure to perform on the ground that he had exercised due care and diligence, and, to accomplish this, the onus was held to lie upon him to exclude all presumption of negligence.

A few points will be noticed in the general discussion of this subject by Judge Frost, He says: "Proof of the act, and of the injury resulting from it, is prima facie evidence that the act was done wilfully or negligently." This observation is open to the criticism of being indefinite as to what shall constitute prima facie evidence, and also in connecting two conclusions with such prima facie proof as the only conclusions possible to arise therefrom. Had he said, "proof of the circumstances attending the killing, and of the damage resulting therefrom, is sufficient, in itself, to authorize the jury to say whether it was a case of wilful trespass or of negligence," it would have been unobjectionable. But the mode in which he subsequently applies this proposition shows that it was intended to be made as if saying that the proof of the fact of killing and of the injury resulting," &c. The circumstances attending the killing are doubtless sufficient to put the jury on an inquiry into the cause. But these circumstances must be the subject of proof, in order to open the cause of the damage to the jury. If the fact of killing can only be made out presumptively, that fact, when ascertained, can throw no light, in itself, upon the proximate cause of the injury, for it exists as a mere deduction of the mind, without power of illumination as to its causes or antecedents. The proposition, as applied in Danner's case, and charged in this, is substantially this: an animal being found dead near a railroad track along which trains have been known to run, may be presumed to have been killed by a passing train;

are important as bearing on the question of negligence, they may be assumed also from the fact of finding the animal dead. Thus the conclusion would be reached by allowing one presumption to be based upon another, an altogether inadmissible mode of arriving at judicial conclusions.

*71

*Again, as it regards the connecting of wilfulness and negligence, had he said that proof of the circumstances established either that the killing was wilful, negligent or accidental, then the proposition would be complete. The omission of accident from this category renders the proposition imperfect.

Again, Judge Frost says: "The only enquiry for the jury was, did the injury result from negligence or accident? If not accidental, it must have been negligent." He then concludes that it is the duty of the defendant to show that it was accidental, in order to avoid the conclusions that it was negligent. In other words, the plaintiff tenders an issue that the act was either negligent or accidental; he does not offer to prove that it was negligent, but demands of the defendant proof that it was accidental, at the peril of being otherwise adjudged negligent.

An issue of negligence consists of a charge, on the one hand, of the fact of specific negligence, and, on the other hand, of a denial of such fact.

Suppose, however, that the fact alleged by the plaintiff, in his pleadings, was, that the killing was either negligent, on the part of the defendant, or accidental; in that case the illogical character of the issue tendered would at once have been apparent. If a state of facts is presented by a plaintiff, admitting of either of two conclusions, one of which tends to establish the plaintiff's claim, and the other to defeat it, the law at once adjudges the plaintiff's case bad, as it does not necessarily lead to the conclusion that he seeks to establish.

The charge, in the present case, virtually states that the fact of negligence may be inferred in the absence of the circumstances attending the killing, where there is reasonable ground to conclude that the animal was killed by a passing train. This is not, and cannot be, law, so long as its conclusions are consistent with right reason.

It is unnecessary to consider the hardships that may ensue to the owners of straying cattle if the rule of the common law is vindicated in its purity. If evils exist they are the proper subjects of legislative consideration. It is the first duty of the Courts to preserve the purity and right reason of the law. This duty being carefully performed, society will, by other appropriate means, rectify the inconveniences which, at the most, are temporary merely, while an injury inflicted on the purity of the law is permanent, and well nigh incurable.

*72

*It is unnecessary to cite the authorities tending to show that the rule in Danner's case is not recognized by any other authorities, English or American; for that fact was not disputed upon the argument, and is indisputable.

The refusal of the Court to charge that the value fixed on the animals killed by the plaintiff, in returns for the purposes of taxation, was conclusive upon the plaintiff, was free from error. The fact of value was to be ascertained from all the proof bearing on that question, including any statements made by the plaintiff of their value for any purpose whatever.

For the reasons assigned above, I am compelled to dissent from the conclusions of the majority of the Court.

4 S. C. 72

STATE v. SIMMONS.

(Columbia. Nov. Term, 1872.)

[Criminal Law \$4.]

The Court of General Sessions being vested by the Constitution, Article IV, Section 18, with "exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." the Legislature cannot vest in an Inferior Court "exclusive original jurisdiction of all criminal causes less than capital." The Court of General Sessions retains its jurisdiction, notwithstanding the terms of the Act.

[Ed. Note.—Cited in State v. Glenn, 14 S. C. 132; State v. Sims, 16 S. C. 486, 491.

For other cases, see Criminal Law, Cent. Dig. § 119; Dec. Dig. \$24.]

Before Graham, J., at Charleston, November Term, 1872.

These were separate indictments against Cain Simmons, Jack Drayton and Solomon Lyons, for murder. The verdict in each case was "guilty of manslaughter." The only point of law involved in the appeal is fully stated in the opinion of the Court.

Chamberlain and Seabrook, for appellant, relied upon The State v. Garner, 14 Rich., 143, and The State v. Ellison, 14 Rich., 199; they also cited Harris v. Oberly, 1 Rice Dig., 187; Brigh. Dig., 507.

Buttz, Solicitor, contra: The Constitution, Article IV, Section 18, provides that "the Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." Under this provision the Legislature may confer upon an Inferior Court equal or *73

concurrent jurisdiction *with the Court of General Sessions, but not exclusive jurisdiction. It follows that the Act of 1872, so far as it attempts to confer upon the Inferior Criminal Court of Charleston exclusive juris-

diction in all cases less than capital is void. "which shall not be otherwise provided for by Notwithstanding the term "exclusive," the law." Do they so qualify the power con-Court of General Sessions retains the jurisdiction vested in it by the Constitution, and the jurisdiction of the two Courts in cases less than capital is concurrent.

Jan. 3, 1873. The opinion of the Court was delivered by

MOSES, C. J. The three cases are separate and distinct, but the points to be settled by the appeals are identically the same.

By the 1st Section of the 4th Article of the Constitution, the judicial power of the State is "vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common pleas, having civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only; in Probate Courts, and in Justices of the Peace. The General Assembly may also establish such municipal and other Inferior Courts as may be deemed necessary."

By the 18th Section of the same Article it is ordained that "the Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law."

The Act of March 13th, 1872, (No. 145), 15 Stat., 187, establishes "in the County of Charleston an Inferior Court for the trial of criminal cases, to be called the Criminal Court of Charleston County, and which shall be organized by the Judge thereof immediately after his election." The 4th Section provides that "the Criminal Court shall have exclusive appellate jurisdiction of all criminal causes from the Courts of Trial Justices for Charleston County, and exclusive original jurisdiction of all criminal causes less than capital, and not at present conferred by law upon the Courts of Trial Justices."

At the November Term, 1872, of the General Sessions of the County of Charleston, the three defendants were separately indicted for the crime of murder, and in each case the jury returned a verdict of "guilty of manslaughter." They moved the Judge in arrest of judgment, "That the General Assembly, having declared by Act that the Criminal Court for Charleston County shall have exclusive original jurisdiction of ali offenses less than capital, this Court has no more right to administer punishment upon a conviction therein had for manslaughter than *74

it has to hear, try and determine an *indictment for this offense." The motion was overruled, and a reversal of the judgment is asked here, on the ground taken in the Court

The question involves the constitutionality of the Act of 1872, so far as it provides for the exclusive jurisdiction by the Inferior Court, "of all criminal causes less than capital," and must be determined by the construction which may be given to the words, thority that the provision was intended to

ferred on the Court of General Sessions as to reserve to the Legislature the right to deprive it of all jurisdiction over criminal offenses less than capital, or are they to be held in subordination to its right to vest some other Court with concurrent jurisdiction in the cases referred to?

The Courts of General Sessions, as they have existed in this State, at least from 1734. (7 Stat., 184,) have exercised all the powers of the King's Bench in England. By the Constitution it is recognized as a superior tribunal, and, unless restricted by that instrument, may still claim all the common law jurisdiction which pertains to the King's Bench. In State v. Walker, 14 Rich., 37, it is said: "Within its jurisdiction fall all prosecutions on behalf of the State, even when jurisdiction is given to another tribunal by words not plainly exclusive."

In Peacock v. Bell and Kendall, 1 Saund., 746, the Court said: "And the rule of jurisdiction is that nothing shall be intended to be out of the jurisdiction of a Superior Court. but that which especially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged." To deprive the Court of General Sessions of jurisdiction in a criminal case, it must be clearly apparent, by the Constitution, from which it derives its power, that it is not of the class of offenses intended to be committed to it.

The Act of 1872 proposes to take from it the trial of every criminal case, except that for murder, which is the only offense now held capital by the laws of the State, by conferring exclusive authority over all of them on an Inferior Court. The clause of the Constitution, while it vested the Court of Sessions "with exclusive jurisdiction over all criminal cases," did not propose to restrain the Legislature from organizing other Courts. with concurrent jurisdiction over such cases. The first Section of the fourth Article, after enumerating the Courts in which the judicial

*75

power of the State *shall be vested, provides: "The General Assembly may also establish such municipal and other Inferior Courts as may be deemed necessary." While such other Courts might be established with like jurisdiction as the Courts of General Sessions possessed, this would not affect the powers of these last, except as to their exclusive character, conferred by the Constitution. The word "which" must refer to "criminal cases," which last words immediately precede it, and as against such as might be otherwise provided by law, the exclusive jurisdiction of the General Sessions could not prevail. It was the retention of exclusive au-

islature, without a change of the Constitution, could never have vested any other Court with equal and concurrent jurisdiction in such cases. Was the Court of General Sessions, by the said eighteenth Section, vested with jurisdiction or exclusive jurisdiction? By what rule of grammatical construction can the adjective which denotes or expresses "the quality of the thing named," or defines its character, be rejected? The Constitution declares the extent of the power-it made it exclusive—save as otherwise provided for by law. Any transposition of the words would only create a combination from which no conclusion could be inferred, other than that which would hold the provision as only affecting the exclusive jurisdiction of the Court.

The Act of 1872 undertakes, except as to the charge of murder, to exclude the Courts of General Sessions from all jurisdiction in criminal cases, and, so far as it thus proposes, we hold it in violation of the Constitution, and therefore void.

The motion in each of these cases is dismissed.

WRIGHT, A. J.; and WILLARD, A. J., concurred.

4 S. C. *76

*DUNCAN v. HARPER.

(Columbia. Nov. Term, 1872.)

[Wills \$\infty\$ 461, 498.]

Bequest of \$1,000 to testator's daughter, E., "and her bodily issue, and not to be subject to the debts of my daughter E.'s present or any future husband." When the will was made, E. had been dead over twelve months, leaving several children then living, and this was known to the testator: *Held*, That by the term "bodily issue" the testator meant children: that by "and" he meant "or," and, consequently, that the children of E. were entitled to the legacy by direct gift to them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 980, 1088; Dec. Dig. \$\$461, 498.] [This case is also cited in Clark v. Clark, 19 S. C. 352, as to construction of wills.]

Before Thomas, J., at Lancaster, April Term, 1871.

Bill in equity by H. H. Duncan and C. L. Duncan, plaintiffs, against Margaret H. Harper and others, defendants, for construction of the will and settlement of the estate of William Duncan, deceased. The plaintiffs were executors of the will, and Margaret H. Harper and other defendants are children of Eliza Jane Williams, a daughter of testator, who pre-deceased him.

18th of January, 1862, and the testator died in that time, leaving seven children who were

revent, for if it had been omitted, the Leg- | April of the same year. The disposing clauses of the will are as follows:

> "Secondly. I give to my son, William G. Duncan, seven hundred and fifty-three dollars; to my son, George F. Duncan, six hundred and sixty-eight dollars; to my son, John G. Duncan, twenty-two hundred and twenty dollars; to my son, Columbus L. Duncan, ninety-five dollars; to my son, Thomas J. Duncan, eleven hundred and thirty-two dollars; to my son, James Duncan, sixteen hundred and eighty-nine dollars; to my son Samuel A. Duncan, eleven hundred and thirty-seven dollars; to my daughter, Sarah S. Gibson, five-hundred dollars; to my daughter, Eliza Jane Williams, one thousand dollars; this one thousand dollars I give to my daughter Eliza Jane Williams, together with the negro girl Emily, which I have given her, I give to her and her bodily issue, and not to be subject to the debts of my daughter, Eliza Jane Williams' present or any future husband.

> "Thirdly. It is my will and desire that after the hereinbefore named sums are paid to my hereinbefore named children, and after paying all my just debts, that the balance of the proceeds of the sale of my estate, both personal and real, together with the proceeds of all notes and accounts, the ready cash, and whatever else of value I may die possessed of, shall be equally divided share and share alike betwixt my sons William G. Duncan, H. H.

Duncan, George F. Duncan, *John G. Duncan, Columbus L. Duncan, Thomas J. Duncan, James Duncan and Samuel A. Duncan.

"Fourthly. It is my will and desire that all that I have herein given to my son Samuel A. Duncan, be received by my son James Duncan, in trust for the benefit of my said son Samuel A. Duncan, and if my said son Samuel A. Duncan shall die, leaving no child or children, the same, or the remainder thereof, shall be equally divided betwixt my sons William G. Duncan, H. H. Duncan, George F. Duncan, John G. Duncan, Columbus L. Duncan, Thomas J. Duncan and James Duncan, to share and share alike.

"Fifthly. As I have, in making this my last will and testament, taken into consideration the tracts of land which I deeded to my sons H. H. Duncan and Columbus L. Duncan on the 16th day of January, one thousand eight hundred and sixty-two, in which deeds is stated that they are to account for the said land at twelve and eight dollars per acre, respectively, at the final distribution of my estate, it is my will and desire that no further account be taken thereof."

Eliza Jane Williams, daughter of testator, was dead when the will was executed. She The will was executed and dated on the died in Alabama over twelve months before then alive, and this was well known to the testator when the will was drawn. The testator could neither read nor write, but he had a strong mind and good memory, which he retained to the last. The children of Eliza Jane Williams were parties defendant to the suit.

The question in the case was, whether the children of Eliza Jane Williams were entitled to the legacy of \$1,000 bequeathed by the second clause of the will, "to her and her bodfly issue."

His Honor held that they were entitled, and decreed accordingly.

The plaintiffs appealed.

Allison: The evidence that testator knew when the will was drawn that Mrs. Williams was dead was incompetent, and cannot be considered.—I Green Ev., § 275 to § 282. But if competent it cannot control the construction—there being no ambiguity in the words of the will. The term "bodily issue," as used by the testator, is one of limitation, and not of purchase, as shown by many authorities in this State.—Thomas v. Benton, 4 Des., 17; Sherman v. Angell, Bail. Eq., 351; Johnson v.

*78

Johnson, McM., *345; Reeder v. Spearman, 6 Rich., 88; Dougherty v. Dougherty, 2 Strob., 63; Hay v. Hay, 4 Rich. Eq., 378; Burleson v. Bowman, 1 Rich. Eq., 111. If Mrs. Williams had been alive at the death of testator there cannot be a doubt that she would have taken an absolute estate in the \$1,000. But she was dead, and the legacy lapsed, and the money passed under the residuary clause of the will.

The Act of 1789, 5 Stat., 107, may be relied on, but it is well settled that the Act does not apply to this case.—Pegues v. Pegues, 11 Rich. Eq., 550.

Kershaw, contra:

The points in this case are two:

First. Are the respondents entitled to the legacy in question, by virtue of the Statute of 1789? (5 Stat., 107, § 9?)

The Section is in these words: "That if any child should die in the life-time of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally partitioned with the children by the father or mother when living."

The argument of Chancellor Dunkin, in Pegues v. Pegues, 11 Rich. Eq., 550, is conclusive. He says: "The Act of Assembly of 1712, 2 Stat., 523, provided that intestate's estate should be distributed one-third to the widow, and the residue in equal proportion among the children, and such persons as legally represent such children, in case any of the said children be then dead, unless the child has been advanced. In the same man-

162, that if the intestate shall leave a widow and one or more children, the widow shall take one-third, and the remainder be divided between the children, (if more than one,) the issue of a deceased child taking, among them, the share of their parent. A like beneficent spirit is manifested by the Act of 1789, in securing to the issue of the child of the testator the bounty which was intended for the parent. Any legacy given in the last will of a father or mother shall go to the issue of such child, if the child should die in the lifetime of the parent. The Act is remedial. The object is to secure to the offspring what was given to the ancestor, but which gift could not take effect by reason of the death of the ancestor. All the legislative proceedings look to what is to be done on the death of the testator or intestate, and all mean

*79

what is ex*pressly declared by the Act of 1712, that in case any of the children be dead, the issue of such deceased child shall take among them the share of the estate to which the parent would have been entitled, if he had survived the testator."

This reasoning of the learned Chancellor is sustained by the English Courts. Statute of Wills, 1 Vic., 26, § 33, provides, "That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest, not determinable at the death of such person, shall die in the life-time of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.'

This Statute is evidently the same as our Act of 1789, but more fully expressed.

It has been determined, under this Statute, that "even when the death of the donee happened before the date of the will, the surviving issue take, as heirs or distributees, notwithstanding the Act is 'shall die,' which has been construed to mean 'shall die after the passage of this Act.'"—2 Red. on Wills, 366.

In determining the meaning of the words of the Act, it is said by Sir James Wigram, V. C., "I am bound, as well as I can, to fix that meaning, by considering the policy of the Act and the objects it was intended to accomplish. Now, the policy of the Act and the objects it was intended to accomplish are, for the present purpose, sufficiently manifest. It was intended to prevent a portion given by testator to a child going from the estate of such child, and his family from being left portionless, by reason of the death

of the child under certain circumstances, a joint tenancy, and she being dead, the chilconsequence of law which the common feel- dren would have taken.-Id., 335; 1 Rop. Leg., ings of mankind declared to be a disappointment of the intention of the father."-Winter v. Winter, 5 Hare, 306.

The verbal criticism of the Chancellor deciding the case of Pegues v. Pegues is no answer to the force of this reasoning from the reason and spirit of the law. That case having been decided by a Court of three, O'Neall, Chief Justice, dissenting, and concurring in an opinion with Dunkin, Ch., who delivered the Circuit decree, cannot preclude the more reasonable construction by this Court.

* 20

*Second. Are respondents entitled, irrespective of the Statute? The gift is to "Eliza Jane Williams and her bodily issue." It is said by Ch. Harper, in Henry v. Talbird, Bail. Eq., 554, that "when a testator gives to one and his issue, he intends a benefit to the issue some way." He either intends that they shall take in indefinite lineal succession, or that persons answering that description at a particular time shall take. In every case of a gift to one and his issue the question is, in which of these senses he intended to use them.

In this case, he knew that Eliza Jane Williams was dead, but the bequest is to her and her "bodily issue." It is evident that he intended the issue to take some benefit. he intended them to take at his death, as persons, this is the construction contended for. If that they should take in "indefinite lineal succession," they shall take, but, without the succession intended, the gift is absolute in the first takers. It is the same as a gift to the "bodily issue," or issue of the body of Eliza Jane Williams.

This is no question of limitation. If it were, the word "issue" is a word of purchase. Says the Master of the Rolls: "I do not find anywhere but that issue is a word of purchase."—Davenport v. Hanburn, 3 Ves., 257.

To pursue this line of argument is to ignore the fact that the testator never did intend to give any estate to Eliza Jane Williams, by the clause in question, because she was dead and he knew it. He could not, therefore, have used the word issue as a word of limitation, there being no precedent estate to limit.

If the words had been to "Eliza Jane Williams," or her bodily issue, there would have been no question that the issue would take by substitution.—2 Red. on Wills, 494; Davenport v. Hanbury, 3 Ves., 257.

To prevent the divesting of a legacy, and to carry out the intention of the testator, the word and will be construed or .- 1 Red. on Wills, 487, 494.

If the bequest were to Eliza Jane Williams and her children, it would have created a

330; Buffar v. Bradford, 2 Atk., 220; Wild's Case, 6 Coke Rep.

In what sense testator used the words "bodily issue," is a question of intention. The circumstances make it evident that he used it as synonymous with children.-1 Rop. Leg., 90, 91.

*Where a legacy was given to the children of Mary and Anne, and Mary had no children, and Anne was deceased before the making of the will, leaving two children, the Court held it so apparent that Mary meant Anne, and Anne meant Mary, that they decreed accordingly.-Bradwyn v. Harper, Amb., 374; cited 1 Red. on Wills, 624.

It has been held that where a legacy is given to A. and his executors, administrators and assigns, it made no difference that the testator knew that A. was already dead when the will was made—the legacy failed. This, on the ground that the class of persons named could only take an interest transmitted from their testator or intestate.-1 Rop. Leg., 323; Maybank v. Brooks, 1 Bro. C. C.,

The addition of the words "executors, administrators and assigns," in that case, made no difference: it was, with or without those words, a personal bequest to A.: therefore there was nothing that could be explained by parol.

The Courts will look at the circumstances under which the devisor makes his will, as the state of his family, &c.-Jarman's 10th Rule of Construction; 1 Redfield, 426, n.

And where the intention is obscured, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose.—Idem, Rule 13.

Read in the light of circumstances surrounding the testator, nothing could be more irrational than such a construction of this legacy as appellants contend for.

The later English cases evince a determination not to allow technical rules of construction to overbear and break down all the better instincts and involuntary sentiments of common sense and the common experience of mankind.—1 Red. on Wills, 429, n.

The American cases admit the aid of extrinsic circumstances, such as might have been supposed to influence testator's mind at the time of making the will.—Idem, 663.

In a note at that place, authorities are collected to the following points:

Circumstances extrinsic of the will are often received, whereon to found presumption of intention.-Williams v. McCreary, Wend., 443; 14 Ga., 370.

The intention of the testator is to be looked for with reference to the date of the will -Maupin & Goodloe, 6 Mon., 398.

The situation and circumstances of the

*82

testator, as to his property *and family, are always to be taken into consideration.—Morton v. Perry, 1 Met., 446, 449. And the reasonableness of the different constructions claimed.—Jarvis v. Buttrick, 1 Met., 480.

It is always considered that the knowledge of the circumstances surrounding the testator, at the time of making his will, affords important aid in determining its import, and will be looked to in all cases of doubt.—Rewalt v. Ulrich, 23 Penn., 388; Wotton v. Redd, 12 Grattan, 196.

In a recent case in Maryland, it was declared that the primary sense of the word "issue" is got to be regarded as a technical expression, prima facie operating by way of limitation, but that its force will be controlled by the apparent intention of the instrument, to be collected from the words used with reference to the subject-matter, and such other attending circumstances as are admissible in aid of the construction.—

McPherson v. Snowden, 19 Md. Rep., 197; cited, 2 Red, on Wills, 377.

This is sufficient for respondent's case. In the light of attending circumstances, it is impossible to say that they were not intended to take their mother's part of testator's property.

So where the words "children," "grand children," &c., are designated, it is presumed they were used in their primary sense, but this sense will be enlarged or qualified if it may be gathered with reasonable certainty to have been the intention of the testator, "either from the necessity of so construing it, in order to give it any operation, or from some other equally satisfactory probability arising out of the state of facts existing at the date of the will, which are of a character to be properly admissible in aid of the construction of the will."—2 Red. on Wills, 339.

Thus a legacy to the children of A., he being dead and without children, but having left grand children, it must be made to appear that the testator was aware at the date of the will that the term children could have no strict, literal and technical application to existing facts, in order to give it a secondary application. This knowledge, it has been held, must be proved, and cannot be presumed.—Idem, 342, 343.

Jan. 3, 1873. The opinion of the Court was delivered by

MOSES, C. J. The doctrine of lapse, as applied to legacies, cannot be interposed for the solution of the rather novel question which arises in this case. The person named

*83

as legatee was not only dead *at the date of the execution of the will, but the testator permitting the subject of the gift to be enlong before had knowledge of the fact. The joyed by the residuary legatees, which would

disposition in favor of the daughter, or of any who could claim by or through her, was senseless, absurd and nugatory.

If, however, from a construction of the words permitted by the rules applicable to the interpretation of wills, they can be held to confer a direct gift to the children, not transferred through the parent, who could not take by reason of her death before the date of the will, such effect should be given to the legacy as will save it from falling into the residuary estate.

Mr. Jarman, in his Treatise on Wills, Vol. 2, p. 683, recognizes the distinction between a claim founded not on a mere clause of substitution, but on a substantive, independent, original gift.

The primary rule which governs the construction of wills requires that effect should be given to the intention of the testator to be ascertained from the face of the whole instrument. To do this "the Court is permitted to look at all the circumstances under which the devisor makes his will, as the state of his property, of his family and the like."—2 Jarman, 472. It is well expressed by Ch. J. Marshall, in Finlay, et al., v. King's Lessees, 3 Pet., 377 [7 L. Ed. 701]: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although, in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance.'

The legacy to the daughter was impossible. The testator could not have intended any benefit to her. We are not to account for the follies of men, and required to discover a motive for an act so entirely irreconcilable with common sense. We cannot, however, fail to recognize the fact that he intended the one thousand dollars and the negro girl to be separated from "the balance of the proceeds of the sale of his estate, both personal and real, and whatever else he may be possessed of," which he includes in his residuary estate, and in which he contemplated that the legacy now in question should not fail and pass. To allow it to be so included would disappoint his intention by defeating his purpose.

Technical words must be understood according to their legal import, unless a testator manifest a clear intention to the contrary.—2 Roper on Legacies, 1461; Clark v. Moseley, 1 Rich. Eq., 396 [44 Am. Dec. 229].

*84

*It is not to be denied that the words "bodily issue," as used in this clause of the will, are generally to be taken as words of limitation; but so to hold them here would defeat the plain purpose of the testator, by permitting the subject of the gift to be enjoyed by the residuary legatees, which would

be contrary to the expressed intent. It is said, in all the elementary works on the subject, that though the words "heirs and issue" are usually to be accepted, when connected with testamentary dispositions, as words of limitation, yet they may be received as denoting children, if from the context of the instrument such an intention can be discovered, more especially if thereby it will prevent a specific legacy from falling into the disposition of the residue of the estate. Perhaps the rule is no where better or more concisely stated than by Lord Eldon, in Christopher v. Naylor, 1 Meri., 320, in the following words: "If upon fair reasons deduced from the words of the will, all the contents, design and tenor of it, as manifested by its contexts, shew the word 'issue' to be meant in a more restrained sense, that sense may be given to it."

In regard to the word "issue," as was said in relation to that of "heirs," in Bailey et al. v. Patterson, 3 Rich. Eq., 158, quoting from Jarman, "it is always open to enquiry whether a testator used the word 'heirs' according to its strict and proper acceptation, or in a more inaccurate sense, to denote children, next of kin, &c." Although we are permitted to look for the meaning of the testator to the context of the whole will, still, before the legacy can vest in the party for whose supposed benefit it was intended, we must find words of sufficient import, according to the canons of interpretation, to justify an application of them to the particular individual they were intended to designate. If the deceased daughter was not the object of the testator's bounty, and though the words "bodily issue" were meant to refer to her children, still, to entitle them to the legacy, the disjunctive "or" must be changed to the copulative "and," When it is apparent from the intention of testator that the word "or" is used instead of "and," and vice versa, the Court interferes to change the word.—1 Jarman, 443; 2 Rop. on Leg., 1405, 1410; Adams v. Chaplin, 1 Hill Eq., 265; Shands v. Rogers, 7 Rich. Eq., 422; and various other cases in our own reports. To effectuate the intention here, to enable those who, from the tenor of the whole will were clearly, as to this specific legacy, the persons designed to take, effect must be given to the words "bodily is-

*85

sue" *as importing words of purchase and not of limitation, for otherwise the legacy would be enjoyed by those having an interest in the residue of the estate, in which the testator never designed the property referred to in the clause under review to be included.

The decree is affirmed and the motion dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 85

MASSEY v. BROWN.

(Columbia, Nov. Term, 1872.)

[Principal and Surety \$\ightharpoonup 116: Release \$\ightharpoonup 28.]
B, D and C were sureties in the guardianship bond of S, guardian of M, S and C became insolvent, and D died, leaving B his executor. S was indebted to M, on his accounts as guardian, in the sum of \$10.578.98. M, after he became of age, compounded with B, in his individual right, for \$2.000, and gave him a general release from his liability as surety, it being verbally understood between them that the release should not prejudice M's rights against the estate of D: Held. That the liability of D's estate to M was not discharged by the release.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 281; Dec. Dig. © 116; Release, Cent. Dig. § 59; Dec. Dig. © 28.]

[Principal and Surety \$\sim 127.]

M claimed against the estate only one-half the debt, and the appeal was from a decree rejecting the claim. This Court reversed the decree and remitted the case to the Circuit Court, with instructions to consider and decide what equities, if any, as between B and the estate of D, grew out of the composition.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 352; Dec. Dig. © 127.]

[Evidence \$\sim 461.]

Although the general rule is that a release of one of several joint obligors discharges the others, yet equity will restrain the general effect of the release, according to the intent of the parties, and such intent may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1843, 2129–2133; Dec. Dig. 461.]

Before Thomas, J., at Lancaster, June Term, 1872.

Bill in equity by D. W. Brown, executor of Dixon Barnes, deceased, plaintiff, against John B. Erwin and wife, creditors of Barnes and others, defendants, for settlement of the estate of the testator.

Creditors were called in by publication to establish their claims before a Referee, and in pursuance of the call B. F. Massey presented a claim, which arose as follows: B. F. Massey, the claimant, was the ward in Chancery of Samuel B. Massey, deceased, and Barnes, the testator, Brown, his executor, and James E. Cureton, were sureties in the guardianship bond of Samuel B. Massey, which was in the penal sum of \$26,500, and bore date the 16th of June, 1856. Cureton was dead, and his estate, and also the estate of the guardian, were insolvent.

The returns of the guardian showed that he was indebted to his ward in a sum which amounted, on the 23d of August, 1869, to \$10,-578.98. The claim was for half this sum, or \$5,289.49, besides interest.

*86

*Erwin and wife contested the claim, and insisted that it had been discharged by a re-

lease given by the claimant to D. W. Brown, which was proved, and is as follows:

"State of South Carolina, "Lancaster County.

"Whereas, Daniel W. Brown, of the County of Lan ster and State of South Carolina, on the 16th day of July, in the year of our Lord one thousand eight hundred and fiftysix, became surety, together with Dixon Barnes and James E. Cureton, for Samuel B. Massey, deceased, guardian of the person and property of Bartlett F. Massey, (all of the County and State aforesaid) in the penal sum of twenty-six thousand five hundred dollars: and whereas the said Samuel B. Massev hath made default in the premises, failing to discharge the obligations resting upon the guardian of the property of the said Bartlett F. Massey; and whereas the said Samuel B. Massey is now dead and his estate is totally insolvent, and the sureties upon his said guardianship bond have become liable to the said B. F. Massey for his deficit in the premises, to wit: the amount of -- dollars, more or less: Now know all men by these presents, that I, the said Bartlett F. Massey, of the State and County aforesaid, being of full and lawful age, freely and voluntarily, for and in consideration of the sum of two thousand dollars, to me in hand paid, by the said Dan'l W. Brown, of the said State and County, (the receipt whereof I do hereby acknowledge,) have remitted, released, and forever discharged, and I do hereby, for myself, my heirs, executors administrators and assigns, remise, release and forever discharge the said Daniel W. Brown, his heirs, executors and administrators, of and from all liability upon said guardianship bond, and from all debt, demand, action, and cause of action, which I now have in law or equity, or which may result from the existing state of things.

"In testimony whereof I have hereunto set my hand and seal, this the 23d day of August, A. D. 1869.

(Signed) B. F. Massey, [L. S.] Witnesses:

(Revenue stamps affixed before signing.)

D. A. Belk, John Brown,

*87

*The claimant, in reply, testified as follows:

"That Brown was the executor of Barnes' estate, when witness executed the release. John Brown, the son of D. W. Brown, drew up the release. Mr. Daniel Brown got his son to draw up this release in pursuance of the bargain which he made with his father. Mr. Daniel Brown proposed this compromise." (The claimant proposed to give in evidence the declaration of D. W. Brown at the time and previous to the execution of the release. Erwin and wife objected to such

declaration.) Subject to the objection, the following testimony was taken down: "Witness says that Mr. Daniel W. Brown came to his (witness') house to see if he could make a compromise, and asked witness what he would take; witness told him he did not know about making a compromise with him, as witness did not know if he would get anything from any of the other parties or not; he (witness) had been told that the estate of Dixon Barnes was insolvent, and witness told Brown so. Mr. Brown told witness that he had come to make a compromise for himself, and that Barnes' estate should pay, and he (Brown) would see to it. Witness told Brown if that was the case he would make the compromise with him, as an individual, and no further. Witness and Brown agreed to the sum of two thousand dollars. Witness understood, from the conversation of Mr. Brown, that he meant to say that the estate of Dixon Barnes should pay its part of the liability on the guardianship bond of S. B. Massey, without reference to the compromise with Brown, as an individual. Witness thinks he mentioned at the time the amount due by S. B. Massey, as guardian, to him, about the sum of ten thousand dollars; witness did not know the exact amount."

On the 27th of September, 1871, the Referee filed his report upon the claim, in which he states his conclusion to be "that the release of D. W. Brown by B. F. Massey operated to discharge also the estate of Barnes, his co-obligor, from liability on the bond, and that the claim cannot be allowed."

To this report the claimant excepted, on the ground that the release of Brown did not operate as a discharge of the co-surety, Barnes.

The decree of His Honor is as follows:

Thomas, J. On the 27th day of December, 1871, a report was filed in this cause by the Referee on the claims of creditors of the

*88

*estate of Colonel Dixon Barnes, deceased, into which was incorporated a special report on the claim of B. F. Massey.

This claim is for \$10,578.98, which appears to have been the balance ascertained to be due him 1st June, 1859, by his guardian, Samuel B. Massey, deceased.

The claim, as appears from the report, has the following for its origin: Col. Barnes became one of the sureties on the guardianship bond of Samuel B. Massey, to the Commissioner in Equity, dated June 19th, 1856. The other sureties were D. W. Brown and one James E. Cureton. The guardian, Massey, and the surety, Cureton, are both dead, and their estates insolvent.

On the reference, the allowance of this claim was resisted by John B. Erwin and his wife, Mary B., who, in right of the latter, are the principal creditors of the estate, and the

The ward, B. F. Massey, attained his majority on the 18th day of December, 1861. On the 23d day of August, 1869, he executed to Brown, the co-surety, a release, under seal, from all liability on the guardianship bond, which was full and unreserved, and contained no allusion to any other of the co-obligors on the bond. The consideration stated is \$2,000 paid by Brown. This release was relied upon as operating also a release of the estate of Barnes from liability, and as a bar to the claim. The Referee, regarding it as having this effect, in his report, decided that the claim could not be allowed. To this report, B. F. Massey put in the following exception: "Because the release of B. W. Brown as surety on said bond did not operate as a discharge of the liability of his co-surety, the said D. Barnes." This exception raises the only question for the consideration of the Court on the report.

The doctrine that the release of one of the obligors of a bond is a release of the others is too firmly established to be successfully questioned now. As early as the case of Bower v. Swadlin, reported in 1 Atkins, 294, Lord Hardwicke speaks of it as settled principle. In that case he used this language: "There is no doubt but a release to one obligor is a release in equity to both, as well as in law." The same principle was fully recognized in Cheatham v. Ward, 1 B. and P., 630. This rule has been steadfastly adhered to by the Courts, both English and American, ever since.—Rowley v. Stoddard, 7 Johns., 207; Averill v. Lyman, 18 Pick.; Carmeger v. Morrison, 2 Met., 381, 407; Smith v. Tun-

*89 no, 1 McC. Eq., 443 [16 Am. Dec. 617.] *The rule seems to apply to the obligors without regard to their status as principal and surety, and to require that the release shall be under seal. It appears to be distinct from those rules regulating the liability of sureties with reference to the conduct of principal obligor and obligee. Under the latter class the rights of sureties are placed on higher ground than those of mere principal obligors, and are more zealously protected by the Courts. The case of Rees v. Berrington, 2 Ves., Jr., 540, is a leading example of this class. There it was decided that the obligees taking notes from the debtor, extending the time of payment beyond that fixed in the bond, without the consent of the surety, discharged the latter from liability on the bond. The reason upon which Lord Elden based this decision was, that the contract had been varied and the risk of the surety increased. This is, however, to some extent, the reason why the release of one obligor is a release of the others, only in the latter instance the contract is absolutely extinguished.-Willings v. Consequa, Pet. C.

latter of whom is the only child of Col. [C., 301 [Fed. Cas. No. 17,767]. I apprehend that the extension of time to the surety would not discharge the principal; and in this, as well as many other respects, the Courts have interfered for the protection of the rights of sureties, even when those rights have only been jeopardized by the conduct of the principal debtor and obligee. The surety, having paid the debt, has the right to call upon his co-sureties to refund to him their quota of the amount paid, or, even without paying it, to call upon them, where the principal is insolvent, to contribute towards raising a fund sufficient for its payment.-Me-Kenna v. George, 2 Rich. Eq., 15. The release of one of his co-sureties would not only defeat this right, and thus increase his risk, but would so change the contract into which he had entered as to enable him to say, with truth, "In Hœc Fædera Non Veni."

> But it was urged in the argument by the counsel of Massey that the consent of Brown to his own release, being the consent of the executor of Barnes, prevented the release from operating to discharge the estate of the latter. It may be well doubted whether, even if Brown had by parol consented to the technical release, i. e. release under seal of one of the other sureties, he could not still have claimed his own discharge from liability on the bond. But his parol consent, as the executor of Barnes, to the release of a co-surety, presents a very different question, and one much less involved in doubt. The authorities are clear to the point that he

> > *90

*could not, by his contract, create a charge upon the estate of Barnes unless the estate had been benefited by the contract.—O'Neall v. Abney, 2 Bail., 317; Welsh v. Davis, Supreme Court decision, MS. Here, if his consent to his own release can be construed into a contract that the estate of Barnes should not be thereby discharged, he has attempted to continue a charge upon the estate, from which, but for his contract, it would, by operation of law, have been released. This, we have seen, the law will not permit. None but the parties beneficially entitled to the estate could enter into a contract of the kind which would be binding upon it.

It is therefore ordered and decreed that the exception be overruled and the report confirmed. It is further ordered that B. F. Massey pay the costs arising upon his claim; and that the remaining costs of the cause, not previously paid, be paid out of the land

And it is further ordered that the balance of the proceeds of the real estate sales be apportioned and applied toward the satisfaction of the debts still unpaid, in the order of their priority, as established in the report.

The claimant appealed on the following grounds:

1. Because the release of D. W. Brown as

surety on the said bond did not operate as will discharge the whole debt, and at his a discharge of the liability of his co-surety, the said D. Barnes, and the Circuit Judge erred in decreeing otherwise.

2. Because said release was an arrangement between co-sureties to bear their proportionate part of the debt, in which Brown acted for the estate of Barnes, he being the only legal representative of said estate, and, as such, had a right to consent that the estate of Barnes should remain bound for its proportionate part, and did so consent and stipulate with the appellant.

3. Because the release was beneficial to the estate of Barnes by relieving said estate of one-half of a joint liability, and being made with the assent of the executor of Barnes, could not discharge said estate from the whole of said liability.

Kershaw, for appellant:

This case resolves itself into two points-First. Does a release by the debtor of one of two co-sureties operate as a discharge of the remaining surety?

Answer. It will not.

*Although it seems to be settled at law that a release or a discharge of one surety by the creditor * * * is a discharge of the others, this is not the case in equity.—2 Lead. Cases in Eq., Pt. 2, 367, Am. Ed.

By the civil law the creditor may transact with one of the sureties without prejudicing his right of resort to the others, but he cannot recover from the others more than the proportion they would have paid, supposing the co-surety with whom the transaction had taken place had contributed his share .-Burge on Suretyship, 155.

Such is also the law of England. creditor may release or compound with or give time to one co-surety without prejudicing his right to proceed against the others, but he cannot recover from the other cosureties more than the proportion they would have paid, supposing the co-surety released had contributed his share.—Id., 156; refers to Ex Parte Gifford, 6 Ves., 805; Dunn v. Shee, 1 J. B. Moor, 2; Stirling v. Forrester, 3 Bli., 575.

The release of the surety does not discharge the principal, nor does the release of one co-surety discharge the other co-sureties. -Id., 164.

"The principal is to discharge all the obligations of all the sureties; but they stand, with regard to each other, in a relation which gives rise to this right among others: that if one pays more than his proportion there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay. The party has a right to say for himself that he will not consider that relation, but will take 6s, though the surety is liable to pay 10. He may say he will be passive as to the other 4s, or he facts outside the deed.

own risk, as to the remedy against the other surety; or he may reserve his remedy against the co-surety expressly. It depends upon the effect and terms of the bargain actually entered into. * * * I have a strong opinion that, under the circumstances, the other persons liable upon this note are not discharged because Baylis was contented to make a bargain, the effect of which leaves him to his chance as to his ultimate liability between him and his co-surety."-Per Ld. Eldon, in Ex Parte Gifford.

The relation of principal and surety excepts the case from the rule of law.—Smith v. Winter, 4 Mees and W., 465.

Second. Should these propositions not be sustained, do the circumstances of this case preclude the discharge of the executor of Barnes as co-surety, by reason of the release of Brown?

*92

*Answer. Yes, because the release was made with the assent of the executor of Barnes, and the remedy was reserved.

Even in the case of a release of the principal debtor, the surety will not be discharged, if there be such reservation expressed or implied.—Ex parte Gifford, 6 Ves., 805; 2 Lead. Cas. in Eq., Am. Ed., Pt. 2, 383.

A release of the maker of a note, with the assent of the endorser, will not discharge the latter, nor when it appears the intention of the parties to preserve the liability of the endorser.-Eldridge v. Chacon, Crabbe,

The personal representatives of a deceased surety are competent to assent to such an arrangement.-United States v. Cushman, 2 Sumner, 310.

This point is further sustained by Smith v. Tunno, 1 McC. Ch., 453; Rees v. Berrington, 2 Ves., 543.

All the cases turn on the point that the transaction was had without the privity of the surety.

The evidence of the declarations of D. W. Brown at the time and previous to the execution of the release is objected to. They are not offered to explain, vary or contradict the language of the release, hence are admissible.—1 Green. Ev., § 282.

Such conversations are admissible as part of the res gestie.

The defendant may prove by the subscribing witness, as part of the transaction, the conversation of the parties to the instrument before and at the time of the execution, which may qualify it or affect its validity. -Volk v. Gaillard, 4 Strob., 99.

But the rule does not apply, because the evidence is only introduced to show the assent of the executor of Barnes to the transaction and the reservation of the right to proceed against him, which are independent

This transaction, being a settlement of a guardian's account with his ward, by one of the sureties to the guardianship bond, will be scrutinized. It can only be sustained so far as it was consistent with the utmost good faith. If the release had the effect contended for by respondent, then it was obtained by fraudulent representations and is void.—1 Story's Eq. Jur., §§ 317, 318, 321; 1 Rich., 435.

Moore, contra:

The admission of the appellant that he can claim against the estate of Barnes only the one-half of the balance due him by his

*guardian, is, in itself, fatal to the claim; for it is predicated upon the assumption that the release of the co-surety, Brown, from liability on the guardianship bond, changed the contract of Barnes from a liability for the whole balance into a liability only for the one-half. It is, therefore, a claim independent of the bond, and is entirely without foundation.

A release to one co-obligor of a bond is a release and discharge of the whole of them.—Executors of Wilson ads. Minor Winn. 2 Bay., 517; Rowley v. Stoddard, 7 Johns., 207; Averill v. Lyman, 18 Pick., 346; Goodman v. Smith, 18 Pick., 414; Carnegee v. Morison. 2 Met., 381, 407.

Such a release actually extinguishes the obligation.—Willings v. Conseque, Pet. C. C., 301.

A release or discharge of one surety by the creditor is a discharge of the others.—Nicholson v. Kivel, 4 Ad. & E., 675.

A release by ward to guardian discharges surety.—Kirby v. Taylor, 6 John. Ch., 242.

Quo ad the ward, the sureties were all principal obligors, and, with respect to each other, stood in equali jure. The discharge of one was therefore a discharge of all.

The second ground of appeal is contradicted by the release, which contains no stipulation that the co-sureties should "bear their proportionate part of the debt." The consideration paid by Brown for his release was only \$2,000.

Even if the declarations of Brown made before the release be evidence, they amount to no more than a mere personal undertaking, which could not bind the estate of Barnes.—O'Neall v. Abney, 2 Bail., 317; McBeth v. Smith, 3 Brev., 511; Mayer v. Galluchatt, 6 Rich. Eq., 1; Welsh v. Davis, Supreme Court, 1871, MSS.

Inasmuch as the funds in Court were not under the control of Brown, they could, in no point of view, be bound by a promise made by him.

Jan. 8, 1873. The opinion of the Court was delivered by

MOSES, C. J. The proposition of the appellant, that a release by the debtor of one

This transaction, being a settlement of a guardian's account with his ward, by one of the sureties to the guardianship bond, will be scrutinized. It can only be sustained so far as it was consistent with the utmost in the like relation to the debt.—Burge on

Suretyship, 156; Nicholas v. *Revell, 4 Ad. & Ell., 675. The same rule will generally prevail in equity. The argument before us, insisting on a contrary doctrine, relies for its support on Ex Parte Gifford, 6 Ves., 805, in which Lord Eldon held that the discharge of one surety did not release the other sureties, and although Mr. Justice Story, in note to page 572 of his first volume on Equity Jurisprudence, interposes to defend the distinguished Chancellor from the strictures to which his decision has been subjected, it must be admitted that his conclusion has not been accepted as the ruling authority on the question.-Nicholson v. Revell, 6 Nev. & Mann., 192, 200; Evans v. Brembridge, 35 Eng. L. & E. R., 398.

Equity construes a release according to the intention of the parties, and will give it no operation beyond the design or the purpose it was intended to accomplish. principle is so fully enforced by Chancellor Kent, in Kirby v. Taylor, 6 John. Ch., 242, that any further reference to authority in support of the rule is unnecessary. It is certainly in strict consistency with the doctrine of equity, which always seeks, if possible, to give effect to the intent which induced the Act, if it can be ascertained without a violation of the rules of law. We cannot, however, refrain, because they appear so pertinent to the case before us, from referring, in the language of the Chancellor, to some of the authorities on which he rested his opinion: Lord Hardwicke said, in the case of Cole v. Gibson, 1 Ves., 503, "that it was common in equity to restrain a general release to what was under consideration at the time of giving it." And, again, in Ramsden v. Hitton, 2 Ves., 304, he observed, "that if a release be given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent such surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released."

The declarations of D. W. Brown, at the time of the execution of the release, were not offered to explain, vary, or contradict the language of the instrument discharging him. It was not to add conditions or restrictions which would impose on the immediate parties to it, as between themselves, any other obligations than those which it plainly expressed, or in any way to contravene or disturb the contract between them, but they were offered to show that while Brown was not to be held chargeable by Massey for any further amount, as the consideration for the

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discharge of his lia*bility on the bond, the rights of Massey, as to the other surety Barnes, were not to be prejudiced by reason of his release. They were to show something extrinsic to, and outside of, the discharge, Viewing the evidence in this light, we do not perceive any objection to its competency. Giving effect to the release according to the intention of both the parties, and remembering that Brown was the executor of Barnes. we cannot hold it as discharging the estate of which he was the personal representative from liability on the bond.

While we must reverse the judgment of the Court below on the effect of the discharge, another question arises, and should be determined before a final adjudication can be had, and that is, as to the liability of Brown, (conceding the principal and the other surety, Cureton, to be insolvent,) to contribute to the amount which the estate of Barnes may be required to pay for the default of the guardian. In other words, does the compromise of Brown, as between him and the estate he represented at the time, enure also to its benefit, and, if so, to what extent? As all the parties are before us, it is possible we have authority to decide it; but Brown should be first heard, and we prefer first, therefore, to remit it to the judgment of the Circuit Court.

The decree of the Judge below is reversed, and the case is remanded to the Circuit Court for the County of Lancaster, to be heard on the point indicated in this opinion, and such other questions as may further properly arise out of the pleadings.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *96

*MARCO v. COUNTY TREASURER.

(Columbia. Nov. Term, 1872.)

[Counties = 158.1

The Act of March 9, 1872, Sec. 4, directing certain funds, then in the hands of the County certain funds, then in the hands of the County Treasurer, which were appropriated for building a Court House, to be applied in payment of the past indebtedness of the County, did not prevent the County Treasurer from paying a warrant drawn for money due for building the Court House. The effect of the Act was to place all the past indebtedness of the County, whether contracted for building a Court House, or otherwise, upon the same footing. or otherwise, upon the same footing.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 221, 222; Dec. Dig. € 158.]

This was an application by Samuel Marco against the County Treasurer of Darlington County, to compel him to pay a warrant for the County Commissioners of said County. and dated the 3d of June, 1872.

The facts, as stated in the petition and admitted by the answer, were that the consideration of the warrant was money due the petitioner under a contract for building a Court House for the County, dated April 23d, 1870; that when the warrant was presented to the County Treasurer for payment he had in his hands a fund sufficient to pay the same; that said fund had been raised under the Act approved February 19th, 1870, and the Joint Resolution of December 3d, 1870, authorizing the levy of taxes for the construction and completion of a Court House at Darlington, and had been deposited in the Carolina National Bank at Columbia.

The County Treasurer refused to pay the warrant on the ground that he was prevented from doing so by the 4th Section of the "Act to provide for the payment of the past indebtedness of Darlington County, and for other purposes," approved March 9, 1872, which provides "that it is hereby made the duty of the County Commissioners of Darlington County to draw their warrants on the County Treasurer, against any funds in his hands, including the money now in bank which was appropriated for building of a Court House, for the payment and liquidation of the past indebtedness of the County, and the County Treasurer, on presentation of said warrants, shall pay the same."

Harllee, for relator.

Chamberlain, Attorney General, for respondent.

Jan. 16, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The relator demands the writ of mandamus to compel the County Treasurer of Darlington County to pay a check drawn upon him by the County Com-

*97

missioners of that County, *in favor of the relator, for the sum of \$5,500, being the amount due the relator on account of a contract for the building of a Court House for said County, authorized by law.

It appears that the respondent, as County Treasurer, holds funds to an amount sufficient to pay the relator's demand, raised and held under authority of an Act of the General Assembly, providing means for defraying the expenses of building such Court House.

The only question presented is whether the payment of this amount is prevented by the operation and effect of the Act entitled "An Act to provide for the payment of the past indebtedness of Darlington County, and for other purposes," approved March 9, 1872. \$5.500, drawn in favor of the applicant, by The portion of this Act in question is the 4th Section, which reads as follows: "That to return the record to the Circuit Court for it is hereby made the duty of the County Commissioners of Darlington County to draw their warrants on the County Treasurer against any funds in his hands, including the money now in bank which was appropriated for building of a Court House, for the payment and liquidation of the past indebtedness of the County; and the County Treasurer, on presentation of said warrants, shall pay the same."

The effect of this Act was not to render the fund in question inapplicable to the payment of the relator's demand. Its design was to place certain other demands on the same footing, as to such fund, as that occupied by the relator's demand. It does not appear, by the proceedings in this case, that there is any outstanding demand against the County Treasury, of the class contemplated by that Act. No question, then, can arise in this case between the relative claims of the relator and the creditors of the general class intended to be favored under the Act in question.

Previous to this Act the fund stood appropriated by law for the payment of the relator's demand; and unless the Act in question operated as an absolute repeal of the authority for such appropriation, the relator is entitled to receive payment out of the fund in question. The Act cannot bear that construction; at most, it could only operate as a repeal on the contingency of the prior presentation of demands against the Treasury of the class contemplated by its provisions. It does not appear that any such demands exist; accordingly the fund stands appropriated to the payment of relator's demand. The writ must issue.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *98

*CHALK v. PATTERSON.

(Columbia. Nov. Term, 1872.)

[Appeal and Error 569.]

Where amendments to the case proposed by appellant's attorney are prepared and served by respondent's attorney, it is the duty of the Circuit Judge to consider and allow, disallow, or modify them, whether respondent's attorney ap-pears at the time and place of submitting the case and amendments for settlement or not. The non appearance of the attorney is no ground

for regarding the amendments as alsadoned. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2538; Dec. Dig. $\Longleftrightarrow 569$.]

[Appeal and Error C=657.]

Where the case brought up by appellant, as part of the judgment record, has never been set-tled in conformity with Sections 288, 292, of the Code of Procedure, the remedy, it seems, is

settlement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830-2833; Dec. Dig. ♦⇒ 657.]

[Appeal and Error \$\sim 569.]

A case may be settled upon affidavits and other proofs, as well as upon the minutes or personal recollection of the Judge who tried it. The power is not personal in the Judge, but belongs to the Court, and may be exercised by his successor in office.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2533, 2536; Dec. Dig. 👄 569.1

This was an action by Thomas T. J. Chalk, plaintiff, against Giles G. Patterson, defendant, tried in the Circuit Court at Chester.

The plaintiff appealed, and the respondent gave notice that he would move this Court "to dismiss the appeal herein on the ground that the same has not been perfected according to law, and for such other relief as may be just."

The motion was now made, and was supported by affidavits, in which the facts in reference to the proceedings before the Circuit Judge for settlement of a case are stated. The ground of the motion appears in the opinion of the Court.

McAliley & Brawley, C. D. Melton, for the motion.

Hamilton, contra.

Feb. 5, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The respondent asks relief on the ground that the case brought up, as part of the judgment record, has never been settled in conformity with Sections 288 and 292 of the Code of Procedure.

It appears that the respondent duly prepared and served amendments to the case proposed by the appellant, and that the amendments were submitted to the Circuit Judge with the proposed case. It further appears that the Circuit Judge treated the amendments as abandoned, on the ground that the respondent's attorney did not appear at the time and place of submitting the case and amendments for settlement in order to press the allowance of his amendments.

*99

*The non-appearance of the party or his attorney was no ground for regarding the amendments as abandoned. It is not necessary that a party proposing amendments should appear to sustain them. It would be onerous and unreasonable to require such appearance. The party proposing amendments is entitled to notice of the time and place of submitting a case and amendments for settlement, so that he may have an opportunity to appear, if he deems his interest to demand it, but he is under no obligation to the appellant to appear. If he does not appear, it

is the duty of the Circuit Judge to consider the proposed amendments, and to pass upon the propriety of the allowance or disallowance of such amendments. The usual practice in New York is to mark such amendment either "allowed," "disallowed," or "allowed as modified," and when the amendment is "modified," the modification is made on the face of the amendment. In this way the evidence of the action of the Circuit Judge is preserved, and the party preparing the case is guided in engrossing the case as settled.

The Circuit Judge, having disregarded the amendments, the case cannot be considered as "settled," within the meaning of the Code of Procedure and the rules of Court.

This is not to be regarded as a mere irregularity committed by the Circuit Court, but as a denial to the respondent of that which may be essential to the presentation of his rights to this Court.

The record must be returned to the Circuit Court, for proper settlement of the case, upon the amendments proposed by the respondent. In the meantime the appeal will stand without prejudice.

It was urged that, as the Circuit Judge, who should have settled the case, has been succeeded in office by a Judge who has no knowledge of the case, it is impossible to settle the case properly. A case may be settled upon affidavits and other proofs, as well as upon the minutes or personal recollection of the Judge who tried it. The power of settling a case is not personal in the Judge who tries the case, but is in the Circuit Court, and may be exercised by the Judge for the time being, whether he tried the case or not. The fact that a change in the Judge renders the settlement more difficult or uncertain is no ground for the Court to refuse that which is manifestly due and essential to the respondent's rights.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *100

*WILLIAMS v. CALDWELL.

(Columbia. Nov. Term, 1872.)

[Frauds, Statute of \$\iiint_27.]
G. requested W. to ship to him certain goods, and C. promised W. to accept G.'s draft for the amount of the goods if he would comply with the request, which was done, and the goods charged on W.'s books to G.' Held, That C.'s promise was within the Statute of Frauds, and void for want of writing.

[Ed. Note.—Cited in Robertson v. Hunter, 29 S. C. 14, 6 S. E. 850; Ollever v. Duval, 32 S. C. 276, 10 S. E. 1070; Willoughby v. City of Florence, 51 S. C. 467, 29 S. E. 242.

For other cases, see Frauds, Statute of, Cent. Dig. § 44; Dec. Dig. € 27.]

Before Graham, J., at Charleston, February Term, 1872.

Action by George W. Williams & Co., plaintiffs, against James M. Caldwell & Co., de-

The complainant alleged:

"1. That some time since, to wit: on or about the fourteenth day of October, eighteen hundred and sixty-nine, one J. H. Gayle, being desirous of purchasing sundry goods, wares and merchandise of and from the said plaintiffs, amounting in value to the sum of two hundred and twenty-one 94-100 dollars, it was agreed by and between them, the said plaintiffs and the said defendants, before the sale of the said goods, wares and merchandise, or delivery of the same, that if they, the said plaintiffs, would make sale of the same to the said J. H. Gayle, and ship the same to him to Wright's Bluff, S. C., by the steamer Marion, and cause the same to be insured, they, the said defendants, would pay to the said plaintiffs the amount of the value of the said goods, wares and merchandise, to wit: the sum of two hundred and twentyone 94-100 dollars, as also the amount of two 22-100 dollars for insuring the same; or that they, the said defendants, would accept the draft of the said J. H. Gavle, drawn in favor of the said plaintiffs, at thirty days, for the said sum of two hundred and twentyone 94-100 dollars, the value of the said goods, wares and merchandise, and would also pay the amount of two 22-100 dollars for insuring the same.

"2. That they, the said plaintiffs, did, in conformity with the promise, undertaking and agreement made by the said defendants. and on the faith and credit of the same. cause to be shipped to the said J. H. Gayle. at Wright's Bluff, S. C., by the steamer Marion, the said goods, wares and merchandise, a list and statement of which is hereunto annexed, amounting in value to the sum of two hundred and twenty-one 94-100 dollars, and did also cause the said goods, wares and merchandise, shipped by the steamer Marion to Wright's Bluff, S. C., to be insured at a cost of two 22-100 dollars; but that the

*said defendants have refused either to pay the said plaintiffs the said amount of two hundred and twenty-one 94-100 dollars, the value of the goods, wares and merchandise, and the amount of two 22-100 dollars paid by them for insuring the same, or to accept the draft of the said J. H. Gayle, drawn in favor of them, the said plaintiffs, for the said sum of two hundred and twenty-one 94-100 dollars and directed to them, the said defendants, when the said draft was presented to them for acceptance."

The defendants answered, and, for a first defense, relied upon the Statute of Frauds. and, for a second defense, denied the agree-, it was properly left to the jury to say wheth-

The plaintiffs called a witness, who gave evidence tending to prove the allegations of the complaint: That before the goods were shipped defendants promised plaintiffs to pay for them if the plaintiffs would ship them to Gayle; that the goods were shipped and charged on plaintiffs' books to Gayle.

At the close of plaintiffs' case defendants moved for a non-suit, on the ground that the contract, as alleged and testified to, was void, the same not being in writing. motion was denied, and defendants excepted.

Defendants then gave evidence tending to show that their promise was to accept Gayle's draft on them for the amount of the goods, payable at sixty days from the date of the purchase; and that no such draft had ever been presented.

In reply, plaintiffs gave evidence tending to show that the draft which defendants agreed to accept as a draft payable at thirty days; that such a draft was received from Gayle, but not until three days after it had matured; that it was then presented to defendants, who refused to accept the same.

The presiding Judge charged the jury that if defendants were the original purchasers of the goods, they were liable; that the question was, to whom did plaintiffs sell the goods? If they were sold to Gayle, then the promise of defendants was not binding.

The jury found for the plaintiffs \$221.94, and judgment was entered thereon.

The defendants appealed, and now renewed in this Court their motion for a non-suit.

Simonton and Barker cited Birkmeyer v. Darnel, Salk., 27; Matson v. Wharan, 2 T. R., 80; Forth v. Stanton, 1 Saund., 211; Jones v. Cooper, Cowp., 228; Leland v. Crayon, 1 *102

McC., 100; Richardson *v. Richardson, 1 McM., 280; Bronson v. Stroud, 2 McM., 372; Simpson v. Nance, 1 Sp., 4; Taylor v. Drake, 4 Strob., 431.

Buist, contra:

The exception of the defendants is to the ruling of the presiding Judge, overruling the motion made for a non-suit.

It is respectfully submitted, under the authorities, that the evidence submitted by the plaintiffs was sufficient to authorize the submission of the case to the jury, and that the presiding Judge was, therefore, not in error, as alleged.

In Darnell v. Pratt, (2 Carr. & Pay., 82,) it appeared that a mother took her son to school, the father being then alive; but it did not appear what transpired on that occasion. Afterwards a bill was delivered to the defendant, (the boy's uncle,) who said it was quite right to deliver the lill to him,

er the original credit was not given to the defendant only.

In Storr v. Scott, (6 Carr., Pay., 241,) where the defendant, as steward of certain races, selected at the shop of the plaintiff a gold cup, saying, "you must send the cup as usual, I suppose, to the clerk of the course," which had frequently been done by the plaintiff before. Lord Lyndhurst said to the jury: "The question is, upon whose credit the cup was furnished," and left them to say whether the credit was to be given to the defendant or to the clerk of the course.

The rule, as extracted from the English cases, is thus expressed in Leigh's N. P., 1025: "It is a question for the jury, in such cases, whether credit was given to the defendant before the debt was incurred, or to another, as the principal, taking all the circumstances of the case into consideration."

In the late case of Mountstephen v. Lakeman (L. R. 7, Q. B., Ex. Ch., 196) the defendant being chairman of a local board of health, asked the plaintiff whether he would lay certain pipes. The plaintiff said, "I have no objection to do the work, if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid;" and accordingly the plaintiff did the work. The work was not authorized by the board, and they refused to pay for It was held that the defendant was lia-*103

ble for the price of the work, *as there was evidence for the jury that the defendant contracted to be primarily liable.

In 3 Parsons on Contracts, 20, it is said: "From the very definition of a collateral promise, it follows that there must be some one who owes the debt directly. There must exist an original liability as the foundation for the collateral liability; and one of these liabilities must be entirely distinct from the other. If, therefore, the creditor trusted to one of the parties more than to the other, but did, in fact, trust to one together with the other, it is not within the statute; and in ascertaining whether this original and distinct liability exists, and then a collateral one founded upon it, the Court will look to the intention of the parties, as they may be inferred from all the circumstances of the case and of the parties. At the same time, however, it must be remembered that the expressions used by the parties are the first and most direct evidence of their intention."

In the notes to Smith's Leading Cases, case of Berkmyr v. Darnell, Vol. 1st, Part 1st, page 474, it is said: "When it is doubtful whether the third person is liable on the credit given exclusively to the defendant, the question should be left to the jury on all for he was answerable. It was decided, at the evidence; (Elder v. Warfield, 7 Harris, nisi prius, and afterwards by the Court, that 391; Scudder v. Hale, 1 South, 249;) and

the fact that the goods were charged to a third person, for whose use they were bought, or that a bill was rendered to him as the purchaser, although strong, will not necessarily be conclusive evidence in favor of the defendant.-Homans v. Lombard, 8 Shepley, 508; Walker v. Richards, 41 N. H., 388; Hazen v. Bearden, 4 Sneed, 48; Loomis v. Smith, 17 Conn., 115. Even when the promise is not given until after the goods are ordered, it may still be so positive as to shew, in connection with the other evidence, that the delivery was solely upon the credit of the defendant, and thus make him liable, notwithstanding the statute.—Darlington v. McCann, 2 E. D. Smith, 411; Briggs v. Evans, 2 E. D. Smith, 193; Gleason v. Briggs, 28 Verm., 155.

The burden of proof rests on the party who relies on the statute as a defense to a cause of action, which is prima facie valid; and the Court will not presume either that another and concurrent obligation exists, or that the party liable for its performance is a principal, and the defendant merely answerable for his debt or default.—Beaman v. Russell, 20 Verm., 205; Holmes v. Knight, 10 N. H., 205.

*104

*In Towne v. Grover, 9 Pick., 306, W. undertook to complete certain work in defendant's house, but was unable to procure timber; whereupon the plaintiff supplied the timber, on defendant's undertaking "to pay him for it out of the money that he (the defendant) had to pay to W., provided W.'s work was completed." The Court held that this was not a collateral, but a direct undertaking by the defendant.

In McKinney v. Quilter, 4 McC., 409, Johnson, J., in delivering the opinion of the Court, says: "The statute provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof be in writing, and signed by the party to be charged therewith, &c.

"The cases involving the construction of this clause of the statute are very numerous, and some of the distinctions are very subtile and refined; but the broad rule on which they all proceed is, that when the undertaking is original, it is binding, although it is not in writing, and although it may have grown out of a debt, &c., of another, but otherwise when it is collateral to the liability of another."

The defendants, by giving evidence and submitting the case to a jury, are bound. They cannot retract their submission and demand a non-suit.—McEwen v. Mazyck & Bell, 3 Rich., 215; 4 Strob., 192.

Feb. 14, 1873. The opinion of the Court was delivered by

the ruling in Taylor v. Drake, (4 Strob., 431 [53 Am: Dec. 680],) it is clear that the Circuit Judge should have granted the defendant's motion for a non-suit. The contract on which the action was brought, as disclosed by both the pleadings and evidence, was a collateral contract to answer for the debt of another, and, as such, must be in writing, to be capable of enforcement under the statute of frauds. It appeared, by the plaintiff's evidence, direct and uncontradicted, that the goods were sold to Gayle upon the promise of defendants to accept a draft drawn for the purpose of paying the purchase money on such sale. As the case stood at the time the motion for a non-suit was made, and that asnect is unchanged, there was no evidence that could justify a jury in finding the contract of sale, as it regards the goods, as a *105 contract *between the plaintiffs, as sellers,

WILLARD, A. J. Under the authority of

contract *between the plaintiffs, as sellers, and the defendants, as purchasers. On the contrary, the transaction, regarded as one of purchase and sale, was between the plaintiffs and Gayle. The promise of the defendants was both inducement and consideration to such contract of sale, and was, in substance, a contract to assure the performance of what Gayle had undertaken to do, namely, to pay for the goods purchased.

The point ruled in Taylor v. Drake, (4 Strob., 431 [53 Am. Dec. 680],) was, that if the person to whom the goods were delivered is liable as purchaser, then a promise made by a third person to pay the amount of such purchase must be regarded as collateral, and, as such, must be in writing, in conformity with the Statute of Frauds, in order to be capable of being enforced.

The promise of defendants here was to accept for the amount of such purchase. Such a promise was, in substance, a promise to pay for the goods sold to Gayle, and for which the latter was primarily liable. The only consideration for defendants' promise was the credit given to Gayle, and this shows that the contract to accept was intended as a means of securing payment for the goods sold and delivered to Gayle.

In Taylor v. Drake the promise was to pay or endorse. Here the promise was to accept; and on the same ground on which, in that case, the contract was held to be collateral to an original contract of sale, the present promise must receive the same construction.

In Taylor v. Drake a non-suit was entered by the appellate Court after a verdict for the plaintiff, thus showing that on a clear and uncontradicted state of evidence the Court will undertake to say, without the aid of the jury, whether the contract is to be regarded as original or collateral. As there was no question of credibility or of contradictory testimony to be settled, and no inference of fact to be drawn presumptively, there was nothing to put in exercise the peculiar functions of a jury. The decision of that case leads to the conclusion that the present verdict must be set aside, and the case remanded for judgment, dismissing the complaint.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *106

*DONALDSON v. BANK.

(Columbia. Nov. Term, 1872.)

[Appeal and Error \$\$\sim 78.]

In an action against a bank which had fail-and stockholders thereof, to make the latter liable, according to the terms of the charter, for the amount of the shares held by them "at the time of such failure," a decree, which merely ascertains the date of the failure and orders references as to certain facts, is not appealable—the same not being a final judgment, within the sense of the Code of Procedure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 476; Dec. Dig. ◎ 78.]

[Appeal and Error \$\simes 80.]

A decree or judgment is not final which leaves in doubt whether the plaintiff will, in the end, be entitled to recover.

[Ed. Note.—Cited in Jones v. A. H. Williams e Co., 89 S. C. 581, 72 S. E. 546.

For other cases, see Appeal and Error, Cent. Dig. § 494; Dec. Dig. &—80.]

Before Graham, J., at Charleston, June Term, 1872.

These were actions by R. J. Donaldson and others against the Farmers' and Exchange Bank and others; Hugh Walker against George A. Trenholm and others; James Bankhead against George A. Trenholm and others; and Tomlinson, Fort and others against the Farmers' and Exchange Bank and others.

The point decided on the appeal will be understood from the Circuit decree, which is as follows:

Graham, J., (who, after stating the cases in the order above named, proceeded as follows): The first entitled case has, by an order of Court giving leave to amend, been made a creditors' bill, for the benefit of all creditors of the Farmers' and Exchange Bank. The next two entitled cases have been, by an order of this Court, consolidated with the first case, because involving the same question, namely: the liability of the stockholders of the Farmers' and Exchange Bank under its charter. The last entitled case was a suit brought in the Court of Equity for Charleston, by creditors of the bank, for the marshaling and distribution of its assets. By an order of Court the creditors of the bank were required to come in and prove their claims before Master Tupper.

At the expiration of the time fixed by the order, a dividend was declared and paid to those who had proved their claims; but a portion of the assets are still in the Court for distribution.

The orders, from time to time, made in these cases by the Court of Equity, to whose powers and jurisdiction this Court has succeeded, have all been directed to the end of bringing before the Court all the creditors of the Farmers' and Exchange Bank, that they may receive their due proportion of the assets of the bank, and of any fund which may be derived from the enforcement of the liabilities, which, it is alleged, are imposed by the charter of the bank upon the stockholders.

*107

*The defendants, who are alleged to have been stockholders of the bank at the time of its failure, or within twelve months previous thereto, deny their liability to the plaintiffs, upon various grounds. For the purposes of this decree, it will be necessary to state and consider some of these only.

The Farmers' and Exchange Bank of Charleston was incorporated by the Act of Assembly of December 16th, 1852, (12 Stat., 212.) This Act contains, among others, the following provisions:

"Section 1. That the charter of the Planters' and Mechanics Bank is hereby renewed for twenty-one years from and after the first of January next.

"Sec. 2. That said bank shall be permitted to enjoy all the privileges, rights, powers, immunities and benefits, which it now enjoys under the existing charter, and shall be subject to all the provisions of an Act passed on the 18th December, 1840, entitled 'An Act to provide against the suspension of specie payments by the banks of this State,' and also to such regulations and restrictions as the Legislature, from time to time, shall propose.

"Sec. 4. That in case of the failure of said bank each stockholder, copartnership or body politic, having a share or shares in such bank, at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually, for any sum not exceeding the amount of his, her or their share or shares."

Section 8 incorporates eight new banks, and among them the Farmers' and Exchange Bank of Charleston, with this provision applicable to all and each of them: "which said banks shall have and possess the same rights and privileges, and be subject to the same duties, liabilities, obligations and restrictions herein provided for the said Planters' and Mechanics' Bank."

The full amount of stock having been subscribed, the bank was organized and proceeded to business. It issued and put into cir-

culation, from time to time, bills to a large of creditors for whose benefit it was imamount, which it redeemed on demand in specie, until 29th November, 1860, when, in common with the other banks in the city. it suspended specie payments and never afterwards resumed them. It continued. however, to issue its notes and to carry on its other banking business, until 1865, when, in consequence of losses sustained by the war *108

and other causes, its *capital was so much impaired that it was compelled to close its doors and go into liquidation.

The defendants deny that the charter of the bank imposes the alleged or any other liability on the stockholders. They contend that, under the eighth Section, the Farmers' and Exchange Bank, and other banks thereby chartered, are expressly subjected, as banks or corporate bodies, to the same duties, liabilities, obligations, regulations and restrictions therein provided for the Planters' and Mechanics' Bank as a bank; but that neither this clause nor any other imposes any individual liability on the stockholders of the eight new banks. The absence of such a clause, they contend, is conclusive that no such liability exists. They submit that the Legislature may have intended to create such a liability, and may have thought that they had done so. Even if such were the case, the necessary clause amounts to casus omissus, which cannot be supplied by implication. This ground of objection was considered by my predecessor, in the case of McRay v. Whaley, and, after elaborate argument, was overruled. I do not feel called upon to review this decision or reverse it.

Assuming, then, that the clause in the charter of the Planters' and Mechanics' Bank imposing a liability, in case of failure of the bank, upon the stockholders, forms a part of the charter of the Farmers' and Exchange Bank, the question to be considered is, whether the plaintiffs are entitled to the relief asked? The answer to this question must depend upon the further questions, what construction shall be given to the clause referred to, and who are the parties for whose protection it was intended?

In the determination of these questions very little, if any, aid can be derived from the decisions made in other States upon analogous statutes, and upon which so much reliance was placed by the plaintiffs' counsel. These decisions turned, in a great manner, upon the peculiar phraseology employed in the charters to which construction was given, and which differed, in several essential particulars, from that used in the statute now under consideration. In all these cases the charters not only imposed an individual liability upon the stockholders, but designated, with great minuteness, the extent of such liability, the contingency upon which it should attach, the particular class posed, and the mode of procedure by which it should be enforced.

Upon all these points the charter of the *109

Farmers' and Exchange *Bank is entirely silent. It is couched in the most general and ambiguous terms. It declares that the stockholders shall be liable in case of "failure." but does not indicate, in any way, the meaning of the word "failure," or say to whom, or for what, they shall be liable.

This want of technical skill in the framework of the statute necessarily renders its construction a task of no little difficulty and perplexity.

It is an established rule, in the exposition of statutes, that the intention of the law giver is to be deduced from a view of the whole and of every part of a statute taken and compared together.

When the general purpose of the statute is thus ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. If the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view .--1 Kent, 462.

Applying the principles to the case in hand, it appears to me that the intention of the Legislature must be ascertained by construing the 4th Section of Act of 1852, in connection with the 2d Section of the same Act, which incorporates into the charter the provisions of the Act of 1840. That Act, dictated by considerations of public policy, was intended to provide against the suspension of specie payments by the Bank of the State.

It provides that, if any bank shall "declare a determination to suspend, or refuse payment of its notes, according to their legal obligation, in current coin," it shall be liable to pay to the State, at the expiration of every month after such suspension or declaration. and during the continuance thereof, a heavy penalty, to be recovered by the State, in an action of debt. In order to preserve the banks in a safe condition, and to prevent the currency from being debased, and the community defrauded, by an amount of bank bills in circulation disproportioned to the means of redeeming them, the Act required the President or Cashier of each bank to make monthly returns on oath, setting forth, among other things, the bills in circulation. the specie on hand, and the other resources of the bank.

From these provisions of the Act it is obvious that the leading object of the Legislature was to guard against the public mischief of an irredeemable circulation. By the Act

*110

of 1852, eleven banks *were about to be incorporated, each of them clothed with the right circulating currency, or medium of exchange, instead of gold and silver. Against bills thus put in circulation, a very disastrous experience had recently shown that the community had no practical means of protecting themselves.

This was the "mischief felt." This was the necessity and occasion of the law. It is not surprising, therefore, that the Legislature, throughout this Act, manifests an anxious solicitude to prevent an abuse of the high privileges it was about to confer upon the banks, and to secure, by the most stringent provisions, those who should receive the bills, in their daily business, as currency or money. 'To effect this end, it not only imposed upon the banks, as banks, a severe penalty in case of their suspending payment of their notes in specie, but also rendered personally liable, for the redemption of the notes, those who had asked for the privilege of supplying the circulating medium.

The second Section of the Act was designed, in case of a failure of the bank, to repair the public wrong due to the State, by an abuse of the charter which the State had granted.

The fourth Section was intended to repair the private injury sustained by those who had received, as money, bills of the suspended bank.

These two Sections are in pari materia; they relate to one subject, are governed by one spirit and policy, and are consistent and harmonious parts and provisions in one system. They must, therefore, be construed together, and, so construed, lead irresistibly to the conclusion that the "failure" referred to in the fourth Section is a failure on the part of the bank to pay its notes, according to their legal obligation, in current coin." And this conclusion is confirmed by the language The liability of the stockhoider is used. made to depend, not upon the insolvency of the bank, (its inability to pay its debts,) but, upon its "failure," or "suspension of payment."

This is the definition of the word "failure," given by Worcester and other lexicographers, and, in this sense, the context shows that the Legislature intended to use it. If this be not the true construction of the Act, it is difficult to say in what sense the Legislature could have used the word failure. If the bank did not fail when it refused or was unable to satisfy its engagements in money as they became due, when did it fail? Was it

*111

when the whole mass *of its means, including property of every description, could not, by any possibility, or in any event, be made adequate to the liquidation of its existing This construction would make the failure of the bank equivalent to its total insolvency, and would render the liability im-

to issue lills or notes, intended to be the posed on the stockholder a security of little value to the creditor, who would have no means of determining the precise time at which this condition of its affairs was reached, and who, without this knowledge, would be unable to determine against what stockholders to bring suit. From the allegations in the complaint, the plaintiffs' view appears to be that the failure of the bank took place in 1865, when it closed its doors and ceased practically to exist; but there is nothing in the charter to warrant the conclusion that the Legislature intended to suspend the creditors' right to enforce the statutory liability of the stockholder until the insufficiency of the assets of the corporation was made to appear, either by the bank's voluntarily going into liquidation, or by judgment recovered, or execution issued against it.

The plaintiffs' construction is open, too, to the further objection that it would enable the bank, by keeping up the semblance of business, or the creditor, by delaying suit, to shift the liability arbitrarily from one set of stockholders to another. Such a provision would be unreasonable, and a construction which would lead to such a result should not be given to the Act, unless absolutely necessary to give it effect; and, in my opinion, it is not required, and would be inconsistent with its whole scope and design.

My opinion is that the failure of the Farmers' and Exchange Bank, contemplated by the fourth Section of the Act of 1852, occurred on the 29th day of November, 1860, when it publicly suspended, and refused payment of its notes in current coin, and that the stockholders who became thereby liable were those at that time owning shares in the Bank, or who had held such shares at any time within twelve months previous to that date.

This brings us to the inquiry, to whom and for what are the stockholders liable? In considering this question, we must bear in mind that, to create any individual liability for the debt of a corporation, is a wide departure from established rules, and depending solely upon provisions of positive law. Such liability is, therefore, to be construed strictly, and should not be extended beyond the limits to which it is plainly carried by the statute creating it.-Gray v. Coffin, 9 Cushing, 199.

*112

*This rule is peculiarly applicable to a case like the present, where the vague and loose phraseology of the statute imposes an onerous liability, not only on those beneficially interested in the stock of the bank, but also upon executors, administrators, and other trustees, in whose name the legal title to the shares chanced to stand at the time of the failure of the bank, and upon married women, minors and other persons under disability, who could have had no participation or agency in bringing about the failure in

consequence of which the liability is imposed. I holders liable for the redemption of the notes The only creditors of the Farmers' and Exchange Bank who are before the Court as suitors in these several cases are those who hold the unpaid bills of the bank. This is the only class of creditors who responded to the call in the case of Fort v. Farmers' and Exchange Bank, and it may reasonably be inferred that there are no others. There is no averment in the pleadings that the bills held by the plaintiffs were issued prior to the failure of the bank. The general allegation that the plaintiffs are bill holders is not sufficient, because the liability created by the charter was not intended, as we have seen, for the benefit of all the creditors of the bank, but only for the benefit of those who hold the bills of the bank, issued when they were convertible into coin, and constituted a part of the circulating medium of the State. But the holders of the bills of the bank issued after its failure, when they had ceased to be convertible into coin, and practically amounted to contracts for the payment of Confederate money, stand upon a very different footing. Whatever doubt there may be as to the proper construction of the charter in other respects, it is certain that both the persons liable as stockholders and the extent of their liability were fixed at the failure of the bank. There is nothing, either in the terms of this clause of the charter or in the reasons which led to its adoption, to give countenance to the idea that the Legislature

debts of the bank contracted after its failure. Those who dealt with the bank while in a state of suspension did so at their peril. They were not within the mischief against which the law intended to provide by fixing individual responsibility upon the corporators, and the Legislature has, therefore, left them to the protection of their own sagacity or vigilance. Against the bank itself they have a right of action, and they will be entitled to receive their proportion of its undis-

intended to make the stockholders liable for

*113

tributed assets, unless, *indeed, the notes held by them should prove to be a part of those which it was stated at the bar had been unlawfully issued as a loan to the Confederate Government, in which case their right to recover, even against the bank, may be doubtful.

It was contended that the statutory liability imposed by the charter does not enure to the benefit of the bill holders who purchased the bills of the bank after its failure, and when they had ceased to have any of the characteristics of money, even though such bills may have been issued before the failure.

I do not consider this position tenable. Such an interpretation of the charter would defeat the object which we have attempted to show the Legislature designed to accomplish by it. The Act of 1852 made the stock- which it is unnecessary to state.

to twice the amount of stock held by them.

This liability, whether it be that of guarantors or original debtors, attaches to the notes issued prior to the failure, is part of them, as much as if written on the back of them, goes with the notes everywhere while they last, and invites every one to take them. -Furman v. Nichol, 8 Wallace, 51 [19 L. Ed. 370]. The holders of such bills are entitled, therefore, not only to enforce the statutory liability of the stockholders, but to claim the full amount of their face without any regard to the price at which they may have purchased them.

In deference to the wishes of the plaintiffs' counsel. I have consented to hear and determine the main issue of law involved in this case before the introduction of any testimony as to the character of the plaintiffs' claim. This inquiry is now necessary, as it would be improper to subject the defendants to further expense until it shall have been ascertained that those who are invoking the aid of the Court are holders of notes which the stockholders are bound to redeem.

I shall, therefore, direct an inquiry upon this point, and it may prevent delay and trouble hereafter to say, now, that, in my judgment, the date of a bank note is of little or no weight in determining the date of its issue. Its purpose of circulation involves this result. In ordinary banking business, such notes are usually paid into the banks and re-issued again and again. they are thus re-issued by the bank a new contract is made. It is upon this ground that the bar of the statute of limitations has been held to be inapplicable to such bills, though they are not distinguishable in form from ordinary promises to pay. For this reason,

*114

*I would hold, after so long a lapse of time since the suspension of the bank, during the greater part of which it continued its usual business, without any suit against it, by any bill holder, to compel payment in specie, that the presumption is that the bills now outstanding have been issued since the suspension, and that, therefore, the burden of proof is upon the holder, who claims a prior issue.

It is ordered that it be referred to Wm. J. Gayer, Esq., to take testimony as to whether the plaintiffs are holders of bills of the Farmers' and Exchange Bank, issued prior to 29th November, 1860, and that he report the testimony to the Court.

It is further ordered that the Referee take testimony and report what bills, if any, of the said bank, proved before him, were issued as a loan to the State of South Carolina, or to the Confederate States, in aid of the rebellion.

The plaintiffs in the case of Donaldson and others appealed on a number of grounds, pellants.

Magrath & Lowndes, contra.

Feb. 17, 1873. The opinion of the Court was delivered by

The decree appealed WILLARD, A. J. from is clearly not final in the sense entitling it to be brought in this Court. The decree merely determines an important question on which the rights of the parties may, to some extent, depend, but establishes no rights as between the parties plaintiff and defendant.

Several persons unite as plaintiff, alleging that they are holders of bills issued by the Farmers' and Exchange Bank. They seek to recover the amount of these bills from certain defendants, who, they allege, were stockholders of the bank at the time of its failure, and, as such, liable, personally, under the statute, on account of such obligations, to an extent equal to twice the amount of stock held by them.

This claim involves an important question, namely, at what period of time must the bank be regarded as having failed, in the sense of the statute. Two periods were alleged, one in 1860, when the bank ceased to make specie payments, and one in 1865, when it was ascertained to be insolvent. The decree fixes the period of failure in 1860. Before the rights of the parties can be fixed,

*115

as it regards *the bearing of this question of the date of failure upon them, it must be ascertained whether the bills held by the plaintiffs were issued and in circulation at such date of failure, and whether the defendants were stockholders at that time. There appear to be, in addition to these, other questions that may have to be brought to a solution before a final decree can pass, but for the present purpose it is enough to know that the rights of the parties have not been passed upon to such an extent as to show that they will ultimately be entitled to a decree. We cannot say, from the record before us, but that the complaint will finally be dismissed, as against all the plaintiffs, for the want of a substantial interest in the question passed upon by the decree.

A decree or judgment cannot be regarded as final that leaves in doubt the question whether the plaintiff will, in the end, be entitled to recover. Such a decree may pass upon an important question material to be considered in its bearing on the result of the case, but it is the office of a decree to go further than to settle the question on which the rights of the parties depend—it must ascertain and fix these rights to an extent amounting to a substantial termination of all questions directly at issue in the case.

this point, and, by its terms, ordering a ref- balance. The procedure for foreclosure was

Chamberlain, Seabrook & Dunbar, for apprenence to ascertain certain facts, contemplates a further hearing in the Circuit Court before a final adjudication is reached.

> The decree, not being final, is not appealable into this Court at the present stage of the proceedings, and the appeal must be dismissed.

> MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *116

*ALSTON v. ALSTON,

(Columbia. Nov. Term, 1872.)

[Records = 18.]

Evidence that the parties to a lost mort-gage of five plantations, executed in 1854, resid-ed in the District where the lands lie, and that the office of the Register of Mesne Conveyance of the District, with its books and records, was destroyed by fire in 1865, with other slight circumstances, fortified by the maxim omnia presumuntur esse rite acta: Held, In a contest with a junior mortgagee of one of the plantations, to sustain the conclusion of a Referee and the Circuit Judge, that the lost mortgage had been duly recorded.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 40; Dec. Dig. ⊗=18.]

Before Carpenter, J., at Charleston, April Term, 1870.

On June 10, 1854, William Algernon Alston, Sr., conveyed to his son Joseph Alston five plantations in Georgetown District, one of which was called Calais, and to secure the payment of the purchase money, \$100,000, Joseph Alston and his wife, Helen Alston, gave to the vendor their bond and mortgage of the plantations, bearing the same date.

On April 11, 1856, Joseph Alston gave to Joseph Thurston his bond, conditioned for the payment of \$8,000 with a mortgage of Calais to secure its payment.

On March 16, 1858, Joseph Alston conveyed to his son, W. A. Alston, Jr., the five plantations, the deed of conveyance stating that they were subject to the mortgage to William Algernon Alston, Sr., and W. A. Alston, Jr., who joined in the deed, covenanted to assume upon himself and pay the debt to William Algernon Alston, Sr., and also other debts of Joseph Alston, whether secured by mortgage of the plantations or otherwise.

William Algernon Alston, Sr., died about the year 1860. W. A. Alston, Jr., also died, and after the death of the latter, proceedings were commenced against his executors and devisees by the executors of William Algernon Alston, Sr., for foreclosure of the mortgage of June 10, 1854. Under these proceedings the five mortgaged plantations were sold to a purchaser who paid part of the money The present decree stops short of reaching in cash and gave bond and mortgage for the for construction of the will and settlement of Alexander Robinson that the bond and mortthe estate of William Algernon Alston, Sr., and after the sale for foreclosure Richard Lathers, as executor of Joseph Thurston, deceased, came in by petition, and having proved the mortgage given by Joseph Alston to his testator, claimed to be first paid out of the proceeds of the sale of Calais, on the

*117

ground, as he contended, that the *mortgage to William Algernon Alston, Sr., had never been recorded.

The case was referred to a Referee, and so much of his report as relates to the question made by the petition of Lathers is as follows:

"It has been already stated that of the five plantations mortgaged by Joseph Alston and Helen Alston to secure the payment of the Lond for \$100,000, one was known by the This mortgage was duly name of Calais. executed 10th June, 1854.

"A mortgage of Calais was executed by Joseph Alston to Joseph Thurston, 11th April, 1856, to secure a bond of same date, originally conditioned for the payment of \$8,000.

"This bond and mortgage were produced in evidence; the latter recorded in the proper office at Georgetown, on 16th April, 1856, and re-registered at same office, on 16th April, 1867.

"There is no direct proof of the recording of the mortgage of Joseph Alston and Helen Alston to William Algernon Alston, nor could direct proof have been expected under the state of facts already adverted to in relation to this instrument. But the circumstances, from which it is submitted that the Court would infer that the mortgage was duly recorded, are, among others, the following:

"1st. That the parties all resided in the same District; that the casualties of war have destroyed the usual and direct proof on this subject. The offices and records were destroyed in March, 1865.

"2d. That there is proved registry of a mortgage of slaves to W. A. Alston, Senior, by W. A. Alston, Junior, dated 30th March, 1858, which mortgage was given as collateral security (among other things) for the amount then due on the bond and mortgage of W. A. Alston by Joseph Alston and Helen Alston, which bond and mortgage had been assumed by W. A. Alston, Junior. It was expressly provided in the mortgage of slaves that the slaves were not to be liable until the lands covered by the other mortgage had been sold and failed to realize the amount due.

"A certified copy of this mortgage, from the registry of the Secretary of State, was produced before me, and is marked Ex. C.

"3d. There is extreme improbability that in a transaction of this magnitude this ordinary precaution would have been neglected even by a simple unlettered person; but,

connected with a bill which had been filed superadded to this, it was proved by Mr. gage were prepared in Mr. Petigru's office, *118

> and that there was the great*est precision in the business conducted between them, as the father never did business directly with his son. Mr. Petigru represented both parties. The bond was given for the purchase money; and it also appears by the professional bill of Messrs. Petigru & King against W. A. Alston, receipted by the firm 21st June, 1854, that there are charges on-

> "18th May, 1854, for drawing and engrossing conveyance of five plantations; and

> "18th May, 1854, for drawing and engrossing mortgage of the same, special; and

> "18th May, 1854, for drawing and engrossing bond for purchase money, etc.; and

> "10th June, 1864, 'attending you and Col. Joseph Alston, and seeing papers properly executed.

> "On the other hand, it was proved by Mr. Richard Lathers that he was intimate with Mr. Joseph Thurston for very many years; that the bond by Joseph Alston to Joseph Thurston was in witness' possession for some time; that he saw to the last payment thereon through Mr. Dukes, the agent of Joseph Alston, in New York; that Mr. Thurston considered it a good investment and well secured; that Mr. Thurston was a man of great prudence in his affairs; that witness never knew him to take a second mortgage; that Mr. Thurston took unusual care in all his investments, and that, in business, it was his advice never to take any but the best security.

> "The Referee has attentively weighed all the circumstances, and the strong conviction on his mind is that the mortgage to William A. Alston was duly recorded, and prior to that executed to Joseph Thurston, and that Mr. Thurston, although aware of the existence of the mortgage, probably relied on the ample security of the other mortgaged plantations to secure the principal debt.

> "He therefore recommends that the mortgage to William A. Alston be recognized as the prior lien upon Calais plantation."

> The decree of the Circuit Court is as follows:

> Hearing the report of A. H. Dunkin, Esq., Special Referee, of date 26th February, 1870, and counsel having been heard thereon, it is ordered that the exceptions filed in behalf of Richard Lathers, Esq., executor of Joseph Thurston, to said report, be overruled, and that in this and every other respect the report be confirmed and made the judgment of the Court.

> The petitioner, Lathers, appealed on the grounds:

*119

*First. Because the executors of W. A. Alston, not having produced the original mortgage, with endorsement of record thereon, or falsehood of any proposition can be attainnor an authenticated copy of such record, and having failed to show, by competent evidence, that such mortgage was ever recorded, and having also failed to establish a sufficient ground upon which to raise a legal presumption of the registry of such mortgage, the mortgage of Joseph Alston to Joseph Thurston on said plantation, the original of which is produced in evidence, with date of record endorsed thereon, is entitled to legal priority of lien.

Second. Because the executors of W. A. Alston, to establish their claim as against the original recorded mortgage of Joseph Thurston, produced in evidence, were required to show not only the fact of the said registry prior to the mortgage of Joseph Thurston, but also that such prior mortgage was a subsisting unreleased lien as against the plantation covered by the mortgage of Joseph Thurston at the time such last named mortgage was made and recorded, all of which they have failed to do.

Third. Because the executors of W. A. Alston neglected to take advantage of the provisions of the Act of the Legislature of said State, prescribing a means by which the lien of papers lost during the war might be preserved, and omitted altogether to record their alleged mortgage.

Fourth. Because the decree of His Honor the Circuit Judge is contrary to law and the evidence.

Rutledge & Young, for appellant. DeSaussure, McCrady, Simons & Simons,

March 14, 1873. The opinion of the Court was delivered by

MOSES, C. J. The brief in this case has been completed since the last session of the The consideration of the argument, Court. submitted in printed form, was, therefore, necessarily deferred to the present term.

The concurrence of the Circuit Judge in the conclusion of the Referee, giving a preference to the mortgage of the plantation "Calais," executed in 1854 by Joseph Alston to his father William Algernon Alston, Sr., over that of April, 1856, to Joseph Thurston, by the same party, might be sustained as decisive of the case if the question involved was to be determined as one of fact only .-Blackwell v. Searles, 1 S. C., 116.

*In the absence of that positive proof which is attained through the medium of evidence of actual facts from the lips of credible witnesses, a resort is often had to inferences or deductions from circumstances which generally attend a transaction of the same kind, and from these a presumption arises which ed." Presumptions of law must command belief until the impression is removed by countervailing positive proof. Presumptions of fact receive their force from the customs and habits of society. What men commonly do under an existing state of circumstances it is presumed all others in the like condition will do, and the results which are found to follow a particular act may be expected to succeed its repetition.

The case before us cannot be adjudged by an application of the rules which govern either conclusions conceded as presumptions of law or results accepted as presumptions of fact. It depends on the application of principles appropriate to both, or, in the language of the writers, to "presumptions of fact recognized by law,"

The execution of the mortgage to William A. Alston, Sr., if not admitted, has certainly been proved, and may be accepted as an established fact in the case. To give validity to a mortgage, neither recording or any other means of notice is necessary. It stands as a valid instrument between the parties, and it is only where the rights of third persons are protected by Statute against it that its efficacy as a subsisting lien is at all liable to objection. By our Statute of 19th December, 1843, 11 Stat., 256, "No mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers for a valuable consideration without notice, unless recorded in the office of Register of Mesne Conveyance for the District wherein such real estate lies within sixty days from the execution thereof." It is through the effect of this provision that the appellant, Richard Lathers, as executor of Thurston, claims that he has a title superior to that created by the senior mortgage. The instrument itself, as also the Register's office, where it is alleged it was recorded, together with the records thereof, have all been destroyed, and the enquiry first arises whether the facts proved in the cause make a prima facie impression in favor of the appellee, which must be overcome by the appellant before his motion can prevail. The testimony, which would have been of the highest character, is beyond hu-

*121

man reach, *and resort can alone be had to those presumptions which, if they are sufficient to command belief, must avail as the best testimony which it is in the power of the party to produce.

All of the maxims of the common law, universally recognized wherever it prevails, as founded in wisdom and justice, and in perfect harmony with the great principles which give symmetry and vigor to the whole system, are interposed in the argument against the motion. "Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium," prevails until "actual certainty of the truth is claimed as shifting the burthen of proof

on him who avers against the conclusion lutely certain, but we do not see such error which it announces. Mr. Best, in his Treatise as would justify our interference. on Presumptions of Law and Fact, p. 84, says: "So collateral facts, requisite to give validity to instruments, will, in general, be presumed." Mr. Broom, in his Legal Maxims, p. 429, remarks: "That the presumption omnia rite esse acta applies also to the acts of private individuals, especially when they are of a formal character, as writings under seal."

The effect of this rule, connected with the presumption that men are influenced in their conduct by their own interests, changes the course of proof, and throws on the other side the necessity of shewing the want of formalities, through the absence of which it claims a priority for the junior mortgage on which it relies for a precedent lien. The execution of the senior mortgage is proved-its foreclosure has not been resisted by those having an interest in defeating it. The junior mortgagee then interposes, and claims priority because he alleges that the first mortgage was never recorded, and is, therefore, void against him, a subsequent creditor without notice. The averment seeks to avoid an instrument valid and subsisting between the parties, and he who is to be benefited, by reason of any want of conformity to the law, should not complain if he is asked to shew it. He is not required to prove a negative. He is only asked to sustain the allegation, which he contends vitiates and destroys, as to him, the instrument which is valid and effective between the immediate parties to it.

Doe v. Griffin, 3 Camp., 7, is a case in point. Ejectment for leasehold premises, upon the assignment of a term by the defendant to the lessor of the plaintiff, to secure the payment of an annuity. It was insisted for the defendant that the lessor of the plaintiff was bound to prove that the annuity had been duly enrolled in pursuance of 17 Geo., 3 C., 26, as the assignment and all the annuity deeds were otherwise null and void. Lord El-

*122

lenborough said: "If *the annuity was not duly enrolled, that proof should come from the other side. Here is an assignment, executed by the defendant. I will presume it to be valid until the contrary be shewn." The principle, thus laid down, may well be applied here. On the trial, however, the onus was assumed by the appellees of showing, by circumstances, in the absence of the written proof, which had been destroyed, that the senior mortgage had been recorded. It is true they were of a character to raise a presumption only sufficient to require contradicting testimony from the other side, which it failed to produce. The conclusion to which the Circuit Court arrived may not be abso-

The motion is dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. 122

KIRKLAND v. CURETON,

(Columbia. Nov. Term, 1872.)

[Appeal and Error \$\sim 1018.]

In an action upon a money bond, where the defense is payment, the facts found by a Referee, to whom the whole issues have been referred, by consent, must be considered as finally adjudicated, unless it is made to appear that the evidence was incompetent to support his conclusions in point of law, and that, had the case been tried by a jury, the presiding Judge would have been justified in directing a finding for the party against whom the Referee found.

[Ed. Note.—Cited in Griffith v. Charlotte, C. & A. R. Co., 23 S. C. 36, 37, 55 Am. Rep. 1.

For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. ©=1018.]

[Appeal and Error \$\sim 1018.]

If any evidence is given which entitles the Referee to pass upon the question of fact, it is his province to decide what its force and effect is, and it is not competent for the Supreme Court to say that it does not sustain his conclusions.

[Ed. Note.—Cited in Meetze v. Charlotte, C. A. R. Co., 23 S. C. 21.

For other cases, see Appeal and Error, Cent. Dig. § 4006; Dec. Dig. = 1018.]

[This case is also cited in Adger & Co. v. Pringle, 11 S. C. 548; Ex parte Williams, 17 S. C. 405, as to the question of payment.]

Before Thomas, J., at Lancaster, --Term. 1872.

This was an action by Mary M. Kirkland, as administratrix of Thomas J. Withers, deceased, plaintiff, against Thomas K. Cureton, as surviving executor of Thomas Cureton, deceased, defendant, to recover a sum of money claimed to be due and unpaid on a joint and several bond, dated 1st of January, 1853, for \$10,000, and interest given by James B. Cureton, as principal, and the testator of defendant, with two others, as surety to the intestate of plaintiff, and secured by a mortgage of a tract of land given by James B. Cureton to Withers. Payments from time to time had been made, which were entered on the bond, which were admitted.

*123

*The defense was, that in January, 1863, one William Dixon purchased the mortgaged land from James B. Cureton, and in consideration thereof paid to Withers \$8,000, and gave him his (Dixon's) bond, with two sureties, for \$12,500, and that Withers accepted said sum and bond in full payment and satisfaction of the amount then due on the bond sued on, but did not enter the same as credits on the bond.

The whole issues were referred to a Referee, and at the hearing before him, William Dixon, for the defendant, testified that James B. Cureton sold the mortgaged land to witness for \$20,520; that in January, 1863, he paid Withers \$8,000, and gave him his bond for \$12,520; that these two sums exceeded the amount due by Cureton to Withers by \$1,056.70, which sum Withers paid to Cureton; that Cureton was not present when this transaction took place, he being absent from the State at the time: that Withers retained the bond sued on in this action, and the mortgage to secure its payment, and gave to witness an instrument, under seal, as follows:

"Whereas, William Dixon has executed and delivered to me his bond, with sureties, dated the 1st day of January, eighteen hundred and sixty-three, conditioned for the payment of twelve thousand five hundred and twenty dollars, interest from date, being part of the consideration agreed to be paid by the said Dixon to James B. Cureton for certain lands at Liberty Hill, sold by said Cureton to said Dixon, which lands were subject to mortgage executed to Thos. J. Withers by said Cureton to secure the payment of certain debts, which mortgage is dated the first day of January, eighteen hundred and fifty-three; and extended to another debt under date the 28th day of November, eighteen hundred and fifty-three: And whereas it is understood by and between the said Withers, Cureton and Dixon, that when the said Dixon shall pay, or cause to be paid, the bond aforesaid, executed and delivered by him to the said Withers, in full, the debt of said Cureton to said Withers shall be thereby extinguished, including one for the principal sum of three thousand dollars on which said Dixon is surety. Now, therefore, I, the said Thomas J. Withers, agree and promise to and with said Dixon, that when his said bond shall be fully satisfied and paid I will cause the said mortgage to be marked satisfied and discharged.

"Witness my hand and seal, this tenth day of January, eighteen hundred and sixtythree.

"Words 'including one for the principal

*124

sum of three thousand *dollars, on which said Dixon is surety,' being interlined before signing and sealing. T. J. Withers, [L. S.]"

"Signed and sealed in presence of

W. E. Johnson."

The following was indorsed on the above paper: "Memorandum explanatory of within:

| "Due by Wm. Dixon to James B. Cureton, for purchase money of land and interest, 1st January, 1863 \$20,520 00 |
|--|
| "Paid to T. J. Withers \$,000 00 |
| "Bond given for balance\$12,520 00 |
| "Debt and interest due by Cureton to Withers on these several bonds, 1st January, 1863,\$19,463-30 |
| "Deposited by T. J. Withers to credit of |
| Cureton in Bank of Camden 1,056 70 |

\$20,520 00"

James B. Cureton was also examined for the defense.

He testified that he sold the land to Dixon to pay the debts he owed Withers; that he had received no part of the purchase money except the \$1,056.70 paid to him by Withers; that after he made the sale, he met Withers and informed him of the sale and his purpose in making it, and asked Withers to allow Dixon to take his (witness) place and pay the debts he owed Withers. (The reply of Withers was excluded as a matter that the witness was incompetent to testify to.)

It further appeared that after Withers' death proceedings were taken to foreclose the mortgage, and that under those proceedings the land was sold to pay the debt to Withers.

The Referee found, as a conclusion of fact, that the sum paid by Dixon to Withers, and the bond of Dixon, were accepted by Withers in full payment and satisfaction of the bond sued on in this action. His conclusions of law were that the bond was satisfied, and that defendant was entitled to judgment against plaintiff for costs.

The plaintiff excepted to the conclusions of the Referee, and judgment having been entered on the report by order of the Court, he appealed, and moved this Court to review the evidence taken on the trial and reverse the judgment.

*125

*Shannon, for appellant, contended that the written paper executed by Withers at the time of the transaction between Dixon and himself, shows what was the intent of that transaction, and that Dixon's bond was not taken as payment but as collateral.

Moore, Allison, contra.

March 14, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The appeal is from a judgment entered upon the report of a Referee of the whole issues in an action on a bond conditioned for the payment of money. It is to be assumed that the order of reference was made with the consent of the parties, as no objection is made to it on the

der the Code of Procedure.

Under the appeal we have only authority to review the decisions below on questions of law material to the case.-Sullivan v. Thomas, 3 S. C., 531. The facts found by the Referee must be considered as finally adjudicated, unless it is made to appear that the evidence on the part of the defendant was incompetent to support his conclusions in point of law, and that, had the case been tried before a jury, the presiding Judge would have been justified in directing a verdict for the plaintiff.

The Referee found, as matter of fact, that the obligee of the bond in suit had accepted in full payment and satisfaction thereof a certain sum of money and the bond of a third person with sureties.

If this conclusion of fact is to be regarded [Ed. Note.—For other cases, see Appeal and as decisive, the judgment in favor of the de- Error, Cent. Dig. § 4661; Dec. Dig. ©=1195.] fendant was a necessary legal consequence.

There was testimony in the case competent to go to the Referee, or to a jury, as bearing on the question of fact, whether the money and bond were accepted as payment of the bond in suit.

The action was against the personal representative of a surety on a joint and several bond made by James B. Cureton, T. J. Cureton, and others, to T. J. Withers. It was contended, on behalf of the defendant, that this bond had been satisfied and paid by the acceptance, on the part of Withers, the obligee, of the amount, in cash and the bond of a third person.

The fact to be established, and which was found by the Referee, was, that the acceptance of such payment and bond was intended by the parties as payment. The evidence discloses two facts material to this question: *126

First, that J. B. Cureton, the principal *obligor of the original bond, applied to Withers, the obligee, to accept the cash payment and bond offered, by way of substitution, in satisfaction of the original bond; and, second, that on the completion of the transaction, Withers, having received such cash payment and substituted bond for an amount exceeding the sum due on the original bond, paid the difference, in cash, to J. B. Cureton.

It does not appear, by direct testimony, that Withers, in terms, acceded to the proposition of J. B. Cureton, to accept the cash and bond, evidence on that subject having been rejected by the Referee, under the defendant's exception. The fact of the payment of such difference clearly bears on the question of acceptance. It was the province of the Referee to pass upon the force and effect of this testimony, and it is not competent for this Court to say that that evidence was insufficient to sustain his conclusion.

We regard the evidence as sufficient to entitle the Referee to pass upon the question

ground that the issue was not referable un-tas matter of fact, and, therefore, there is no error of law in the report which can be made ground for setting it aside.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 126

KIRKPATRICK v. ATKINSON.

(Columbia. Nov. Term, 1872.)

[Appeal and Error =1195.]

A decree on appeal affirming the Circuit decree settles the law of the case to that time, and, as between the parties, is conclusive, in all subsequent proceedings in the same case, on all points adjudged by the Circuit decree.

[Cancellation of Instruments \$\infty\$=57.]

Under a decree setting aside, for fraud, misrepresentation and undue influence, deeds of real estate and slaves in which the grantor reserved to himself the use for life, and ordering defendant, the grantee, to account to the plaintiff, as administrator of the grantor, for the rent of the lands and hire of the slaves from the date of the deeds: Held. That the account was properly taken by charging defendant with the value, as estimated, of the rent and hire.

[Ed. Note.—Cited in Rabb v. Patterson, 42 S. C. 537, 20 S. E. 540, 46 Am. St. Rep. 743.

For other cases, see Cancellation of Instruments, Cent. Dig. § 115; Dec. Dig. ⊕57.]

Before Thomas, J., at Chester, October Term. 1871.

The proceedings in this case were commenced by a bill in equity filed in 1857 by Isom Kirkpatrick, as administrator of John McKelvy, deceased, against Valentine Atkinson and Elizabeth his wife, and its object was to obtain a decree setting aside, on the *127

*grounds of want of sufficient capacity, and of misrepresentation, fraud, and undue influence, two deeds made by the intestate and his wife, dated 23d June, 1847, whereby the intestate "in consideration of their services heretofore and which may hereafter be necessary, and moneys which may in future have to be paid," conveyed to defendants the tract of land on which he lived, and seven slaves and all his other personal estate, reserving to himself and his wife the use thereof during their lives.

The wife of the intestate died in September, 1848, and he died in July, 1852.

By an order of the Court made in July, 1857, issues were made up to try by a jury:

1. Whether the intestate was of sufficient capacity to execute the deeds?

2. Whether said deeds were procured to be executed by misrepresentation, fraud and undue influence.

The issues were tried at March Term, 1858,

and the jury found for the plaintiff on both Court of law. It is ordered that such payissues.

Defendants moved for a new trial of the issues, and the motion was heard by Chancellor Dargan, in July, 1858, who inade the following decree:

Dargan, Ch. This cause coming on to be heard on the bill, answer, and the verdict of the jury, on the issues heretofore ordered by this Court, and the grounds of appeal therefrom on the part of the defendants, on consideration of the same, it is ordered and decreed that said grounds of appeal be overruled-and the jury having found by their verdict that the three several deeds mentioned in the pleadings made by John Mc-Kelvy and wife to Valentine Atkinson and wife, to wit: The two deeds, dated 23d June, 1847, and also for negro Mat, of the 7th of August, 1847, were procured to be executed by misrepresentation and fraud, and at the time of the execution of said deed, the said John McKelvy was not of sufficient capacity to execute the said deeds-and this Court, being satisfied with said verdict, from the testimony, it is ordered and decreed that said deeds are fraudulent and void-that they be vacated and set aside—that the defendant, Valentine Atkinson, deliver them up to the Commissioner of this Court, and that the same be cancelled. It is further ordered that said defendant. Valentine Atkinson. deliver to the complainant, administrator of

*128

John *McKelvy, the negroes and other personal property in his possession, embraced and mentioned in said deeds, together with the issue and increase of the female slaves since born, and also of the stock of horses, cattle, hogs and sheep. And it is ordered and decreed that said negroes and other personal property belonged to John McKelvy at the time of his death, and now constitute a part of his estate, and that the complainant, his administrator, proceed to administer the same according to law.

It is further ordered that the defendant account before the Commissioner of this Court for the hire of the negroes and the rents of the lands conveyed to him from the time of the execution of the deeds conveying the same; that he also account for all such slaves or other personal effects of the said John McKelvy, which have at any time come into his possession, and have been sold by him, or in any wise disposed of or lost by his default; also, for all moneys or personal effects of whatsoever kind or nature received by him for or on account of said John McKelvy. Also ordered that the Commissioner enquire and report to the next term of this Court upon the various matters is further ordered that defendant, Valentine term for an order vacating, on the ground of in this Court, and also of the issue in the cree as required defendants to account for

ments of defendant, for John McKelvy, of any debts as may be established, be allowed as an offset pro tanto in the accounts directed to be taken.

The defendants appealed to the Court of Appeals in Equity, and that Court, at May Term, 1859, made a decree as follows:

"It is ordered and decreed that the Circuit Court be affirmed and the appeal dismissed."

The grounds of appeal and opinion of the Court of Appeals are reported in 11 Rich. Eq., 27.

On the reference before the Commissioner it appeared that McKelvy remained in possession of the property from the time of the execution of the deeds until his death, and there was no proof that defendants reserved the rents of the land and hire of the slaves. Testimony was heard as to what the land would have rented for and the slaves hired for, and on the 25th June, 1859, the Commissioner filed his report wherein he charged the defendants with the value of the rents and hire from the 23d June, 1847, to the 1st January, 1854.

The defendants excepted to the report on

*129

several grounds. The *first is recited infra in their second ground of appeal to this Court, and the second was to the effect that the Commissioner erred in charging defendant with the value of the rent after the death of McKelvy.

The case was heard on the report and exceptions by Chancellor Carroll, at July Term, 1859, who, on the 25th of March, 1862, filed his decree, whereby he sustained defendants' second exception, and so much of the first as related to the rents since the death of McKelvy-overruled the rest of the first and all other exceptions, and recommitted the report to be reformed in accordance with the decree.

Isom Kirkpatrick died in the year 1860, before the decree of Chancellor Carroll was filed. On the 2d October, 1870, a complaint, in the nature of a bill of revivor, was filed by Elias M. Kirkpatrick, as administrator de bonis non of McKelvy. Defendants answered the complaint, and stated that the terms of the deeds gave them no right to the possession of the property during the life-time of McKelvy; that they had never claimed such right, and had not, in fact, received the rents and hire, and the original bill did not call for an account of such rents and hire.

By an order made at April Term, 1871, the bill was revived and a Referee appointed with instructions to restate the account in accordance with the decree of Chancellor of account herein directed to be taken. It Carroll. Defendants moved at the same Atkinson, pay the costs of these proceedings mistake, so much of Chancellor Dargan's devy, and to strike from the account all the charges during that period. The motion was refused, and defendants excepted.

On the 11th September, 1871, the Referee filed his report, whereby he charged defendants with the sum of \$8,434.84, a greater part of which was rent and hire prior to Mc-Kelvy's death. Such part defendants moved, at October Term, 1871, to strike out of the account, but the motion was refused, and they again excepted. The report was then confirmed, and judgment having been entered for plaintiffs, defendants appealed on the grounds:

1. Because His Honor Chancellor Dargan, in his decretal order, bearing date July 9th, 1858, erred in directing that the defendants should account for the hire of negroes and the rent of lands of John McKelvy, from the date of the deeds conveying the same, it being apparent on the face of said deeds that

*130

they were not intended to *convey to the defendants any interest in said property until the death of McKelvy, which did not occur until several years subsequent to the date of said deeds; and the plaintiffs' bill expressly stating that the said John McKelvy was in possession of said property at the time of his death, and not charging that the defendants had any use or enjoyment of said property during the life-time of said McKelvy.

- 2. Because His Honor Chancellor Carroll erred in not sustaining defendants' first exception to the report of the Commissioner, filed July 4th, 1859, which is in the following words: "Because the Commissioner erred in charging the defendants with rent of lands and hire of negroes from the 23d day of June, 1847, until the 1st of January, 1854, inasmuch as John McKelvy had in his possession dominion and control of said land and negroes, and exclusively enjoyed the emoluments thereof; and inasmuch as, by the express terms of the deeds made by McKelvy and wife to Atkinson and wife, the said McKelvy and wife were to have the benefit and use of said property conveyed, during their lives; and Atkinson and wife were not to have nor to enjoy the use or benefit of said lands and negroes until after their decease.
- 3. Because His Honor Judge Thomas erred in not granting defendants' motion to strike out of the report of the Referee all charges made for rent and hire during the life-time of John McKelvy, it being clear that defendants had no use or possession of the property during that time, and said charges being manifestly unjust and not warranted by law.
- 4. Because Giles J. Patterson, Esq., Commissioner in Equity, erred in holding that the decretal order of Chancellor Dargan required him to charge defendants with the hire of negroes and rent of lands from the date of session nor enjoyed the benefit of the proper-

rent and hire anterior to the death of McKel-the deeds in controversy, which were not in possession of defendants until the death of McKelvy, as it should not have been assumed that the said Chancellor intended by said order to charge the defendants for the use of property of which they had neither the possession nor the right to possession. And Chancellor Carroll and, after him, Judge Thomas, have erred in sustaining the error of such Commissioner, and in refusing to correct the same when brought to their attention.

> 5. Because the order of Chancellor Dargan, if intended to charge defendants with the rent of land and hire of negroes, during a period when it was not charged or proven

*131

that the same were in possession *of defendants, was an error patent on the face of the record; and, being mere nullity, could confer no authority upon the succeeding Chancellor, Judge, Commissioner or Referee, for the successive rulings and orders whereby the defendants have been unjustly charged with the hire of negroes and the rent of lands during a period when said defendants had no possession of said negroes or enjoyment of said land.

6. Because of the amount composing the final judgment, the sum of \$7,787.63 is on account of charges not claimed in the bill, and from which defendants have never received one particle of benefit, and it would be subversive of all law and justice for the plaintiff to receive more than he has demanded in his complaint, and more than he has proven to be due by reason of the mistakes or inattention of others-officers of this Court-for which the defendant is in no wise responsible.

Brawley, for appellants, contended:

1. That the decree of Chancellor Dargan, so far as it directed an account to be taken of the rents and hire prior to the death of McKelvy, related to a matter not in issue in the case, and established a liability different from and greater than that charged in the bill. The error, therefore, is apparent on the face of the record, and the decree should be reversed, or treated as void. He read from the bill to show that neither in the stating nor any other part was any claim made for an account of the rents and hire which had accrued before McKelvy's death, but, on the contrary, that such claim was inconsistent with the allegations and prayer of the bill. He cited 1 Dan. Ch. Pr., 359, 376, 412, 421, 435-8; Mitf. Pl., 39; Story Eq. Pl., §§ 263-4; James v. McKeoan, 6 John., 569; Lyon v. Sallmage, 16 John., 516; Gonham v. Child, 1 Bro. C. C., 94; Crocket v. Lee, 7 Wheat., 525; Harrison v. Nixon, 2 Peters, 503; Carneal v. Banks, 10 Wheat., 190; McCaw v. Blewit, Bail, Eq., 98.

2. That defendants neither had the pos-

the bill is "that an account be taken of the hire of such slaves and the rents and profits of said tract of land, which have been received or enjoyed by the defendants." The decree should be construed with reference to the prayer. All plaintiffs asked was an +132

account of the *rents and hire received, and. the decree should not be construed as being intended to give more than was asked. So construing it, there is error in the account taken.

Hemphill, contra:

1. The defendants can have no standing in this Court as appellants.

(a) Because the objection, now taken as the ground of appeal, was, in effect, overruled in this case by the late Court of Appeals in Equity.-11 Rich. Eq., 27 to 32; 7 Stat., 304, § 3.

(b) Because the appeal now, from the decree of Chancellor Dargan, comes too late, for the Courts will not permit a matter once passed over in an appeal to be afterwards stirred up.—Boyce v. Boyce, 6 Rich. Eq., 320; Britton v. Johnson, Dud. Eq., 28; Dupont v. Johnson, 1 Bail. Eq., 279; Huson v. Wallace, 1 Rich. Eq., 24; Austin v. Kinsman, 1 S. C., 101.

2. If there was a final decree as to the distinct branch of litigation now before the Court, the appeal should have taken in the time and in the manner prescribed by the rules of Court, or the right of appeal is lost. -Simpson v. Downs, 5 Rich. Eq., 424.

3. Chancellor Dargan's decree finally settled the point now under consideration, and this appeal is too late.-7 Stat., 305, § 5.

4. The appellants having acquiesced in the decree of Chancellor Dargan, and acted under it, their appeal should be dismissed, because taken too late.—Rawls v. Walls, 5 Rich. Eq., 149, 150.

5. The bill is sufficient to cover the decree. By the special prayer of the bill no time is fixed from which the accounting is prayed.

6. If there is in the bill a prayer for specific relief and one for general relief, the Court will grant any relief the case requires not inconsistent with the specific relief prayed-Jeannerett v. Radford, Rich. Eq. Cases, 471, 474, 475; Hatcher v. Hatcher, 1 McM., 317; Story's Eq. Pl., §§ 40, 41, and note 2; Mitf. Pl., 38, 39, and note 2; 2 Madd. Ch., 138, 139; Beaumont v. Boultree, 5 Ves., 495.

7. If parties go to trial on general statements in the bill, the Court is bound to render a decree on the case thus made, if enough appears on the record to warrant the judgment which the facts proved authorize the Court to pronounce.-Clark v. Saxon, 1 Hill Ch., 72.

8. By the decree of Chancellor Dargan it *133

ty before McKelvy's death. The prayer of fact, from the testimony before him, that Atkinson did have possession of the land and slaves during the life of McKelvy.

9. The judgment of the Chancellor on a question of fact, like the verdict of a jury, will not be disturbed unless the overbearing weight of the testimony leads to a different conclusion.-Womack v. Austin, 1 S. C., 421; Williams v. Beard, 1 S. C., 325; Blackwell v. Searles, 1 S. C., 116; Austin v. Kinsman, 1 S. C., 97, and the two cases there cited; Cabeen v. Gordon, 1 Hill Ch., 58; Lord v. Lowry, Bail. Eq., 514.

10: There were sufficient facts in the testimony to warrant the conclusion that Atkinson had possession of the property during the life of McKelvy.

March 14, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The decree of the Court of Appeals, on the appeal in this case, from the decree of Chancellor Dargan, is the law of the case and, as such, must be administered by us.

The Commissioner's report, on which the final decree now before us on appeal was based, proceeds on the ground that, under the accounting ordered by the decree of Chancellor Dargan, affirmed by the Court of Appeals, the defendant was to be charged with the reasonable hire of the slaves and rent of the land from the date of the execution of the deeds, subject to reduction by such discharges as should be established under the last clause of that decree. As the case now stands before us, the question of charging the rents of the land only relates to rents accruing during the life-time of McKelvy.

The question is, whether this method of accounting is conformable to Chancellor Dargan's decree. That decree contains the following language: "It is further ordered that the defendant account before the Commissioner of this Court for the hire of the negroes and the rent of the lands conveyed to him, from the time of the execution of the deeds conveying the same." It concludes with the following language: "It is ordered that such payments of defendant for John McKelvy of all debts as may be established be allowed as an off-set, pro tanto, in the accounts directed to be taken.'

This decree was based on the idea that the defendant had, by undue influence, obtained *134

a certain control over the property of *Mc-Kelvy, and it is consistent with the idea that defendant had substantial control of that property from the execution of the deeds. The clauses directing the accounting are intelligible, as viewed from this standpoint. To direct an account of the profits of the employment of McKelvy's slaves and land, allowing to the defendant, out of such profits, appears that he con*sidered, as a question of whatever went to the support or advantage of McKelvy, would have led to no satisfac- [Carriers = 159.] tory result. Such an account, while difficult to take and unlikely to result in any satisfactory degree of certainty, would only be correct, in principle, if the relation between defendant and McKelvy had been legitimate. As it was, the exercise of control on the part of defendant over McKelvy's property must, under the decree, be referred to undue influence on the part of defendant over McKelvy. Such being the case, the risk and loss lies with defendant, if the profit of the employment of the land and slaves was less than, by prudent management, it might have been made. The proper course, therefore, was that directed, and which was adopted by the Commissioner, to charge defendant with the value of the use of the slaves and land, and leave to him to establish proper discharges under the last clause of the decree.

The proposition that has been advanced and discussed that the decree of Chancellor Dargan, as affirmed, must be regarded as having settled merely the question of fraud as affecting the deeds, leaving open all other questions in the case, has no foundation. It is the province of a decree to ascertain all the rights of the parties in contest and ripe for a decree, and not to select some one or more questions, and to dispose of them, leaving their bearing on the practical rights of the parties open for future discussion. The decree of Chancellor Dargan precludes, by its terms, the idea that any thing touched upon by that decree was left open and undisposed of. It not only determines the leading issue of the case, but gives specific directions as to the accounting, the effect of which was to settle the principles on which the accounting ought to be conducted.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *135

*PORTER v. SOUTHERN EXPRESS COM-PANY.

(Columbia. Nov. Term, 1872.)

[Evidence =244.]

A receipt of an Agent of an Express Company of goods for conveyance and delivery to containing a memorandum of agreeplaintiffs, ment, is of itself evidence to bind the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. ©=244.]

[Carriers \$\infty 94.]

In an action against an Express Company, upon a written contract to convey and deliver goods, the plaintiff relies upon the terms of the contract, and not upon the implied common law obligation of carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–395, 456; Dec. Dig. ⇐⇒94.]

A clause in the contract of an Express Company, that "it is not to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it:" Held, Not to limit the liability of the company in an action upon the contract to recover for the non-delivery of goods.

[Ed. Note.—Cited in Deaver-Jeter Co. v. Southern Ry., 91 S. C. 506, 74 S. E. 1071, Ann. Cas. 1914A, 230.

For other cases, see Carriers, Cent. Dig. § 670; Dec. Dig. & 159.]

[Carriers \$\infty\$94.]

In an action against an Express Company to recover damages for the non-delivery, in 1864, of goods purchased and paid for by plaintiff in Confederate currency, it was not error to re-fuse to instruct the jury that the measure of damages was the value in lawful money of the Confederate currency paid for the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–395, 456; Dec. Dig. \$\sim 94.]

Before Graham, J., at Charleston, March Term. 1871.

Action of assumpsit, commenced in April, 1867. The declaration contained two counts. The first alleged that defendants, being carriers of goods for hire, the plaintiffs, on the 12th of March, 1867, delivered to the defendants, at Petersburg, Virginia, thirteen boxes of tobacco of the plaintiff, and in consideration thereof, and of a certain reward, defendants promised safely and securely to carry and deliver the said boxes of tobacco to the plaintiffs at Charleston, South Carolina: breach, that they have not delivered, &c. The second count was for not taking due and proper care of the tobacco, by means whereof they were lost to the plaintiffs.

The appeal was heard upon a brief containing the pleading and a case with exceptions as follows:

The plaintiffs, to maintain the issues on their part, offered in evidence the testimony of Mirabeau L. T. Davis, a witness residing at Norfolk, Virginia, taken by Commission. This witness, among other things, testified as follows:

"In March, 1864, I was the agent of the defendants at Petersburg, Virginia, for the purpose of receiving goods to be transported by the defendants. As such agent, I gave the following receipt:

"Southern Express Company, "Petersburg, March 12, 1864.

"Received of J. E. Venable, two packages 5 attd & twenty-two packages, 4 attd. Twenty-one and a half boxes & twenty-six and three fourth boxes.

*136

*"Value \$10,000-and C. O. D. \$1,761 10-Addressed N. M. Porter & Company, Charleston, S. C.

"To be forwarded as addressed.

"It is agreed and is a part of the consideration of this contract, that the Southern Express Company is not to be held responsible, except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, fire, &c., unless specially insured, and so specified in this receipt: and in no event to be held responsible for the safe transportation of the articles herein receipted for, after the same shall have been delivered to other parties, which the Southern Express Company is hereby authorized to do, for completing the transportation and delivery; nor is it to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it.

"Paid, Freight......\$1,679 00 "Paid Ins., Charges............50 00

> \$1,729 00 Davis."

"For the proprietors,

"Written across the face of the said receipt are the words, 'War risk excepted.'

"I did sign said receipt on behalf of the Southern Express Company, and it was my principal business to receive and sign receipts for goods to be forwarded by the company."

"The Southern Express Company, at date of said receipt, (12th March, 1864,) was engaged in carrying goods for the public for hire, and did then carry goods, wares and merchandise for hire from Petersburg, Virginia, to Charleston."

The plaintiffs further offered in evidence the testimony of N. M. Porter, one of the plaintiffs, who testified, among other things, as follows:

"In the early part of 1864 I purchased some tobacco in Virginia, of Jones & Co., of Richmond, and shipped through J. Venable, of Petersburg, Virginia. It was to be shipped to my firm, at Charleston, South Carolina, by express, at Petersburg. The invoices I received of this tobacco correspond with the receipt given by Mr. Davis, the Express Agent, and referred to in his examination. Of this tobacco, 132 boxes, all sizes, were received from the defendants. Thirteen boxes did not come to hand. One thousand five

hundred and sixty-five pounds of *tobacco were thus missing. In 1864, at the time when they should have been delivered, the tobacco was worth \$2.25 per pound, in Confederate currency, or \$3,521.25 for the quantity missing."

The plaintiffs further offered in evidence the testimony of George H. Gruber, who testified, among other things, as follows:

"Tobacco, of the same kind as that which was missing, sold in 1865, soon after the close of the war, for thirty-two cents per pound. The tobacco was worth just as much in 1864, when it should have been delivered."

It was admitted that the \$1,761.10 were paid by plaintiffs on delivery.

The testimony for the plaintiffs being closed, the defendants moved for a non-suit on the grounds:

First. That the receipt of the agent at Petersburg was not of itself evidence of the receipt of the missing tobacco, and that there was no other.

Second. That of the common law liability of a carrier for breach, of which this action was brought, the receipt of the Express Company was not evidence, and there was no other.

The said points were overruled by the Court, to which overruling the defendants then and there excepted.

And, the testimony on both sides being closed, the defendants prayed the Court to instruct the jury in the following particulars:

First. That the special contract in the receipt given by the Express Company in this case, containing special qualification of their liability as carriers, will not sustain an action for breach of the implied obligation of common carriers.

Second. That upon a special contract for transportation, requiring claim of loss within ninety days, the plaintiffs cannot recover without the claim be made within that time, and proof thereof.

Third. That the receipt of even the agent of the company is not of itself sufficient to charge the company without the oath of the witness, or evidence aliunde that the goods were received.

Fourth. That the measure of damages is the value of the tobacco at the time it ought to have come to hand at Charleston.

Fifth. That the value at that time in Confederate currency is to be reduced to the value of that currency in the currency of the United States, without interest.

But the Court rejected each of the instructions prayed for by the defendants, except the second and fourth thereof, and in lieu

*138

*thereof, instructed the jury that, as to the point made in the first instruction prayed for, the special contract in the receipt does not relieve the company from the common law responsibility, but the company is at liberty to show, as a matter of defense, that the loss came within one of the exceptions mentioned therein.

That, as to the point made in the third instruction prayed for, the receipt of the agent does bind the company.

That, as to the point made in the fifth instruction prayed for, the plaintiffs are entitled to the value of the tobacco at the time when it should have been delivered, and the jury must judge of that value; the Court will not indicate the standard; the jury must decide from the testimony, and the proof is that it sold for thirty-two cents in 1865, and that it was worth as much in 1864, and that plaintiffs were entitled to interest.

To the granting of which instructions, and the refusal of those prayed for by the defendfore the jury had withdrawn from the box, did except and still do except.

The jury found for plaintiffs \$676.75, and judgment having been entered, the defendants appealed.

Brewster, Spratt & Burke, for appellants: There was error in overruling the motion for a non-suit-

If the receipt of the agent of the defendant be not evidence of the fact of the bailment; or,

If it be not evidence of the cause of action. The issue was as to the contract of bail-To that it was incumbent on the ment. plaintiffs to shew the fact that the goods were delivered, and that such as are stated were the undertakings of the company.

Of the fact, there is but this certificate of the agent-of the undertaking, but the memoranda appended to the receipt. It does not appear that there were boxes of tobacco, or that they were delivered to the agent, but as he has admitted it in this paper, or that there was any undertaking as to the transportation, but as that is stated therein.

Then, as to the sufficiency as evidence of this receipt: That is but the declaration by the agent of the fact, and of a fact affecting the interest of the principal the declarations *139

of the agent are not *evidence. That were hearsay, and hearsay is incompetent to establish any fact susceptible of proof by living witnesses.-1 Green. Ev., § 99; Stark., Pt. 1, 46.

To this there is no exception as to the declarations of an agent in the course of his employment.-Bowman v. Rudeneus, 7 T. R., 663; Masters v. Abrahams, 1 Esp. N. P., 373; Farlie v. Hastings, 10 Ves., 128; Longhorn v. Allnut, 4 Taunt., 511; Kohe v. Cologan, 4 Taunt., 565; Reynor v. Person, 4 Taunt., 662; Gilpin v. Consequa, 3 Wash. C. Ct., 184; Beale v. Petit, 1 Wash. C. Ct., 241; Mowry v. Talmadge, McLean, 159; United States v. Martin, 2 Paine, 68; Millick v. Peterson, 2 Wash. C. C., 31; United States v. Barker, 4 Wash, C. C., 464; Blight v. Ashley, Pet. Ct. Ct., 15; Corps v. Robinson, 2 Wash. C. C., 388; Jourdan v. Wilkins, 3 Wash. C. C., 113.

The principle is that the declarations of an agent bind the principal; but it is not the law that they are evidence of specific facts declared against the principal.

The rule is not hard which merely requires proof of the corpus of the bailment, for, until that be done, it cannot appear that the plaintiff will be injured.

The rule were intolerable that would make the principal responsible for not the acts only but the declaration of his agent.

Of this bailment there was no evidence but in the receipt. The action is for certain boxes of tobacco, which never came to hand.

ants, the defendants then and there, and be- If some came to hand, it would not then imply that these would also, had they been received; beside that, there is no fact to show that the boxes of tobacco had existence; and while, therefore, the declaration of an agent might be shown as part of the res gestæ, the res itself-the bailment-must be shown of which it forms a part, and that also cannot appear from the declaration of the agent.

2d Ground. Non-suit.

No evidence of the cause of action.

That was for breach of the duty of the carrier at common law.

Of that there was no evidence, but that consisting in this receipt.

The receipt is attended by stipulations, and so is a special contract in relation to the bailment: 1. The Express Company is not a "common carrier."-Story Bail., 495, 509, 446; Story on Contracts, 752, 4 T. Rep., 581; 2 Stark., 461; 19 Barb., 577. 2. But, if so, the "common carrier" may accept specially.-5 Bing., 217. 3. The special receipt is a

*140

special contract,-Shaw v. York, 13 *Q. B., 347; York v. Crisp, 14 Com. B., 527; New Jersey Steam Nav. Co. v. Merch. Bank, 6 How., 344; Kilman v. U. S. Express Co., 3 Kansas, 205; Swindler v. Hilyard & Brooks, 2 Rich., 303; Singleton v. Souer, 1 Strob., 214; New York Man. Co. v. Hl. Cent. R. R., 8 Wall, 107; Parker v. Dinsmore, Sup. Ct. New York, pamphlet, p. 7; Myers v. Harnden's Express Co., Sup. Ct. N. Y., p. 8; Van Winkles v. Adams' Express Co., Sup. Ct. N. Y., P. 9; Boorman v. Adams' Express Co., Wisconsin, p. 10; Waylands, Administrator. v. Mosely, Sup. Ct. Alabama, p. 24.

The special agreement supercedes the obligation implied from the bailment simply, and the proof of the one will not support the allegation of the other.-Munro v. Munwood, 5 Sanf., 557; Toxin v. Gonin, 5 Duer, 389; Collwell v. Conklin, 4 Duer, 45; Lawrence v. McCrady, 6 Bosw., 329; Pexley v. Clark, 32 Barb., 268; Cran v. Osgood, 13 Barb., 583; Hampstead v. N. Y. Central R. R. Co., 28 Barb., 485.

This is not a case of variance under provisions of Section 192 of the Code. That applies to a case of misdescription of the cause of action.

This is a case in which one cause of action is alleged and another shown, which is the failure of proof, declared to be fatal, under the Section 194 of the Code.

The question is not as to the degree of difference or extent of injury or inconvenience from the practice, but if the contract in the receipt be in fact different from that declared on, then it cannot be received in proof, but upon the principle that one cause of an action may be shown, and another inferred, which can scarcely be admitted.

So much upon the motion for a non-suit.

But if that, for any reason, be not proper, the same points were made by instructions prayed for, and if the receipt be not of itself evidence of the bailment, or be evidence of a cause of action different from that declared on, the plaintiff is entitled to a new trial, the instructions prayed for being refused.

Porter & Conner, contra:

The receipt of the agent of the company is not only evidence, but the very best evidence of the receipt of the goods. In cases against carriers, the bill of lading is invariably offered in evidence, no matter what exceptions

*141

or limitations there may be in it. The *receipt of an authorized agent is the receipt of the company.-Angel on Carriers, §§ 464-5, § 146; Nelson v. Woodruff, 1 Black., 156.

One who carries for hire is a common carrier, and he cannot vary his common law liability, which is founded on principles of public policy, by calling himself a forwarder, or by any other name. Where there is a special contract, the character of the carrier is not changed, but only his liability to the extent of the exceptions.—Baker v. Brinson, 9 Rich., 203.

The law of common carriers is to be strictly applied to express carriers.—Stadhecker v. Combs & Co., 9 Rich., 193.

The receipt in this case shows that the special insurance (\$50) was paid, and so specified in the receipt. This takes it out of the exception or limitation, and puts the case directly upon the common law liability.

Upon the question of pleading, the material points are that defendants were common carriers; that they received plaintiff's goods to be carried for reward; that they undertook to deliver, and that they did not deliver.

All these things are alleged in the declaration, which is after the form in Coggs & Bernard. The rest is matter of defense.

This is also the form of complaint under the Code, where embarrassments are not allowed to arise out of the form, if there be no surprise upon the party.

The following cases are direct on the point of pleading: Wyld v. Pickford, 8 M. & W., 444; Wyse v. Great Western R. R. Co., 1 Hurl, & Nor., 64; 2 Red. on Rail., 93, note.

The principle is this: That the carrier is to be sued upon his common law liability for breach of duty, and if there be any exception as in a bill of lading or other special exemption, he may set it up in his plea, or prove it under the general issue.

But upon plea of general issue he can only avail himself of it by way of defense.

March 15, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The first ground of exception presented to the refusal of the Circuit

sition that a receipt and memorandum of agreement, issued by an agent of an Express Company, acknowledging that certain goods had been intrusted to such company for con-

veyance to a designated *point, and for delivery to the party seeking to enforce it, is not evidence in itself to bind the company, although the authority of such agent to bind the company, by its terms, was fully shown. The proposition of the defendants is, that the receipt and memorandum of agreement is to be regarded, as to its competency as evidence, as a declaration of an agent, and as such is not in itself admissible, but the matters set forth must be affirmed by the testimony of the witness under oath.

The receipt and memorandum is in itself a contract, and having been made by one authorized to bind the defendants in that manner, is entitled to be received as evidence on the same footing as all other contracts in writing.

The second exception to the refusal to nonsuit misconceives entirely the relation that the proof given in the trial sustains to the pleadings. The declaration alleged an express contract on the part of the defendants, as carriers for hire, to convey certain goods to a designated point, and deliver them to the plaintiffs. The receipt and memorandum produced proved the existence of such a contract, and consequently supported the averments of the declaration. The proposition of the defendants that the receipt was not of itself evidence to support a charge of a breach of the common law liability of a carrier has no meaning or significance as it regards the issue made by the pleadings and the bearing of the proofs upon that issue. The receipt and memorandum of agreement tended to prove the fact alleged by the declaration that the goods were delivered to the defendants for conveyance, and, as such, it was competent under the pleadings.

No ground is presented for interfering with the refusal of the Court to grant a non-suit.

The first instruction prayed by the defendants is a repetition, in other words, of the same proposition embodied in the second exception to the ruling refusing a non-suit. It is not necessary for the plaintiffs to resort to the "implied obligations of common carriers," to make out their case. They prove an express contract to convey the goods to Charleston, and to deliver them to the plaintiffs, founded on a valuable consideration, duly set forth. It is enough for them to show that the goods were not delivered to them according to the contract, in order to establish a breach. The proposition advanced by the defendants has no bearing on the case, and need not be considered as to its intrinsic merits.

*143

*The second instruction prayed miscon-Court to grant a non-suit involves the propo- ceives the meaning of that clause of the receipt, which is in the following language: fendants would have as to prompt informa-"Nor is it to be held liable for any loss or damage whatever, unless claim therefor be made within ninety days after the delivery to it." The view of this clause, taken by the defendants, is, that it operates as a limitation on that part of the contract that requires the delivery at the designated point of the same articles delivered to the defendant for conveyance. The effect of this would be that by the terms of the contract the defendants would be bound in general terms to deliver to the plaintiffs at a certain point, and yet the plaintiffs would not be entitled to enforce such obligation unless demand therefor was made within ninety days. It is not to be presumed that language employed in a contract was intended to impose obligations on one of the contracting parties, and yet not to create rights of a corresponding character in the other party. Certainly language that will reasonably bear any other construction should not be allowed to have such effect. If the construction contended for by the defendants is sound, then the ninety day clause was intended to operate with force and effect like that of the Statute of Limitations upon the plaintiff's right of action arising on a breach of the express contract to convey and deliver. We must exclude all other reasonable constructions before ascribing to the parties such an intent.

The clause in question is the concluding sentence of a paragraph distinct and separate from that part of the contract which requires delivery to the plaintiffs. The subject matter of this paragraph is the extent and measure of the liability of the defendants in the event of the goods becoming damaged or lost while in the hands of the defendants. The clause in question must be regarded as intended to apply to such a case.

As there was no evidence introduced by either party tending to show that the goods were either damaged or lost while in the hands of the defendants, the clause in question had no bearing on the case, and the refusal of the Circuit Judge to give instructions involving a construction of the true meaning and import of this clause was free from error. In the present case the charge is, that thirteen distinct packages, out of a larger lot delivered to the defendants for conveyance, were not delivered to the plaintiffs. To such a case the clause in question has no application. The defendants are to be presumed to know how many packages they received for delivery, and how many they delivered to plaintiffs, and it is not to be sup-

*posed that they stipulated for information as to a matter fully within their knowledge. As it regards the contents of a package, or the state of an article delivered, it is easy to understand the nature of the interest the detion of any claim for damage or loss.

The disposition made by the Court, as it regards this instruction, is not very clear, but that is not important, as the defendants were not entitled to have the instruction given.

The subject of the third instruction has already been considered as involving the false proposition that the receipt and memorandum of agreement was, without force in itself, considered as proof of the contract.

The fifth instruction was not called for. There was no contract between the parties based on the value of Confederate currency. The Court very properly refused to lay down any standard of the conversion of values, as the whole question was one of damage merely, a matter which is wholly within the province of the jury in a case of this nature.

None of the grounds of exception are sufficient to authorize this Court to interfere with the judgment and verdict.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 144

PRICE v. BROWN.

(Columbia. Nov. Term, 1872.)

[Equity \$\infty\$ 377; Jury \$\infty\$ 14.]

An action to set aside a Sheriff's conveyance of real estate, sold under execution, on the ance of real estate, soft under execution, of the ground that the judgment debtor held the land as trustee of plaintiffs, and to enforce the trust, is not an action for the recovery of "specific real property," but is a "matter of equity," triable by the Court, though the Judge may, in his discretion, submit it to a jury.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 789; Dec. Dig. \$377; Jury, Cent. Dig. § 67; Dec. Dig. \$14.]

 $[Trusts \iff 359.]$

Neither the Constitution nor the Code changes the former practice in actions to enforce trusts, except as to the pleading and its incidents.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 554, 565, 566; Dec. Dig. ⋘359.]

[Trusts \$\infty\$20.]

A subsequent acknowledgment of the trust, by deed, is sufficient to satisfy the terms of the Statute of Frauds requiring declarations of trust to be proved by writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 25; Dec. Dig. ⇐⇒20.]

[Trusts \$\ighthapprox 44.]

A judgment debtor, after judgment recovered, executed a deed, by which he stated that he held a certain tract of land in trust, declaring the terms: *Held*, That the declaration was not good against the creditor without clear and convincing proof, aliunde, that the trust existed before judgment was recovered.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 68; Dec. Dig. € 44.]

*145

*Before Thomas, J., at Lancaster, June Term. 1872.

This was an action by Henry R. Price and Nancy E., his wife, and his daughter, Henrietta C., with her husband, John N. Crockett, plaintiffs, against Daniel W. Brown, Jonas Crockett and Eli D. Crockett, defendants.

The object of the action was to set aside a deed of conveyance, from the Sheriff to Brown, of a tract of land sold as the property of Eli D. Crockett under an execution of Jonas Crockett against him, and to enforce certain trusts in favor of the female plaintiffs, to which, as alleged, the land was subject at and before the Sheriff's sale.

Before evidence was heard defendants' counsel contended that the action was for the recovery of specific real property, and demanded a jury. The presiding Judge refused to submit the issues to a jury, and proceeded to hear and decide them himself.

It appeared that, in the year 1856, a tract of land was sold by the Sheriff as the property of Henry R. Price, and purchased by one James Thompson, and that, shortly after the sale, Thompson conveyed a part thereof, being the land in question in this action, to Eli B. Crockett, at the price of \$210 or \$218; that on the 5th of September, 1866, Eli D. Crockett confessed a judgment to Jonas Crockett for \$2,092.13; that on the 15th of April, 1867, Eli D. Crockett executed a deed, which was recorded July 13th, 1867, by which he "acknowledged that he had recovered back the price paid by him for the land out of the separate estate of Mrs. Nancy E. Price, and, in effect, declaring the said Nancy E., and her daughter Henrietta C., entitled to the same;" (a) that Eli D. Crockett had been appointed, by the Court of Equity, trustee of the separate estate of Mrs. Price; that on the 22d of March, 1869, Jonas Crockett assigned his said judgment to Brown; and that, under the execution issued thereon, the land in question, in this action, was sold and conveyed, by the Sheriff, to Brown, in March, 1870.

The action was brought to set aside the conveyance to Brown, and to enforce the trusts of the deed of April 15th, 1867.

James Thompson was examined as a witness for plaintiffs. He testified that he "did not regard the price at which the land was sold to Eli D. Crockett as the full value there-

*146

of; was influenced *by a desire that Mr. Crockett, after paying himself about \$210, then due upon the land, should give the remainder to Mrs. Price and her daughter. Eli D. Crockett was to pay the \$210 due upon the land and give the residue to Mrs. Price and

her daughter. He took the land upon those terms, and was to hold as trustee for Mrs. Price. Mr. Price, immediately after the conveyance by me to Crockett, took control and managed the property in the same manner as he did before it was sold by the Sheriff, and the other trust property."

Eli D. Crockett was examined for the defense. He testified that "he bought the land for himself, with his own money; paid \$218 for it. Afterwards he gave the land to Price's daughter. \$218 was all that Thompson asked witness for the land. At the time witness bought the land there was no agreement with Thompson that witness was to re-convey the land to any of the plaintiffs." On his cross-examination, he said "Mrs. Nancy Price had a separate estate, of which witness was trustee. This deed to the plaintiffs contains the truth. About the first of the war witness got from Dr. Crawford about \$200 of a debt due by him to Price. At the same time Price owed witness as much or more than this sum. Witness was in very easy circumstances at the time." D. W. Brown testified that at the time of the assignment of the judgment to him he had no notice of plaintiff's claim; and Jonas Crocket testified "that he did not know of any claim of Mrs. Nancy Price upon the land at the time of the assignment" of the judgment to Brown.

The decree of the Circuit Judge is as follows:

Thomas, J. One James Thompson, at a sale of the property of Henry R. Price, in the year 1856, by the Sheriff, became the purchaser of the land in controversy. He sold and conveyed the land, by deed, dated August the 20th, 1856, to Eli D. Crockett, for about the sum of \$200.00, upon the parol understanding and agreement that, upon being reimbursed the price paid, he should hold the land in trust for the plaintiffs, Mrs. Nancy E. Price and her daughter, Henrietta C., now the wife of John N. Crockett.

Some time in the year 1861 or 1862, he was reimbursed the price paid by him for the land. Shortly after the execution of the deed of conveyance by Thompson, Eli D. Crockett was regularly constituted and appointed trustee of a considerable separate es-

*147

tate *of Mrs. Nancy E. Price, by the Equity Court, held for Lancaster. On the 15th day of April, 1867, the said Eli D. Crockett, by a deed, in form sufficient to convey real estate, although inartificially drawn, acknowledged that he had recovered back the price paid by him for the land out of the separate estate of Mrs. Nancy E. Price, and, in effect, declaring the said Nancy E. and her daughter, Henrietta C., entitled to the same.

This deed appears to have been duly recorded in the proper office July 13th, 1867. Previous to its execution, viz.: September the 5th, 1866, the said Eli D. Crockett confessed

⁽a) Extract from the decree of the Circuit Court, the brief containing no copy of the deed or other statement of its contents.

judgment to the defendant, Jonas Crockett, for \$2,092.13, upon which execution was immediately issued and lodged in the Sheriff's office for Lancaster. An assignment of this judgment and execution was duly made to the defendant, Daniel W. Brown, dated March the 22d, 1869. And, under the execution, the land in controversy was subsequently levied on by the Sheriff of Lancaster, and advertised to be sold on the first Monday in February, 1870.

The plaintiffs then filed their bill in this cause, seeking to enjoin the defendants, Brown and Crockett, from having the land sold. In this bill was set forth the origin and nature of the trust upon which the land was held by Eli D. Crockett, and a copy of his deed of the 15th day of April, 1867, made an exhibit thereof. To this bill both Brown and Crockett were made parties by regular process, and, in addition, notified that an injunction would be applied for to restrain them from selling the land. In addition to such constructive notice, as might have arisen from the recording of Eli D. Crockett's deed, they thus had express notice of the trusts upon which the land was held by the said E. D. Crockett. Notwithstanding this notice they proceeded and had the land sold by the Sheriff on the first Monday, in February, 1870, which was bid off by the defendant, Daniel W. Brown, at the price of ten dollars, to whom the Sheriff made a deed of conveyance.

The plaintiffs then filed their supplemental complaint in this action, seeking to have the Sheriff's deed set aside and annulled, and the trust aforesaid set up and enforced. Both Brown and Crockett in their answers resist this claim and rely upon Thompson's deed to Eli D. Crockett; and in the argument it was urged that the Statute of Frauds rendered void the parol understanding between Thompson and Crockett in relation to the land. But, in the opinion of the Court, even if this understanding came with-

*148

in *the operation of the Statute of Frauds, still its terms were complied with in the subsequent acknowledgment, in writing, by Eli D. Crockett, contained in his deed of the 15th of April, 1867, which as evidence, had relation back to the parol creation of the trust, and rendered it valid ab initio.—Hill on Trustees, American notes, pp. 86, 87 and 88.

It is ordered, adjudged, and decreed, that the Sheriff's deed for the land to Daniel W. Brown be set aside and annulled; that the plaintiffs, Nancy E. Price and her daughter, Henrietta C. Crockett, are entitled, as beneficiaries, to the possession of the land described in the pleadings; that a recovery thereof be awarded to them, and that the costs herein be paid by the defendants, Daniel W. Brown and Jonas Crockett.

The defendants, Daniel W. Brown and Jonas Crockett, appealed on the grounds, viz:

I. Because they were entitled to a trial by jury, and His Honor the presiding Judge erred in excluding them from such privilege, and assuming jurisdiction that properly belonged to a jury.

II. Because the issues of the action properly belonged to a jury, and, as the defendants did not waive their right to a trial by jury, His Honor assumed functions that did not belong to him, and erred therein.

III. Because the Circuit Judge in his said decree erred in deciding upon the testimony that, on the 20th of August 1856, Eli D. Crockett purchased the land in controversy from James Thompson, with the parol understanding and agreement that he, on being reimbursed the purchase money, should hold the said land in trust for the plaintiffs therein named.

IV. Because, if such was the parol understanding, the same was void as to creditors of the said Eli D. Crockett, without notice.

V. Because the said decree is contrary to the law and evidence.

Kershaw & Connors, Allison, for appellants:

I. There being a conflict in the testimony, the issue should have been tried by a jury—the only tribunal prescribed by law at which the recovery of specific real estate can be had, unless a jury trial should be waived.

"The right of trial by jury shall remain inviolate."—Art. 1, Sec. 11, State Constitution.

*149

*And the 14th Section of the same Article reads as follows, viz: "No person shall be arrested, imprisoned, despoiled or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." * * *

Section 26, Art. IV, is in these words, viz: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

The Code of Procedure declares how issues arise, and how the same are to be tried.

Section 272 of Chapter II.—An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Section 273.—An issue of fact arises upon a material allegation in the complaint, controverted by the answer.

Section 276.—"An issue of law must be tried by the Court, unless it be referred, as provided in Sections 294 and 295. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in Section 290, or a reference be

Section 270.—"Trial by jury may be waived by the several parties to an issue of fact. in actions on contract, and, with the assent of the Court, in other actions, in the manner following: 1. By failing to appear at the trial. 2. By written consent, in person, or by attorney, filed with the Clerk. 4. By oral consent in open court, entered in the minutes.'

II. The defendants, having been entitled to a jury trial, and the juries having been dismissed by the Court before the action came on to trial, defendants were taken by surprise at the trial.

III. The testimony did not warrant the Court in finding that Thompson, by deed, dated August 20, 1856, sold and conveyed the land in controversy to Eli D. Crockett, upon the parol understanding and agreement that, upon Crockett's being reimbursed the price paid therefor, he should hold the land in trust for Mrs. Nancy E. Price and her daughter, Henrietta C. Crockett. The deed itself, as well as the testimony of Eli D. Crockett, shows the contrary. And the Statute of Frauds would render void any subsequent parol understanding between Thompson and Crockett in relation to the lands.-Revised Statutes of 1871, p. 327, § 5.

*150

*That the secret understanding between Crockett and Thompson, if any such, in fact, existed, was void as to the creditor Jonas Crockett, under whose execution the land was sold, and whose debt was contracted upon the faith of the whole estate of the defendant, Eli D. Crockett, of which estate the land in question ostensibly formed a part.

Moore, contra:

1. The 1st and 2d grounds of appeal substantially assert the doctrine that the Court had no power, unless by the consent of the parties, to try the issues involved in the action, but could only refer them to a jury.

Inasmuch as these issues terminated in the question whether the land levied on and sold by the Sheriff was subject to and bound by the trusts which the respondents sought to set up and enforce, the doctrine contended for is at war with the plain provisions of the Code of Procedure.—Sections 276 and 277, p. 482.

2. The 3d ground complains of error on the part of the Judge in a finding of fact, and is answered by the principle that such finding has the force and effect of a verdict of a jury.-Mann v. Witbeck, 17 Barb., 388; Gilbert v. Luce, 11 id., 92.

3. The 4th ground states a legal proposition that cannot be maintained upon authority of the decided cases.

A purchaser without notice from a husband of the trust estate of the wife is trus- ner of pleading and its incidents.

ordered, as provided in Sections 294 and tee for her as to this property.-Franklin v. Crayon, Harper's Eq., 243.

A trust need not be created by writing, if it can be proved by writing, and a voluntary acknowledgment will dispense with written proof.—Rutledge v. Smith, 1 McC. Ch., 119.

A resulting trust may be established by parol evidence.-McGowan v. McGuire, 4 De-

Where one verbally agreed to purchase for another, at Sheriff's sale, bought the property and took titles in his own name, he will be decreed to be trustee.—Denton v. McKensie, 1 DeS. Eq., 289.

Trust funds will always be affected with the trust wherever they can be found and identified, even as against creditors of the trustee.—Gist v. Cattell, 2 DeS., 54.

Trust property cannot be levied on and sold under execution against the trustee .-Jones v. Fort, 1 Rich. Eq., 50.

4. In this case the trust was proven by the *151

written acknowledg*ment of the trustee that he had been paid for the land and held the same in trust for Mrs. Price and her daughter-this payment having been made long before judgment against trustee.

March 20, 1873. The opinion of the Court was delivered by

MOSES, C. J. The objection that the case was decided by the presiding Judge without the intervention of a jury, as claimed by the appellants, cannot prevail. The complaint was not for the "recovery of specific real property." The plaintiff sought relief through the equitable jurisdiction of the Court to set aside the deed from the Sheriff to Brown, and to enforce certain trusts attaching on the land which had been sold as the property of the alleged trustee.

The Constitution, Sec. 16, Art. IV, vests the Court of Common Pleas "with jurisdiction in all matters of equity," and by the 277th Section of the Code of Procedure the issue was triable by the Court, though the Judge, in his discretion, might have referred it to a jury.

The clause of the Constitution which provides that "no person shall be dispossessed of his property but by the judgment of his peers, or the law of the land," may be found in every Constitution under which the State has existed, and it has never been so construed as to deprive Courts of Equity, since their establishment in South Carolina, of jurisdiction over trusts, even in relation to real estate, or to preclude them from deciding all relevant issues arising in the course of the case, without the intervention of a jury. Neither the Constitution or the Code changes the practice which before prevailed in the Courts of Equity, save as to the manThe material question in the case was as to the alleged trust imposed on Eli D. Crockett, on behalf of Mrs. Price and her daughter, by the transaction with Thompson shortly after his purchase of the land, as testified to by him. The deed of 15th April, 1867, was a sufficient compliance with the Statute of Frauds, which requires "that all declarations or creations of trust of any lands, &c., shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

It is said in Lewin on Trusts, 63, "that the Statute will be satisfied if the trust can be manifested by any subsequent acknowledgment of the trustee, as by any express dec-

*152

laration by him, or any *memorandum to that effect." See also Hill on Trustees, 61; Rutledge v. Smith, 1 McC. Ch., 119; Massey v. McIlwaine, et al, 2 Hill Ch., 428; Reid v. Reid, 12 Rich. Eq., 215.

The testimony, however, against the averred trust is so strong and overbearing that the judgment of the Circuit Judge, sustaining it, cannot meet our concurrence. The onus of proving it was on the plaintiffs. Parol testimony to set up a trust should always be clear and conclusive, and evidence of that character should certainly be required here, where the deed to Eli D. Crockett conveys an absolute and unconditional estate.

Thompson, who the plaintiffs claim created the trust, in his examination is vague and uncertain, defining no exact terms or limitations on which it was to attach, offering no declarations of Crockett by which his understanding of the agreement at the time could be made known to the Court, and leaving his intentions alone to inference drawn by himself from what he may have done or said at the interview.

On the other hand, Crockett testifies that he "bought the land for himself, with his own money, and without any agreement at the time with Thompson to re-convey it to any of the plaintiffs." The deed of April 15, 1867, is not produced, nor are its terms and recitals before us. To give it effect, as a declaration or acknowledgment in writing, sufficient to support the trust claimed through the testimony of Thompson, it must appear that it was executed in direct pursuance of it, to carry out the purposes of the agreement with him. How it can be assumed that this was done, it is difficult to perceive, when Crockett says there was no such agreement, There was no evidence that Crockett was repaid in 1860 or 1862 the amount he paid for the land, as alleged in the decree. According to his testimony, when he received the two hundred dollars of a debt due to Price, he (Price) owed him more than that sum.

The material question in the case was as the alleged trust imposed on Eli D. Crockt, on hehalf of Mrs. Price and her daughter of August, 1856, made with Thompson,

In the absence of proof to the contrary, the presumption should be that the re-payment was made at the date of the deed, and this was after the lien created by the judgment of Jonas Crockett. Mr. Browne in his Work on Frauds, Section 97, says: "If the trust had no effect previously to or independently of the written declaration, the trust property could not be disposed of by the ces-

*153

tui que *trust in the meanwhile, and would be subject to the acts and incumbrances of the ostensible owner."

The motion is granted, and the complaint dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. 153

PATTERSON v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1872.)

[Evidence \$\sim 123.]

The declaration of an agent, made the day after the event occurred to which it related, is no part of the res gestæ, and cannot be given in evidence against the principal.

[Ed. Note.—Cited in Mars v. Virginia Home Ins. Co., 17 S. C. 521.

For other cases, see Evidence, Cent. Dig. § 367; Dec. Dig. ♦⇒123.]

[Evidence \$\sim 244.]

At the trial by a jury of an action against a railroad company, as common carriers, to recover for the loss of cotton alleged to have been delivered at a depot of defendants, and burned the same day, a declaration of the agent made the next day that "the railroad company was responsible for the cotton," was received as evidence against defendant: Held, Error, but no ground for a new trial—the declaration being a mere expression of opinion and irrelevant to the issues.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 932; Dec. Dig. & 244.]

Before F. W. McMaster, Special Judge, Richland, April Term, 1872.

Action by George W. Patterson, plaintiff, against the South Carolina Railroad Company, defendants, to recover damages for the loss of cotton alleged to have been delivered by plaintiff to defendants, as common carriers, at their depot in Richland County, called Gadsden.

For the plaintiff, evidence tending to show that some time in the year 1864 the cotton of plaintiff was hauled from the plantation of James W. Adams to Gadsden, and delivered there to Flowers, the agent of the defendants, at that depot; that it was deposited on the platform and was burned the same afternoon on the cars of defendants.

During the trial, Goodson, a witness for the plaintiff, was allowed to testify that he had a conversation with Flowers, the agent, the morning after the burning of the cotton. I asked him who lost the cotton, because I felt an interest in it. I did not like to see Capt. Adams lose it, as it had been in my charge. "He said the railroad company were responsible for the cotton." This evidence was objected to by defendants as incompetent, but was received as part of the res gestae.

*154

*The jury found for the plaintiff, and defendants appealed.

Chamberlain, for appellants, contended that the evidence received was no part of the res gestæ, and should have been rejected. He cited 1 Green Ev., § 108, 110, 113; 1 Phil. Ev., 507; Story on Ag., § 134-5; Enos v. Tuttle, 3 Conn., 250; Mitchum v. The State, 11 Geo., 625; Fairlee v. Hastings, 10 Ves., 123; Stiles v. Western R. R. Company, 8 Metc., 44; Cooley v. Norton, 4 Cush., 93; Corbin v. Adams, 6 Cush., 93; Robinson v. Railroad, 9 Gray, 92; Parker v. Green, 8 Metc., 142-3; Lund v. Tyngsboro, 9 Cush., 36; Baring v. Clark, 11 Pick., 220; Burnham v. Ellis, 37 Maine, 319; Hannay v. Stewart, 6 Watts, 489; City Bank of Baltimore v. Bateman, 7 Har. & Johns., 105: Magill v. Kauffman, 4 S. & R., 317: Bingham v. Cabbot, 3 Dall., 19, 39; Bank of Monroe v. Field, 2 Hill, 445; Thallhimer v. Brinckerhoff, 4 Wend., 394; Hubbard v. Elmer, 7 Wend., 446; Barker v. Binninger, 14 N. Y., 270; Luby v. Hudson River R. R. Company, 17 N. Y., 131; Fogg v. Child, 13 Barb., 246; State Bank v. Johnson, 1 Mill., 200; Park v. Hopkins, 2 Bail., 408; Martin & Walker v. Stribling, 1 Sp., 24; Lark v. Cunningham, 7 Rich., 57; Pritchett v. Sessions, 10 Rich., 293; Raiford v. French, 11 Rich., 367; Garth v. Howard & Flemming, 8 Bing., 451.

Monteith & Bauskett, contra, cited 1 Green. Ev., § 114; Morse v. Conn. River R. R. Company, 8 Gray, 450; Charleston and Savannah R. R. Company v. Blake, 12 Rich., 634.

March 24, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. The principle of law contended for by the counsel of the appellants, restricting the admissibility of the declarations, statements or admissions of an agent as evidence, is not disputed by the other side. The agent having authority to act for his principal, either in a special matter or in his general business, stands, as to all transactions, within the scope of his authority as the principal himself. While the admission and confessions of the principal are always received as competent testimony against him, the rule, in the same unrestricted manner, cannot be applied to those of his agent.

During the trial, Goodson, a witness for e plaintiff, was allowed to testify that he ad a conversation with Flowers, the agent, e morning after the burning of the cotton.

The reason is plain and obvious; the principal is bound not only by all that he does and says, for he may affect himself as he pleases by act or word, but the declarations of the *155*

*agent can only bind the principal so far as they are connected with the business in which he represented him.

In the language of Mr. Greenleaf, in his work on evidence, Vol. 1, Sec. 108: "These surrounding circumstances, constituting part of the res gestæ, may always be shown to the jury along with the principal fact." The res gestæ is the act from which the liability of the principal arises, because the authority to bind him by it has been conferred upon the agent; but, when it is completely executed, the connection of the agent terminates, and, therefore, his admission or statements in regard to any of the results or consequences of the transaction may be treated as if made by a stranger. While there does not seem to exist any difference of opinion as to the true and well recognized rule in relation to the admissibility of such declarations, it does not follow that the appellants can take any benefit from their exception. Their counsel, in his argument, admits "that in the present case the question at issue between the parties was the fact of the delivery of the respondent's cotton to the appellants. If that fact could be established, the liability of the appellants, as common carriers; became, by operation of law, absolute and undeniable."

It is not perceived what effect the answer of Flowers, the agent, to the interiogatory of Goodson, the witness, had in determining the issue as to the delivery. Goodson, in the course of his examination, said he had a conversation with Flowers the morning after the burning of the cotton. Plaintiff's counsel put the question to the witness, "what did he say?" to which objection was made and overruled; he answered: "I asked him who lost the cotton, because I felt an interest in it. I did not like to see Captain Adams lose it, as it had been in my charge;" he (Flowers) said "the railroad company was responsible for the cotton." This was no more than an opinion as to the liability for the loss, without any reference to the delivery of the cotton of the plaintiff, and gave no intimation as to the ownership of that which was destroyed. The fact, neither of ownership nor delivery, can in any degree be affected by this answer of Flowers, and it cannot be construed as an admission that the lost cotton had been delivered on account of the plain-While we cannot sustain the special tiff. Judge, who presided at the trial, in holding that the declarations of the agent, the morning after the fire, was part of the res gestæ, yet we cannot set aside the judgment and grant a new trial merely because the evi-*156

dence admitted was *irrelevant. It, there-

and the plaintiff, in this regard, could not have been prejudiced by its reception. have not considered the second and third exceptions, as the counsel for the appellants informed the Court, on the argument, that he rested his motion entirely on the first ground.

The motion is dismissed, in accordance

with order heretofore filed.

MOSES, C. J., and WILLARD, A. J., concurred.

4 S. C. 156

McNAMEE v. WATERBURY.

(Columbia. Nov. Term, 1872.)

[Executors and Administrators \$\sim 325, 333.] Where the personal estate of a decedent is insufficient for the payment of his debts, the Probate Court, on the application of his administrator, has jurisdiction, under the Constitu-tion, to order a sale of the real estate for that purpose.

[Ed. Note.—Cited in Herndon v. Moore, 18 S. C. 351; Scruggs v. Foot, 19 S. C. 276, 277, 278; Thomas v. Poole, Id., 327; McLaurin v. Rion, 24 S. C. 410; Shaw v. Barksdale, 25 S. C. 211.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1339, 1375; Dec. Dig. ©=325, 333.]

[Injunction \$\ighthapprox 37.]

A purchaser at a sale of a decedent's land, made under an order of the Probate Court, payment of debts, cannot maintain a bill in equity against an occupant of the land, to re-strain him from excavating and appropriating to his own use minerals therein, until he has established his title by action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. \$\sime 37.]

[This case is also cited in Davenport v. Caldwell, 10 S. C. 348, as to jurisdiction of probate court.]

Before Melton, J., at Edgefield, June term, 1871.

This was a bill in equity, by Richard Mc-Namee against A. G. Waterbury, Frank Holman, James Morrison, Thomas J. Davis, John B. Moore and James Gardner. The facts of the case, and the object of the bill, are stated in the following decree of the Circuit Court:

Melton, J. This case came on to be heard by the Court at the June Term of the Court of Common Pleas for Edgefield County, 1871. The pleadings and the evidence established the facts. Dudley Rountree, late of Edgefield County, died intestate, seized and possessed of a considerable estate, part of which was a certain tract of land, of five hundred and thirty-five acres, described in the pleadings. He left him surviving his widow, Mary Rountree, and several children, among them Christiana Black, wife of James E. Black, and Mary H. Rogers. Under proceedings for partition among his heirs, in December, 1856, dollars, for the term of five years and on the

fore, could have no influence on the result, | this tract of land was sold by the Commissioner in Equity for Edgefield District, and *157

> was pur*chased by the said James E. Black, who executed his bond for the purchase money, in the sum of thirty-one hundred dollars, with one Joseph Hightower as surety. On this bond are endorsed several credits, for \$127.31 on the 9th December, 1856, \$700 on the 16th February, 1858, and \$1,200 on the 5th December, 1859. In April, 1859, a bill was filed in the Court of Equity for Edgefield District, at the suit of Christiana Black, by her next friend, Joseph Hightower, against James E. Black, her husband, and the heirs and distributees of Dudley Rountree, under which, on the 8th day of June, it was ordered, amongst other things, that the entire portion of the said Christiana, in the estate of her father, Dudley Rountree, be settled upon her, for her sole and separate use, for life, with power to dispose of the same, after her death, by any instrument of writing in the form of a will; and, in default of any such disposition by her, then, after her death, to belong to the said James E. Black, if he survived her, for and during his natural life; and, after his death, if he survived her, or if he does not survive her, then, from and after her death, to belong to her children, and to be divided amongst them absolutely and in fee, in such proportion as they would take of her intestate estate; that the said tract of land of five hundred and thirty-five acres, bought by the said James E. Black, at the sale by the Commissioner, at the price of \$3,-100, be received and taken as part of the said Christiana's portion of her said father's estate, at the valuation above mentioned; and that the said Joseph Hightower be appointed the trustee under the settlement thereby directed, with the proviso, however, that he should first enter into bond, with at least two good sureties, to the Commissioner of the Court, in the penalty of fifteen thousand dollars, conditioned for the faithful performance of his duties as such trustee. To this proceeding, James E. Black was made a party by regular process, and there was evidence going to show that the order was made with his actual knowledge and consent. Christiana Black died without having exercised the power of disposition conferred by this order, leaving her husband and three children, Joseph D., Mary E. and Eliza K. Black, who are minors. The husband, James E. Black, died intestate on the 7th May, 1861, and administration of his estate was granted to Joseph Hightower. On the 10th May, 1866, long after the death of Black, Joseph Hightower, assuming to act as trustee, executed a lease of a parcel of this land, of three acres,

> > *158

to *D. Frank Holman, for the sum of fifty

23d November, 1867, a lease of a similar partithe Probate Judge to await the further orcel, for a like term and consideration, to Thomas J. Davis and M. C. M. Hammond. The lease of Holman has been assigned to A. G. Waterbury, and that of Davis and Hammond is now held by Davis and J. B. Moore. Frank Holman, James Morrisson and James Gardner, named defendants, disclaim any interest in the matter in controversy.

The parcels of land contain valuable beds of kaolin clay and chalk; and, in pursuance of their respective leases, the defendants, Waterbury, Davis and Moore, are in possession, and have erected expensive buildings and machinery for the purpose of digging and removing these deposits. In April, 1868, In June, 1869, Joseph Hightower died. Mary H. Rogers obtained letters of administration of the unadministered estate of James E. Black, and, on the succeeding day, 11th of June, filed her petition in the Probate Court for Edgefield County, setting forth, among other things, that the personal estate of James E. Black had been sold, in 1861, by Joseph Hightower, as administrator; that the intestate, Black, was indebted to various persons, and principally on the bond hereinafter referred to, now amounting, in balance due, to about four thousand dollars; that Joseph Hightower had failed to administer the estate which passed into his hands; and that there being no personal assets of the intestate remaining, a sale of this tract of 535 acres was necessary for the payment of these debts. On the same day a summons was issued under this petition, directed to the infant children of Christiana Black, returnable seven days thereafter, requiring them to show cause why the prayer of the petition, for a sale of this land, should not be granted. Under an order of the Probate Court, without date, Mary Rountree, the grandmother of these infants, was appointed their guardian ad litem, and accepted the appointment. The summons was not served upon the infants until the 15th June, 1869. Without having inquired into the statements of the petition, without having taken an account of the administration of Joseph Hightower, without further proceeding looking to a marshaling of the assets of the estate, and without any answer or other pleading on the part of Mary Rountree on behalf of the infants, the Probate Court passed an order authorizing and empowering the petitioner, as administratrix de bonis non of James E. Black, to sell, for cash, either at public or private sale, the real *159

estate of her intestate. On *the following day, 19th June, 1869, the petitioner, Mary H. Rogers, accordingly sold and conveyed the said tract of land of 535 acres to the plaintiff, Richard McNamee, for the sum of thirty-five hundred dollars in cash. The der of the Court. On the 28th June, 1869, the bill, in this case, was filed, setting up the title of the plaintiff, impeaching the leases under which defendants claim, and praying a cancellation of the leases, an account of the profits derived from the parcels of land included within them, an injunction against the excavating and appropriating, by the defendants, of the clay and chalk within these parcels, and the surrender of the possession so held by the defendants.

Upon motion before His Honor Judge Platt, a preliminary injunction was granted, in accordance with the prayer of the bill, which, upon a further hearing, was dissolved. In May, 1870, the motion was renewed before me upon an amended proceeding, and under an order to show cause, an ad interim injunction was granted, which, by arrangement between the parties, has been continued in force. Upon this statement of facts it is adjudged:

1. The decree of the Court of Equity, under the bill exhibited, in 1859, by Christiana Black, for a settlement of her interest in Dudley Rountree's estate, to which her husband, James E. Black, and the heirs-at-law and distributees were made parties, is binding upon all the parties, and operated to rescind and vacate the sale by the Commissioner to James E. Black, and to vest the estate in Christiana Black for life, and in James E. Black for life, if he survived her, and, upon the death of the survivor, to vest the estate in remainder in Joseph D., Mary E. and Eliza K. Black, the minor children of Christiana Black. It further operated to entitle James E. Black to be released from the bond given by him for the purchase money. Why James E. Black subsequently made payments on this bond, and why it continues to be held against his estate, and why the payments made by him are not accounted for, are matters not pertinent to this issue; not sufficiently so, certainly, to authorize the Court to disregard the final judgment of the Court of Equity, pronounced upon due course of proceedings.

2. The proceedings of the Court of Probate are irregular. The minor children of Christiana Black were not made parties in the manner prescribed by law. The interest of Mrs. Rountree, their grandmother and guardian ad litem, was largely and directly an-*160

*tagonistic to theirs, whilst the effect of the proceedings was, if possible, to vacate a decree to which she and the petitioners were parties, of which both-constructively, at least-had knowledge, and by which both were concluded; a decree under which these minors held an absolute estate in the lands in question. The statements of the petitioner were not supported by proof, and the orproceeds, it was stated, have been paid to der thereunder was taken as against these minors by default. If these minors held the estate simply as the heirs of James E. Black, they could not be concluded by such questionable and essentially defective proceedings. Clearly they are not concluded, when it appears that the interest of James E. Black terminated at his death, and that these minors held in these lands an absolute estate. The deed of Mary H. Rogers, under the order so pronounced, purporting to convey the estate of James E. Black, in fact conveyed nothing, and the title of the plaintiff is invalid.

It is not pertinent to enquire into the title of the defendants, who were, at the date of the sale to the plaintiff, and are now, in possession of the parcels described in their respective leases. They derive their title from Joseph Hightower, who, having failed to execute the required bond, was not invested, for an instant, with the office of trustee. The consideration for the respective leases is, on their side, grossly inadequate, and they are not regarded as having any claim whatever to the favorable consideration of the Court.

3. The plaintiff, however, must, as at law, depend upon the strength of his own title; and, as this is shown to be invalid, the relief which he seeks must be denied.

It is, therefore, ordered that the bill be dismissed.

The plaintiff appealed, and, for the purposes of the appeal, filed the following exceptions to the decree:

- 1. To the conclusions of law found by His Honor in paragraph No. 1 of his conclusions of law in his decision herein.
- 2. To the conclusions of law found by His Honor in paragraph No. 2 of his conclusions of law in his decision herein.
- 3. To so much of the conclusions of law found by His Honor in paragraph No. 3 of his conclusions of law in his decision herein as finds that "the plaintiff must, as at law, depend upon the strength of his own title, and, as this is shown to be invalid, the relief which he seeks must be denied."

*161

- *4. To so much of the conclusions of law found by His Honor in his decision herein as orders that the bill be dismissed.
- 5. To said conclusions of law, in that it is not decided that the settlement ordered by the Court of Equity, 8th June, 1859, was only executive, and inoperative to divest the title of James E. Black to the realty in question.
- 6. To said conclusions of law, in that it is not decided that the said settlement, being on the express condition that the said realty should be taken by Christiana Black at a valuation, the result of the non-performance of this condition, was that no right to said realty ever vested in Christiana Black and children.

- 7. To said conclusions of law, in that it is not decided that the bond given by James E. Black to the Commissioner in Equity, being secured by statutory lien, created by Act 1791, the said settlement ordered in a suit to which said obligee was no party, was subject to said lien, and the lien never having been removed by said Christiana Black and children, the said realty was properly sold as the property of James E. Black, on the application of his administratrix de bonis non for sale of the same for the payment of debts.
- 8. To said conclusions of law, in that it is not decided that, there being no evidence on the face of said order of settlement or otherwise, that any of the heirs of Dudley Rountree, cestui que trusts of the bond secured by the statutory lien, (except Christiana Black,) ever consented to said order of settlement, said heirs have in no manner waived their claims under said lien, and the bond secured thereby.
- 9. To said conclusions of law, in that it is not decided that the subsequent acts of all the parties connected with the proceedings in equity, and of the successive commissioners in Equity, obligees of the bond given by James E. Black, show that said order of settlement could never have been intended to vacate said bond and lien, was subject to said lien, and, so far as said realty was concerned, embraced only James E. Black's equity of redemption therein.
- 10. To said conclusions of law, in that it is not decided that, even in the event of said settlement being valid and effectual, the effect of the payments made on said bond was to vest in Black an equitable interest pro tanto, and the legal title never having passed from him to authorize his administratix de bonis non to apply for sale of said realty for the payment of Black's debts.

11. To said conclusions of law, in that it

is not decided that, even *in the event of said settlement being valid and effectual, and the fee simple in said realty vesting in the children of James E. and Christiana Black, who were parties to the proceedings in the Probate Court, their interest in said realty was transferred to the plaintiff, a bona fide purchaser, for valuable consideration, and the claims of said children, if any, attached on the fund arising from said sale in the custody of the Probate Court.

12. To said conclusions of law, in that it is not decided that the title of plaintiff and defendants, being from the same source, and the title of defendants being pretensive only and invalid, defendants are estopped from disputing plaintiff's title.

13. To said conclusions of law, in that it is not decided that the decree of the Probate Court, ordering the sale of said realty, (even if the proceedings are so irregular or de-

fective as to vitiate them, which is denied,) can only be overruled or set aside by appeal to the Circuit Court, or by original proceedings for that purpose at the instance of parties to the proceedings in the Probate Court, or others who have been damnified or aggrieved thereby, and cannot (as is attempted in the present case) be impeached collaterally by defendants, who are not only strangers to the proceedings in the Probate Court, and in no manner damnified or aggrieved thereby, but wrong doers, having, according to His Honor's decision, "no claim whatever to the favorable consideration of the Court."

14. To said conclusions of law, in that it is not decided that plaintiff, a bona fide purchaser for valuable consideration, under the decree of a competent Court, is entitled to the equitable aid of the Court of Common Pleas, against defendants, without a shadow of claim, committing irreparable injury.

15. To said conclusions of law, in that it is not decided that plaintiff have the injunction and account prayed for in his bill.

Finley, Youmans, Chamberlain, for appellant.

Carroll, Bacon, Carr, contra. (a.)

April 5, 1873. The opinion of the Court was delivered by

WILLARD, A. J. Under the view taken *163

of this case it will be *necessary to consider only two questions. The first is, whether the Probate Court possesses authority to order the sale of the lands of a decedent for the purpose of raising a fund in the hands of an administrator for the payment of the debts of such decedent when the personal assets are insufficient for that purpose. The second is, whether a purchaser, under an order made by the Probate Court, for the purpose indicated above, can maintain a bill in equity against the occupant of lands so sold, to restrain such occupant from appropriating the usufruct of the land, such as minerals, &c., without having established his title thereto in an action at law.

The determination of the question of the authority of the Probate Court involves the construction of the following language from Art. 4, Sec. 20, of the Constitution: "A Court of Probate shall be established in each County, with jurisdiction in all matters testamentary, and of administration in business appertaining to minors, and the allotment of dower, in cases of idiocy, lunacy and persons non compotis mentis." The particular clause

fective as to vitiate them, which is denied,) to be examined is that conferring jurisdic-

It must be considered, first, in reference to the sense of the terms employed, and, second, in relation to the general intention of the Constitution as to the character of the Court constituted as expressed in the language defining such jurisdiction. We will first consider whether the power of ordering the sale of the lands of a decedent for the purpose of raising a fund in the hands of an administrator for the payment of such decedent's debts is a matter of administration in the sense of the clause under consideration. What are matters of administration is to be determined by the laws of the State existing at the time the language in question was introduced into the Constitution. The object of administration is to pay the debts of the deceased, and distribute his personal estate among those entitled to it, and any act that may properly be performed by an administrator looking to this end is a matter of administration. To accomplish this end the administrator is clothed with authority to collect the personal estate and to convert it into a form suitable for the purpose.

At common law the personal estate alone is assets for the payment of such debts by the administrator. By the Statute (2 Stat., 570.) "the houses, lands and other hereditaments and real estates, situate and being within this State. belonging to any person *164

in*debted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing to any person, and shall and may be assets for the satisfaction thereof, and shall be subject to like remedies, proceedings and process as personal estates." It is the unmistakable intent of this clause to make the real estate of a decedent assets in the hands of his administrator for the payment of his debts, if the exigencies of the estate render that course necessary, for that is the necessary result of assimilating the realty to the personalty, as it regards the mode of applying it to the satisfaction of the debts of the decedent.

The interposition of a Court is not required in order to impose the character of assets on the realty, for that is already done by the terms of the Statute; it is only required to ascertain whether the personal assets are insufficient to discharge the debts. It may well be questioned whether a power to sell the realty, in the event of the insufficiency of personal assets, is not conferred directly by the Statute, so that an adjudication of the insufficiency of assets would authorize such sale without a personal order authorizing and directing such sale. Such a construction has not, however, been put on the Statute by judicial authority, and we are not called upon, at the present time, to consider it. It is

⁽a.) As the principal question in the case seems to have been put at rest by a recent Act of the Legislature conferring jurisdiction upon the Probate Court to order sales of real estate for payment of debts in aid of the personalty, it is deemed unnecessary to publish the arguments of counsel.

enough to know that, assuming the necessity (of a judicial declaration of the fact of the insufficiency of personal assets, upon the ascertainment of such fact, the duty is imperative of subjecting the realty to the payment of such debts, and the Court has no discretion but to proceed to do whatever may be requisite to give efficacy to the Statute. Does jurisdiction in all matters of administration embrace the authority to determine the fact of the insufficiency of personal assets and power to conform to the requirements of the Statute, as it regards subjecting the realty to like remedies, as are appropriate in the case of personalty? As the application of the personalty, as assets in the hands of the administrator, to the payment of debts, is indisputably a matter of administration, it would seem reasonable that a provision of law, placing realty on the same footing, in this respect, as personalty, was intended to make the application of the realty to such purpose a matter of administration also.

It is true that the administrator cannot, of his own mere motion, reach out his hand and take possession of the realty and sell it as if it were personalty. He must, indeed, apply to a Court and show grounds for such demand, but the very fact that he may make

*165

such *a demand of the Court shows that he has a right to the thing demanded, and this right arising under the Statute, he holds in virtue of his office as administrator.

The concession that the administrator is clothed with authority to demand through the proper Court power to sell the realty is a concession; that the application of the realty to the payment of debts, in the event of the insufficiency of personal assets is, in a strict sense, a matter of administration, or, in other words, a matter in respect of which the administrator is clothed with power to act in virtue of his office.

This conclusion is strengthened by looking at the terms under consideration from the stand point of the Constitution. They are there employed to define the powers of a Court, not of an administrator. It is judicial jurisdiction that they describe.

Jurisdiction, in matters of administration, means power to do what a Court ought to do in the matter of administration.

The Constitution furnishes a Court on which the administrator may lean, and which can supplement his legal powers by its process; to say, then, that the measure of the powers of the Court shall be precisely that of the powers of the administrator is to misconceive entirely the distinction between jurisdiction and administrative competency. If it is contended that the power of an administrator, to reach the realty as assets, is not absolute, but depends on the contingency of there being an insufficiency of personal assets, the answer is clear, that the expression

"all matters of administration" is broad enough to embrace contingent as well as absolute power.

The expression "all" imports an intent to clothe the Probate Court with full power in matters of administration. That it was the intention of the Constitution to clothe that Court with full efficiency, as it regards matters of administration, is evident from the nature of the Court, as established by Sections 1 and 20, Article IV, of the Constitution. It is enumerated among the Courts between which the judicial power of the State is portioned. Jurisdiction is conferred upon it in matters of great moment, embracing some of the most delicate and responsible powers exercised in Chancery. addition to matters of administration it has jurisdiction of all matters testamentary. It has charge of the persons and estates of minors and others not possessed of legal competency to act in their own right. It may allot dower. A Court possessed of such large powers must have been regarded as fully *166

competent to ascertain the *fact that the personal estate of a decedent was insufficient to pay his debts, and, to comply with the requirements of the Statute, demanding that in such cases the realty should be subjected to the same remedies and process as the personalty.

In the ordinary course of business before the Probate Court the fact would appear whether the personal estate was insufficient for the payment of debts; in fact, this is the precise place where that fact ought to be judicially ascertained. After that fact is ascertained, the making of the order for the sale of the realty is merely a matter of course under the Statute. Why, then, should the labor and expense be incurred of going into the Circuit Court for such order of sale? No good reason has been assigned, nor can be assigned, for the existence of any such necessity.

The case of the Bank of Hamilton v. The Lessees of Dudley (2 Peters, 492 [7 L. Ed. 496]) was cited as placing a construction on words similar to those under consideration, as employed in the State of Ohio; but it has no bearing on the case in hand. It was there held that the right to sell realty to pay debts was not included under the words "jurisdiction in all probate and testamentary matters," (p. 524).

The words "matters of administration" were not involved in that case. Whatever may be the law of Ohio, it is clear that by the law of South Carolina the application of the realty to the payment of a decedent's debts, in the event of the insufficiency of the personalty, is a matter of administration, and, as such, is within the jurisdiction of the Probate Courts under Section 20 of Article IV of the Constitution,

ready stated, affects the right of the complainant to file a bill in equity as against parties in possession of the land at the time of sale, asking an injunction to restrain them from taking to their own use the profits of the land, the principal profit being a mineral substance found on the land, without first establishing his title in an action at law. The bill was filed prior to the adoption of the Code of Procedure, and must stand or fall by the rules prevailing at that time.

The effect of an order of sale, made by the Probate Court, in the cases under consideration, is to place the purchaser, in reference to the lands to which it relates, in the position and title of the decedent as against the various parties interested in and bound by the settlement of the estate before the Probate Court. It cannot determine any question of title between the purchaser and

*167

a stran*ger to the estate in possession. To obtain possession, as against such stranger, the purchaser must bring his action at law, and establish his title by a verdict.

While his title is in dispute, by one in possession, he cannot obtain the aid of a Court of Equity to restrain the occupant from exercising right of ownership. For the reasons stated, the order dismissing the bill was proper, and the appeal must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J. I concur with the majority of the Court in dismissing the motion, because, in my judgment, the Judge of Probate does not possess the power of ordering a sale of the real estate of an intestate, by an administrator, for the payment of debts, on a deficiency of personal assets. The appellant here relies upon his title for the relief which he seeks by his bill. His claim to the equitable jurisdiction of the Court depends entirely on his right to the land. No matter what incidents attached to or follow its ownership, he is not entitled to their enjoyment unless the title vests in him.

The office of Judge of Probate was unknown by name in this State until the adoption of the Constitution of April, 1868. The first Section of the fourth Article of that instrument, in enumerating the Courts in which the judicial power of the State shall be vested, includes "Probate Courts." The twentieth Section of the same Article declares that "a Court of Probate shall be established in each County, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idi-

The next question to be considered, as al- spective Counties for the term of two years." With the exception of a provision (Section twenty-seven) for a Clerk of the said Court. it is not again mentioned in the Constitution. The Legislature, on the 21st September, 1868, at its first session after the adoption of the Constitution, passed "an Act to define the jurisdiction and regulate the practice of Probate Courts," (14 Stat., 76,) to determine the extent of the jurisdiction of that Court we are to look to the Constitution, for, though the contemporaneous Acts of the Legislature may reflect the light by which the true intention of the Constitution may *168

> be discovered, still of them*selves they cannot operate to extend or enlarge a jurisdiction by the organic law intended to be of a limited character. All the means necessary and proper for the full exercise of the powers conferred by the Constitution may be granted by the Legislature, but it is impotent to confer, by Act, any additional power. In this connection it may be proper to say that nothing can be found in the said Act to which the power now claimed can be referred. If it is not conferred by the language of the Constitution, defining the general powers of the Court, it cannot be implied from either of the provisions of the said Act.

It cannot be denied that the Court, thus established, was the successor of the Court of Ordinary, which had existed in this State from the earliest organization of our judicial system, having in charge all matters relating to the property of deceased persons, whether to be administered under testamentary disposition or by the general law, alike applicable to the estates of all who die intestate. The Legislature, so regarding the new office, by the 39th Section of the same Act, not only directed "that the files, records and property of or appertaining to the said Courts of Ordinary should be transferred to the Courts of Probate for the several Counties," but declared "that all laws and parts of laws of the late Provisional Government of South Carolina relative to the powers, duties and course of procedure of the Courts of Ordinary and Equity, so far as the jurisdiction of the said Court is herein conferred on the Court of Probate, not inconsistent with the Constitution and this Act, or supplied by it, are hereby adopted and declared to be of force, and applicable to the Courts of Probate." Thus all the laws, then of force, in relation to the powers, duties and course of practice in the Courts of Ordinary, not inconsistent with the Constitution, were extended to the Courts of Probate. As the Constitution had included, in the jurisdictions of these Courts, powers ocy and lunacy, and persons non compotes which had before appertained exclusively to mentis. The Judge of said Court shall be the Courts of Equity, it was proper to deelected by the qualified electors of the re- clare such laws "of force and applicable to

the Probate Courts." But the powers so it, the power now claimed was never supposconferred are expressly named in the Constitution. The order of the Judge of Probate, in the case before us, is sought to be justified by the words of the Constitution, repeated in the 5th Section of the Act of 1868, "shall have jurisdiction in all matters testamentary and of administration," and the words of the 7th Section of the same Act, "all proceedings in relation to the settlement of the estate of any person deceas-

*169

ed." We do not perceive *that these enlarge the powers before exercised by the Ordinaries in the particular matters to which they refer. It is not necessary to enquire what was intended by the term "matters testamentary," or to what they were to apply, or to what limited, for the order here was not in a proceeding under a will, but in regard to real estate of which the person last seized had died intestate. Administration, when applied to an estate, has a well defined and technical meaning. It embraces the course of procedure by which the personal property of an intestate is to be taken in lawful charge and held after the payment of the debts for the benefit of those who may be entitled as distributees. Its duties, so far as concern the person to whom the letters, the title to the office, are committed, may be said to be comprised in the oath, which, on qualifying, the administrator is required to take, (5 Stat., 110,) and this exclusively relates "to the goods and chattles, rights and credits of the intestate." Indeed, it is not urged that the power to sell land for the payment of debts of the intestate is a necessary incident to the office of an administrator, for the real estate vests not in him, but in the heir, and, therefore, such a proposition could not be ventured by the learned counsel who have been heard in behalf of the plaintiff.

But, if the real estate, as it is conceded, does not vest in the administrator, how can it follow, as a matter of course, that the Probate Judge, from the mere fact of his jurisdiction in "matters of administration," can authorize the administrator to sell the land for the payment of debts? Where the exercise of a power is claimed for a Court of limited jurisdiction, it must be shown to exist by express grant, or to be necessarily consequent upon some power clearly given. That which was exercised by the Probate Judge is not expressly granted, and to give to the words, "all matters of administration," such an enlarged and extended operation would be changing the character of his Court, and converting it into one of general jurisdiction. At the time the office of Ordinary was substituted by that of the Judge of Probate, he defining it "as the management of the estate exercised jurisdiction "in all matters of ad- of an intestate, or of a testator who has no

ed to be vested in him.

"Words and phrases, the meaning of which, in a Statute, has been ascertained, are, when used in a subsequent Statute, to be understood in the same sense."—Bac. Ab., Tit. Statute, J., 1.

The purpose of the 7th Section of the Act, to which we have above adverted, was to confine to the Probate Court of the County

*in which the will was proved or administration granted "all proceedings in relation to the settlement of the estate of any person deceased." Its position, with reference both to the Section which precedes and the one that follows it, evidently shows the intent of the Legislature in its enactment. But, if we are wrong in so supposing, and it is necessary to give meaning or construction to the word "settlement," as it is that on which, in this connection, the plaintiff relies. can it be held to refer to anything but the adjustment of the estate on which the final account is taken, and the interests of the various parties involved in it ascertained and adjusted by the judgment of the Court? It implies finality, a termination of the office of executor or administrator, and a transfer to the legatees or distributees, as the case may be, of the property held for their benefit. The order for the sale of real estate, necessary for the payment of the debts of the intestate, is but of an interlocutory character, to be granted by a Court of competent authority when the circumstances and condition of the estate justify it.

But it is said that the words "all matters testamentary and of administration" embrace more than the ordinary ministerial duties of an administrator, and hence an attempt is made to distinguish between the limitations imposed upon an administrator, eo nomine, and the Court itself, restricting the one to his duties as specified and limited. but leaving the other charged with the entire administration of the estate. This construction would convert an admitted inferior tribunal into one of the most general and unrestricted powers, for, under such a claim of authority, its jurisdiction, in regard to the real and personal estate of an intestate, would be without limit.

The administrator, instead of being the representative of the intestate, as to the personal property of which the title vests in him, by law, and to an account for which he is liable, would thus be converted into a trustee of the lands while the actual title to them remained in the heirs-at-law.

But the term "administration" has a well understood and accepted meaning. The counsel of the appellant refers to 1 Bouvier, 83, ministration," and yet, by the mere force of executor." It does not refer to the manage-

trator. The administration is the act and work of the party who conducts it, and not of the Court which granted it. The very *171

term adminis*trator denotes the person charged with the administration of the estate. But, if the term used in the Constitution refers to the Court, and not to the administrator, how can this sanction a construction which would give a Judge of Probate power over the lands of an intestate? He exercises jurisdiction over the personal effects of the intestate, through a power originally exercised by the crown, and afterwards delegated to the clergy, as Ordinaries (2 Blk., 494.) who abstained from all interference with the real estate.

So complete was the authority of these officers over the goods and chattels of the intestate, that they were not bound to pay his lawful debts, and after deducting the pars rationabilis of the wife and children, they might apply the remainder to whatever purposes their consciences should approve.-1 Wms., on Exors., 330. By Stat., 13, Ed., 1 c., 19, they were obliged to answer for the debts of the intestate as far as his goods extended, and it was not until Stat. 31, Ed. 3, St. 1, c. 11, that they were required to "depute of the next and most lawful friends of the dead person intestate to administer his goods." The office has relation exclusively to the charge and control of the personal property; the bond which the administrator gives has reference alone to this, and so grave a power as that of converting the real estate, the title to which is in the heirs, into money, the title to which is to vest in the administrator, should not be accorded unless the right to exercise it can be shown by some positive enactment.

The authority is also claimed from the effect of the Stat., 5, Geo. 3, 2, ch. 7, 2 Stat., 570, which makes "houses, lands, negroes and other hereditaments and real estates in the said plantations belonging to any person indebted liable to and chargeable with all just debts, duties and demands, and shall and may be assets for the satisfaction thereof in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty, &c."

This Statute has been of force in South Carolina for over a century and a quarter, and yet it has never yet been so construed as to change the relative rights of the administrator and the heir in regard to the personal and real estate of an intestate. If lands are to be held as assets for the payment of debts "in like manner as personal cannot concur in according it.

ment of it by the Court, but by the adminis- estates in any of the said plantations, respectively, are seized, extended, sold or disposed of for the satisfaction of debts," why may not the administrator sell, by mere leave

*172

of the Probate *Court, without making the heirs parties to the application? While the Statute declares the lands liable for debts. and makes them assets for their satisfaction, as real estates by the law of England are liable to debts by specialty, it in no way changes the legal title in such lands, or subjects them to any sale on the application of the administrator for the payment of debts. The benefits which it confers is to be sought by the creditor, and is not to be extended on the motion of the administrator, who holds no title in the real estate.

It is true that where a Court of Equity entertains an application for the sale of real estate of an intestate, for the payment of debts, the administrator is made a party. The propriety of this course is plain. The personal property is first liable to the debts, and before the real estate shall be subjected to their payment, the personal representative should be required to answer; and, to prevent circuity of action, an account is taken at once in the case, and a decree entered against him, if in default, which enures to the benefit of the heirs.

The Court of Ordinary was clothed with as full authority, in all matters testamentary and of administration, as the Court of Probate, which succeeded it.—See Act of 1839, 11 Stat., 39. It was, however, never contended that, on the application of the personal representative of the deceased, it could grant authority for the sale of real estate for the payment of debts on the failure of personal assets to meet them. A provision, however, did exist, by which the creditor might secure, for his debt, the proceeds of real estate sold by the Ordinary for partition; and, by pursuing the mode prescribed, the rights of the heirs, as well as of the administrator, were duly protected .-- Act of 1842, 11 Stat., 232.

The effect of the decision of the Court will vest this inferior jurisdiction with a large control over the most valuable property of the people of the State. In the majority of the cases of which it will take cognizance, minors will be interested, and in how summary a manner, and by what machinery their rights will be disposed of, may be seen in the course pursued in the case before us.

Believing that the said Courts are not vested, by the Constitution, with the power, I

4 S. C. *173

*HALFACRE v. WHALEY.

(Columbia, Nov. Term, 1872.)

[Payment 65.]

In an action on a contract for the payment of dollars, made in 1863, the onus is on the deor dollars, made in 1863, the onus is on the defendant to show, by evidence, that the parties intended that payment should be made in Confederate currency. The intention may be shown by direct evidence or by circumstances.

[Ed. Note.—Cited in Parker v. Wilson, 5 S. C. 493.

For other cases, see Payment, Cent. Dig. § 197; Dec. Dig. &=65.]

[Payment @=14.]

In such an action the parties are entitled to the benefit of the ordinance of September 27, 1865.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 92; Dec. Dig. —14.]

Before Moses, J., at Newberry, September Term, 1872.

Bill by Henry Halfacre, plaintiff, against Richard S. Whaley, defendant, to foreclose a mortgage on a lot in the town of Newberry. The case came before the Court on exceptions by plaintiff to the report of a Referee, which is as follows:

"It being referred to the undersigned, as special Referee, by order dated 13th March, 1869, to report the amount due on the debt secured by mortgage in this case, the following is respectfully submitted:

"The defendant purchased a lot from plaintiff on the 28th day of July, 1863, for the sum of three thousand dollars. The defendant paid \$1,000 cash, in Confederate currency, and gave two notes for the balance of the purchase money, each in the sum of \$1,000, one payable 1st January, 1864, and the other payable 1st January, 1865, with a mortgage of the premises. The evidence adduced, in reference thereto, is contradictory and unsatisfactory, the plaintiff claiming that the credit portion was to be paid in good money, and the defendant saying that the contract was made in reference to the currency then in existence. Referee has no good reason to doubt the veracity of either party, and is of the opinion that but little was said in reference to said currency, (both parties being present.) The lot sold, according to the evidence, (a copy of which is herewith filed,) for about \$800 more than its true value, or the amount it was purchased for previous to the war, and it seems to be a hardship, under the existing laws, to report either the whole amount, or to scale the same, and justice to both parties would seem to require that the defendant pay the true value, above stated, after deducting the payment. The Referee, however, in view of the conflicting testimony, and regarding the scaling Act imperative in

cases where the contract is made during the years from 1861 to 1865, unless positive and *174

unconflicting testimony is *adduced to the effect that the contract was not made in reference to said currency, reports due 1st October, 1869, two hundred and eighty-one dollars and fifty-seven cents.

"But, should the Court hold that the entire amount should be paid, then the amount due 1st October, 1869, is twenty-nine hundred and nine dollars and sixty-four cents."

The decree of the Circuit Judge is as follows:

Moses, J. Suit in this case was commenced by bill to foreclose a mortgage on a lot of land in the town of Newberry, dated the 25th day of July, 1863, given to secure the payment of two sealed notes of that date, each for one thousand dollars, payable the first day of January, 1864, and the first day of January, 1865, respectively, the same being part of the purchase money of the land embraced in the mortgage.

The defendant answered, and the first hearing was upon bill and answer, on the 13th day of March, 1869, when it was, by order of the Court, referred to Thomas M. Lake, Special Referee, to ascertain and report the amount due on the debt secured by mortgage in this case.

The case was again heard, at the present Term, on the report of the Referee, and exceptions by the plaintiff.

The lot of land embraced in the mortgage was conveyed on the 28th July, 1863, for the consideration of three thousand dollars. by the plaintiff to the defendant, of which sum one thousand dollars was paid in cash, and the remaining two thousand dollars were secured by the two sealed notes hereinbefore mentioned, and the mortgage sought to be foreclosed in this proceeding.

The defendant, in his answer, insisted upon the application of the provisions of the Act of the General Assembly, entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent." The plaintiff denied the applicability of that Act, and insisted upon the payment of his entire debt in the present currency. To this, the only point of issue in this case, the testimony taken before the Referee (a copy of which accompanied his report) was directed. The plaintiff testified not as to the currency in which his debt was to be paid, but that the payment was to be made in good money. The defendant, both in his answer and his testimony, denied all agreement, ex-

pressed or implied, to pay in *any kind of money or currency except in the currency of the country in circulation at the maturity of the notes.

It was in proof that improvements upon

the lot were inferior, and fast deteriorating upon paying more in Confederate money at by age and decay, but that the price at which the lot was sold was enhanced by about eight hundred dollars beyond the price at which it would have sold before the war, in the condition it was then, but the state of the buildings and fixtures must have been in a much better condition before the war than at the time of the sale, showing an actual appreciation beyond the sum mentioned. This fact, taken in connection with the time when the notes were given, the time of their maturity, and the significant fact that the plaintiff accepted a cash payment of one thousand dollars in Confederate currency, leave but little room to doubt the ruling of the Referee in allowing the defendant the benefit of the Act already referred to.

It may be proper to state that the defendant (as shown by the proof) acted consistently with his view of his legal liability in the premises, by promptly offering to pay the first note at its maturity, and, soon after the maturity of the second note, he offered to pay both notes.

It is ordered and decreed that the exceptions to the report of the Referee be overruled, and that the plaintiff have a decree for two hundred and eighty-one (281.57) dollars and fifty-seven cents, with interest from the first of October, 1869, for the satisfaction of which the lot of land described in the bill is held liable by the lien of the mortgage, which decree shall be in full of the entire claim of the plaintiff, set up in this proceeding.

It is further ordered and decreed that each party pay his own costs.

The plaintiff has leave to apply, at the foot of this decree, at Chambers, upon five days' notice to the defendant, or in open Court, for such further order as he may feel advised, to enable him to enforce the liability of the said lot of land for the payment of this decree.

The plaintiff appealed on the grounds:

First. Because His Honor the Circuit Judge erred in deciding that the Act of the Legislature, entitled "An Act to determine the value of contracts made in Confederate States notes, or their equivalent," was applicable to this case, when the testimony and

*176

all the *circumstances clearly shew that the credit portion of the contract in this case was neither made in Confederate States notes or with reference to Confederate States notes as a basis of value. The evidence, in substance, is as follows:

The appellant swears positively that the contract was that he was to take one thousand dollars in Confederate money, and the balance of two thousand dollars was to be paid in good money, to be secured by notes

the time, but the appellant positively refused, saying he had enough of the stuff. That appellant, in the presence of the respondent, asked E. P. Lake to draw the notes payable in good money, and he replied if they were drawn payable in dollars, that meant gold, and therefore it was not necessary. respondent sold, about the same time, a small lot adjoining the one above referred to, and not worth, by several times, as much, at twenty-five hundred dollars in cash. That appellant could have sold his lot for much more than three thousand dollars, if he would have taken Confederate money for it. That he gave twenty-one hundred dollars for said lot just before the war, and put two hundred or three hundred dollars' worth of improvements on it. E. P. Lake proves that the appellant refused to take only one thousand dollars in Confederate money, and that he spoke of good money in relation to the credit portion of two thousand dollars. Houseal proves the lot worth two thousand dollars in gold. Scott proves the lot to be worth twenty-five hundred dollars in greenbacks. Gauntt, twenty-two hundred dollars in greenbacks. McKellar, twenty-two hundred dollars in greenbacks, and with the house burned off it, eighteen hundred dollars.

Second. Because His Honor erred in not ruling that dollars in said notes meant gold dollars, until the contrary appeared by evidence, and that it devolved upon the respondent to establish that fact; and the fact that the contract was made in 1863, and the additional fact that the appellant did take one thousand dollars in Confederate money, was not sufficient to shew that by dollars in said notes Confederate notes were meant.—Austin v. Kinsman, 13 Rich. Eq., 259.

Third. Because His Honor erred in decreeing that the appellant should pay his own costs.

Jones & Jones, for appellant. Baxter, contra.

*177

*April 8, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. The notes secured by the mortgage were each for one thousand dollars, and if the defendant proposed to claim that the medium of their payment was intended to be in Confederate treasury notes, it was incumbent on him to make the proof. -Neely v. McFadden, 2 S. C., 169; Harmon v. Wallace, ibid, 208.

Besides the declarations of the parties at the time of the contract, as to their purpose, it has been held competent to introduce testimony as to the value of the consideration, and any circumstances tending to show the and mortgage. That the respondent insisted agreement in regard to the currency in which the payment was to be made. In the case, they looked for payment. The parties are in hand the presiding Judge sustained the also entitled to the benefit of the ordinance ruling of the Referee, allowing the defendant of the 27th September, 1865, referred to by the benefit of the "Act to determine the value this Court in the case of Bobo v. Goss, 1 S. of contracts made in Confederate States C., 262, and Harmon v. Wallace, already notes or their equivalent," approved March 26, 1869.—14 Stat., 277.

It is evident that the Referee not only misconceived the real purpose of the said Act, but gave to it a construction in direct contradiction to that which it had received in this Court.-Neely v. McFadden, 2 S. C., 169; Harmon v. Wallace, ibid, 208. He regards it as "imperative in cases where the contract is made during the years from 1861 to 1865, unless positive and unconflicting testimony is adduced to the effect that the contract was not made in reference to such (Confederate) currency." The effect of this ruling throws the onus on the plaintiff to show that the contract was not made with a view to Confederate money. The conclusion of the Referee is the more extraordinary, as he states in his report "that justice to both parties would seem to require that defendant pay the true value, (which he fixes at twenty-two hundred dollars.) after deducting the payment." The only ground on which the argument against the motion seeks to sustain the judgment of the Court below is, that the question involved nothing but a mere fact, (the amount due upon the mortgage debt,) and the conclusion of the Referee, adopted by the Circuit Judge, is not to be set aside unless the preponderance of the testimony against it is overbearing.

Though the finding of the amount due on a note or other instrument for the payment of money involves an enquiry of fact, yet if the rules of law fixing the mode and manner of the calculation, and the principles which govern their application, are disregarded, *178

*and an arbitrary method substituted, although a result may be attained, yet the fact sought for is not ascertained. Suppose the condition of a bond requires the interest to be paid annually, and the Referee, charged with reporting the amount due, should refuse to include the interest on the annual interest as part of the debt, would it be contended that the amount so found by him must prevail, because he was charged only with the ascertainment of a fact?

The true enquiry was, what was legally due. The judgment of the Circuit Court is set aside, and the case remanded to it for another hearing, with the following instructions:

The intention of the parties is to prevail as to the character of the currency in which the payment of the notes was to be made, and this may be ascertained by evidence as to their understanding at the time, and, in its absence, evidence of any circumstances may be introduced to show the currency to which of Clerk is a fixed and unshifting period,

cited.

MOSES, C. J., concurred.

WILLARD, A. J. I concur in the conclusion that the burden of showing that Confederate currency was intended by the parties rests on the defendant.

4 S. C. 178

WRIGHT v. CHARLES.

(Columbia. Nov. Term, 1872.)

[Clerks of Courts 27.]

At the election held in June, 1868, under the Ordinance of March 7, 1868, M was elected Clerk of the Court of Common Pleas of Darlington County, He failed to qualify, and under the Court of Common Pleas of Darlington County, He failed to qualify, and under the Court of County and the Court of lington County. He failed to qualify, and under an order of the Governor, authorized by an der an order of the Governor, authorized by an Act of March 23, 1869, an election for Clerk was held in May, 1869, and C was elected. He received a commission "to continue of force for four years," and in July, 1869, he qualified and entered into possession of the office. At the general election in October, 1872, W was elected to the office, and in November of the same year has received a commission "to continue in force he received a commission "to continue in force for four years," and duly qualified as Clerk: *Held*, That C was entitled, under the Constitu-tion, to hold the office "for the term of four years" from the time of his election in 1869.

[Ed. Note.—Cited in Macoy v. Curtis, 14 S. C. 373; Smith v. McConnell, 44 S. C. 493, 22 S. E. 721.

For other cases, see Clerks of Courts, Cent. Dig. §§ 21-25; Dec. Dig. \$\infty\$7.]

[Clerks of Courts & 7.]

A Clerk of the Court of Common Pleas holds his office, under the Constitution, "for the term of four years;" and this whether he was elected because his predecessor's term had expired, or because the person elected had failed to qualify, or because of a vacancy caused by the death or resignation of the incumbent, or by any other cause.

[Ed. Note.—Cited in Whipper v. Reed, 9 S. C. 6, 8, 9; Simpson v. Willard, 14 S. C. 208, 210; Smith v. McConnell, 44 S. C. 496, 22 S. E. 721; McDowell v. Burnett, 92 S. C. 472, 75 S. E. 873.

For other cases, see Clerks of Courts, Cent. Dig. § 21; Dec. Dig. € 7.]

[This case is also cited in Simpson v. Willard, 14 S. C. 191, and distinguished therefrom.]

*179

*Application by Jonathan Wright, plaintiff, against William E. Charles, defendant, to the Supreme Court, in a case agreed upon in a controversy submitted without action.

The facts are stated in the judgment of the Court.

Edwards and Dargan, for plaintiff:

First. The constitutional term of the office

fice may be vacant."-Constitution 1868, Ar- Constitution, 1868, passim; Potter's Dwarticle IV. § 27, compared with §§ 2, 13, 19, 20, 21, etc.; 2 Black Com., 143, (refer to Hays v. Harllee, 1 Mill, 267; State v. Lyles, 1 McC., 238; State v. Hutson, 1 McC., 240; State v. McClinton, 246;) Reister v. Hemphill, 2 S. C., 335.

Second. If the term of office be unshifting the Legislature may provide for the filling of vacancies for the unexpired term in which a vacancy occurs, where the Constitution makes no such express provision.-Reister v. Hemphill, 2 S. C., 335.

Third. But the constitutional provision for the filling up of the unexpired term of the Clerk may be fairly implied from the connection in which the provision for the office is found, if not expressly continued in the 11th Section of the 4th Article of the Constitution.-State v. Hutson, 1 McC., 240; Constitution of 1790, Article III, § 1; Brunson v. Hunter, Chev., 290; Const. Amdt., 1828, § 4.

Fourth. The fourth Article of the Constitution of 1868 has received legislative construction to this effect; and the Legislature has provided for the filling of vacancies (in the office of Clerk, as in other County offices,) which, in constitutional and legislative parlance, means for the unexpired term .-- Act 1869, No. 161, § 1, 14 Stat., 242; Act 1870, No. 235, 14 Stat., 338, and No. 265, 14 Stat., 374; No. 284, § 38, 14 Stat., 397; Constitution 1868, Article II, § 29, and Article IV, § 11.

Fifth. Charles was elected to fill the unexpired term of Moss, whose term commenced the 3d day of June, 1868, and terminated 3d June, 1872, or as soon thereafter as his successor (Wright) was elected and qualified. Ordinance of 7th March, 1868, published with Const., § 7, p. 40; Const., Article IV, § 27; Act 1869, No. 161, 14 Stat., 242; Act 1868, No. 6, § 2, 14 Stat., 11; Act 1868, No. *180

24, *14 Stat., 69; Act 1870, No. 234, 14 Stat., 338; Const., Article II, § 11; Article XIV, § 10.

Sixth. If not elected to fill the unexpired term of Moss, Charles was never legally elected to the office of Clerk, and holds no term. Act 1869, No. 161, 14 Stat., 242; Act 1870, No. 234, 14 Stat., 338.

Seventh. But, even if Charles was legally elected for the term of four years, on the 25th of May, 1869, his term necessarily expires on the 25th of May, 1873.-Const., Article IV, § 27; Ordinance 7th March, 1868, § 7; Act 1868, No. 6, § 2, 14 Stat., 10.

Spain, for defendant:

1. The Constitution of 1868 did not originate Courts or their subordinate officers. It distributed judicial powers and regulated the mode by which the persons, judicial and ministerial, in connection with the adminis-

and "the term will continue though the of-, tration of justice, were to be ascertained. ris, 340.

> 2. The Courts of Common Pleas are ancient and superior Courts, entrusted, by the common law, with the administration of justice, and, as an incident, have the power to appoint their Clerks to assist in the administration of justice-saving the right of the people to constitute and regulate Courts and their officers at pleasure.-Potter's Dwarris, 340; Cooley's Con. Lim., 21; Harding v. Pollock, 19 Eng. Com. Law Rep., 21.

> 3. Then, if the common law allows ancient and Superior Courts to appoint their Clerks, the same common law principle applies to new Courts and newly elected officers, subject to the same saving as before stated.-Harding v. Pollock, Ib.

4. Whether the Courts of Common Pleas in South Carolina are ancient or new, the office of Clerk is appurtenant; and, though a public office, it is not political-it is ministerial. Ib. Jacob's Law Dic., "Office."In South Carolina the sovereign will

has regulated the mode of appointment (election rather) to the office of Clerk, and constituted the term.—Constitution 1868, Article IV. Section 27.

6. The term of office of the Clerk is the creature of the Constitution, and is "four years, and until a successor shall be elected and qualified."-Ib.

7. The Clerk, in each County, is the creature of the electors thereof .- Ib.

*181

*8. The Clerk of the Court of Common Pleas is ex officio Clerk of General Sessions in each County; the latter is, sub modo, an incident to the former office. Herein is a change of the common law,-Ib.

9. Although the term of office of the Clerk of Court was prescribed by the Constitution, (supra,) yet the first elections for Clerks were not under any provision thereof, as to time, but by virtue of an Ordinance of the Convention.—See Ordinance March 7th, 1868, (14 Stat., 31.)

10. Moss' election did not fill the office; his failure to qualify in the time limited wrought a forfeiture of his right to the office. Then the office was vacant: not a term of office. Nothing but actual incumbency can make a person a legal officer; he must file his bond and take the oath of office. He must be not electus merely, but perfectus also.-Act No. 5, 14 Stat., 4; Act No. 25, ib., 69; Con., Art. II, Sec. 30; The Auditors of Wayne County v. Benoit, 20 Mich., 176; The King v. Swyer, 21 Eng. C. L. R., 209.

11. The office of Clerk of Court for Darlington, and it may be elsewhere, being vacant, an Act No. 161, 14 St., 242, was passed "to fill certain vacancies in County offices." The office being vacant, and the Constitution being silent as to the time it should be first filled, but commanding an election by the electors of the County as the mode, the General Assembly rightfully exercised "the Legislative power" as to the time, and properly followed the fundamental mode.—Con. 1868, Art. II, Sec. 1; Reister v. Hemphill, 2 S. C., 325; The People v. Draper, 15 N. Y. R., 543.

12. The electors of a County cannot elect a Clerk of Court for a term short of four years. Whether the election be because of a vacant office, or a vacancy in term of office, they cannot elect a locum tenens or deputy.—Reister v. Hemphill, ib.; State v. Jeter, 1 McC., 233; State v. Lyles, ib., 238; State v. McClintock, ib., 245.

13. Charles having been elected by the electors of Darlington, under a valid law, having qualified, been commissioned, and entered upon the performance of the duties of the office, its duration is assured to him by the Constitution for the full period of four years from date of his qualification, subject to be terminated only by death, resignation, incapacity, misconduct, or neglect of duty. The three latter causes cannot be legislatively determined, but only by some mode of trial prescribed.—Constitution 1868, Art. II, Sec. 31; The Commonwealth v. Gamble, 62 Pa., 343.

April 8, 1873. The opinion of the Court was delivered by

*182

*MOSES, C. J. The controversy in this case is to abide the decision of the law upon the following agreed facts:

One Moss, in June, 1868, by virtue of an Ordinance of the Convention of 7th March, 1868, (14 Stat., 31,) providing "for the ratification of the Constitution and for the election of certain officers." was elected Clerk of the Court of Common Pleas for the Courty of Darlington, but did not qualify.

On the 25th May, 1869, at an election held by virtue of the order of the Governor, authorized by the Act of March 23d, 1869, entitled "An Act to provide for an election to fill certain vacancies in County offices," (14 Stat., 242,) William E. Charles was elected by the electors of the said County to the same office, was commissioned on the 1st of July, 1869, "the commission to continue in force for four years," and on the 6th day of July of same year he qualified and entered into possession of the office and on the performance of its duties. At the general election in October, 1872, Jonathan Wright was elected to the office; on 26th November following was commissioned by the Governor, the commission bearing the words "to continue in force for four years," and qualified on 28th of the same month. He demanded possession of the office, which was refused, and the single question before us is whether, on the demand, Charles should have yielded such possession.

The 27th Section of the 4th Article of the Constitution provides for the election in each County by the electors thereof of one Clerk for the Court of Common Pleas. "who shall hold his office for the term of four years, and until his successor shall be elected and qualified." The term of the office, as well as the manner of the election, are fixed by the Constitution. No provision was made either as to the time when the Clerk was to be elected, nor was authority given for an election to supply a vacancy arising from resignation, death, or any other cause. A temporary Clerk might be appointed by the presiding Judge, but the Clerk, holding as a constitutional officer, by virtue of the said Article, must be elected by the electors of the Coun-The Legislature, therefore, by Act of ty. March 23, 1869, before referred to, "authorized the Governor, in thirty days after its passage, to order an election for the purpose of filling each and every vacancy in the various Counties throughout the State. which has occurred by reason of death, resignation or inability to serve, or from any oth-

*183

er cause." It was under an *election, held by force of this Act, that Charles was elected. The time for the next and every succeeding general election of County officers was fixed by the Act approved February 14, 1870, (14 Stat., 338.)

The term of office being fixed by the Constitution, the party holding it by election is entitled to "all the rights, powers and incidents" which belong or pertain to it, and by what course of reasoning the duration of the term is not to be included among them it is difficult to perceive. The person elected to fill a vacancy does not succeed to the unexpired portion of the term of his predecessor, but holds by a determinate tenure prescribed by the Constitution. The vacancy exists in the office, the term is the duration of it, not dependent on the death or resignation of the person holding it, but on the law. No matter how the office becomes vacant, the party elected to succeed to it is not in as the mere locum tenens only supplying the term of the person who last preceded him. If the Legislature had, by express enactment, declared that one elected to fill the unexpired term of the office of Clerk, made vacant by any cause, should only hold for such term, it would have been inoperative and void, for, as was said by Mr. Justice Wright, in the opinion of the Court in Reister v. Hemphill, 2 S. C., 325, "where the organic law fixes the term of office, it is not in the power of the Legislature, by an Act, to change that term."

The argument for the plaintiff appears to rest upon the proposition "that the constitutional term of the office of Clerk is a fixed and unshifting period." It certainly is fixed by the Constitution, but if it is meant by un-

shifting that it cannot vary as to its beginning and ending, the very fact that the Constitution extends it "until his successor shall be elected and qualified," proves its fallacy. The question is not as to the mode of filling the vacancy, but the tenure by which the party elected shall hold the office. No distinction is made by the Constitution between the election held by reason of a vacancy occurring by resignation or death, and the absence of such a difference in a matter which must have been in the minds of the framers of the Constitution goes far to sustain the construction contended for by the defendant. In fact, every election is to supply a vacancy, no matter how arising.

If the language of the Constitution must be held to apply to the election of a Clerk to fill a term made vacant by the death or resignation of an incumbent, it applies with in-

*184

creased force to an elec*tion made necessary by the non-acceptance of the person previously elected. Moss never held the office of Clerk, no portion of his term could remain to be filled, for it had never begun by his entrance upon it. The Clerk who preceded him continued to exercise the office until some one should be elected and qualify according to law.

Our own reports are not without authority, which may be said to be conclusive of the question. In the State v. Hutson, 1 McC., 240, it was held that Ordinaries, under the Constitution of 1790, were judicial officers, holding during good behavior.

The Governor, under the Act of 1815, appointed to a vacancy in the office of Ordinary. It was held that although the Act only authorizes him to make a temporary appointment until an election should take place, yet his appointee, being in office as Ordinary, was in under the Constitution, and could hold during good behavior. The same principle governed the decisions in the cases of Jeter ads. The State, The State v. Lyles, The State v. McClintock, all in the same book, and was recognized in Bronson v. Hunter, Chev., 290.

The authorities in New York are identical with our own. Where, by the Constitution of that State, Sheriffs, Clerks of Counties, &c., are to be chosen once in every three years, and as often as vacancies shall happen, it was held in The People v. Green, 2 Wend., 266, that "a Sheriff elected in September, 1826, to supply a vacancy occasioned by the death of his predecessor, who took his office on the 1st of January, 1826, holds it for three years; and an election of another person in November, 1828, under an impression that the term of the former expired in January, 1829, is void."

To the same effect is The People v. Constant, 11 Wend., 133,

The question submitted to the Court is answered in the negative, and it is therefore ordered that judgment be rendered in favor of William E. Charles, the defendant.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *185

*STATE ex rel. SHIVER v. COMPTROLLER GENERAL.

(Columbia. Nov. Term, 1872.)

[Mandamus \$== 16.]

Where a writ of mandamus would be vain and fruitless and without any beneficial effect, or where it would introduce confusion and disorder, or where it is manifestly improper, it will not be granted.

[Ed. Note.—Cited in State ex rel. Douglas & Jackson v. Gannard, 11 S. C. 315; Ex parte Mackey, 15 S. C. 329.

For other cases, see Mandamus, Cent. Dig. \$\\$48, 59, 60; Dec. Dig. \sim 16.]

[Mandamus = 16.]

Where an Act of the Legislature directed the State Treasurer to issue certain scrip to be received in payment of taxes and other dues of the State, and directed an annual tax to be levied for the redemption of the scrip, it is sufficient ground for the refusal of mandamus to compel the Comptroller General to order the levy, that the State and County Treasurers are enjoined from receiving the scrip on the ground that it is null and void.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. €⇒16.]

[States \$\infty\$145.]

The Revenue Bond Scrip, issued by the State Treasurer, under the Act of March 2, 1872, "to relieve the State of South Carolina of all liability for its guaranty of the Bonds of the Blue Ridge Railroad Company," being certificates of indebtedness, payable to bearer, issued by the State in its sovereign capacity, with the faith of the State pledged for their ultimate redemption, and intended to circulate as money are bills of credit, which, by the Constitution of the United States, a State is inhibited from issuing, and are, therefore, null and void.

[Ed. Note.—Cited in Auditor v. Treasurer, 4C. 311, 312; State v. Cardozo, 5 S. E. 309. For other cases, see States, Cent. Dig. § 141; Dec. Dig. \$\infty\$145.]

[Mandamus @=115.]

Where an annual tax is directed to be levied for the purpose of redeeming bills of credit, issued by the State in contravention of the Constitution of the United States, mandamus will not lie to compel the Comptroller General to order the levy to be made.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 242, 244–246, 248; Dec. Dig. 🖘 115.]

[Mandamus =10.]

Where an annual tax is directed to be levied for the redemption of certain bills of credit, which are null and void, mandamus will not be granted directing a levy of the tax to pay the indebtedness for which the bills were is-

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. ⇐ 10.]

This was a petition to the Supreme Court such form and of such denominations as by Robert C. Shiver, J. P. Southern, W. C. Swaffield and W. B. Gulick, against Solomon L. Hoge, as Comptroller General of the State, praying for a writ of mandamus. It set forth:

I. That by an Act of the General Assembly of said State, duly passed on the second day of March, 1872, entitled "An Act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same," it was enacted as follows:

Sec. 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the State Treasurer is hereby directed, with the consent, in writing, of the President of the Blue Ridge Railroad Company, in South Carolina, to require the Financial Agent of the State, in the city of New York, immediately to deliver to the State Treasurer all the bonds of the Blue Ridge Railroad Company, endorsed and guaranteed by the State of South Carolina, which are now in his possession, and held by him as collateral security, for advances made by the

*186

said *Financial Agent, by the order of the Financial Board, to the Blue Ridge Railroad Company; and, upon the delivery of the said bonds, the Treasurer is hereby required to cancel the same, in the manner hereinafter directed; and the said Blue Ridge Railroad Company shall thereupon be discharged from all liability to the State on account of such advance.

Sec. 2. That upon the surrender by the said company to the State Treasury of the balance of the said four million of dollars of bonds, issued by the said Blue Ridge Railroad Company, and guaranteed by the State, the State Treasurer is hereby authorized and required to deliver to the President of the Blue Ridge Railroad Company, in South Carolina, Treasury Certificates of Indebtedness (styled Revenue Bond Scrip) to the amount of one million eight hundred thousand dollars, the said certificate to be executed in the manner hereafter directed; and if the said company shall not be able to deliver all of the said bonds at one time, the Treasurer is authorized and required to deliver to the said President such amount of such Treasury Certificates as shall be proportioned to the amount of bonds delivered.

Sec. 3. That, to carry out the purpose of this Act, the State Treasurer is hereby authorized and required to have printed, or engraved on steel, as soon as practicable, Treasury Certificates of Indebtedness, to be known and designated as Revenue Bond Scrip of the State of South Carolina, in sideration, in their own right and as trustees

may be determined on by the State Treasurer and the President of the Blue Ridge Railroad Company, in South Carolina, to the amount of one million eight hundred thousand dollars, which Revenue Bond Scrip shall be signed by the State Treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

Sec. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said Revenue Bond Scrip, and the County Treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt, and the State Treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and, still further to provide for the redemption of said Revenue Bond Scrip, an annual

tax *of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected in the same manner and at the same time as may be provided by law for the levy and collection of the regular annual taxes of the State: and the State Treasurer is hereby required to retire, at the end of each year from their date, one-fourth of the amount of the Treasury Scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

II. That subsequently to the passage of this Act, the said Blue Ridge Railroad Company did surrender three millions three hundred and ninety-four thousand dollars of the said bonds, issued by the said Blue Ridge Railroad Company, and guaranteed by the State, into the State Treasury, as provided for in and by the second Section of said Act, as above recited.

III. That upon the surrender of said bonds, as before set forth, the State Treasurer did deliver to the President of the Blue Ridge Railroad Company, in South Carolina, Treasury Certificates of Indebtedness, (styled Revenue Bond Scrip,) to the amount of one million seven hundred and ninety-six thousand eight hundred and twenty-three and fiftythree one hundredths dollars, which said certificates were executed in the manner and form and of the denomination required and prescribed by the third Section of said Act above recited.

IV. That your petitioners are now the owners and holders, for good and valuable confor others, of the amount of four hundred, refusal of the said Solomon L. Hoge, Compand fifty-eight thousand three hundred and five dollars of said Treasury Certificates (styled Revenue Bond Scrip,) whereof the denominations and numbers are fully set forth in a certain paper hereunto annexed, and marked "Exhibit A," to which exhibit your petitioners refer as part and parcel of this their petition.

V. That the Comptroller General of said State is the officer now charged by law with the duty of giving notice to the several County Auditors of the said State of the rate per centum of taxes authorized by law to be levied upon the property of the State, for the use of the State; and that the Hon. Solomon L. Hoge is now the Comptroller General of the State.

VI. That by the laws of said State the Comptroller General is required, on or before the fifteenth day of November in each *188

year, *to give notice to each County Auditor of the rates per centum authorized by law to be levied for the various State purposes, which rates, or per centum, shall be levied by the County Auditor on the taxable property of the County, and charged on the duplicate with the taxes required to be levied and collected for other purposes.

VII. That notwithstanding his duty as Comptroller General to give the said notice to the said County Auditor of the annual tax of three mills on the dollar on the assessed value of all taxable property in the State, and to levy, or cause to be levied, the said tax of three mills on the dollar, for the redemption of the said Revenue Bond Scrip, as required by the fourth Section of the said Act above recited, and in disregard of the legal rights of your petitioners as owners and holders, for value, of said Revenue Bond Scrip, the Hon. J. L. Neagle, who was the Comptroller General of said State until the 7th day of December, in the present year, did neglect and refuse to give said notice to the several County Auditors of the State of the rate per centum of three mills on the dollar, as by law he was bound to do, and as is required by the said fourth Section of said Act above recited; and the said Solomon L. Hoge, who has been, since the 7th of December in the present year, and is now the Comptroller General of said State, has neglected and refused, up to the present time, and does now neglect and refuse to give the said notice to the several County Auditors of the State of the said rate per centum of three mills on the dollar on all the taxable property of the State, for the redemption of the said Revenue Bond Scrip, or to levy, or cause to be levied, the said annual tax of three mills on the dollar, as by the said fourth Section of the said Act above recited he is required to do.

VIII. That your petitioners are wronged and injured, and deprived of their legal rights in the premises by the said neglect and troller General, as aforesaid, to give said notice of said rate per centum of three mills on the dollar of tax to redeem the said Revenue Bond Scrip, as hereinafter set forth, and to levy, or cause to be levied, the said annual tax as required by the said fourth Section of said Act above recited: and that your petitioners are without remedy in the premises, unless it be afforded by the interposition of this honorable Court by their writ of mandamus; and they, therefore, pray that a writ of mandamus may issue out of this Court against the said Solomon L. Hoge, Comptroller General, as aforesaid, commanding him

*189

to give the said *notice to the County Auditors of each County in said state of the said rate per centum of tax of three mills on the dollar on the assessed value of all the taxable property of the State for the redemption of the said Treasury Certificates (styled Revenue Bond Scrip) now held by your petitioners, and to levy, and cause to be levied, the said tax, as provided for in and by the said fourth Section of said Act before recited; and that such other order may be had in the premises as justice may require, to the end that said tax, when levied and collected, may be applied to the redemption of said Treasury Certificates of Indebtedness (styled Revenue Bond Scrip) now owned and held by your petitioners.

A rule to show cause, dated December 19, 1872, and returnable January 2, 1873, having been issued and served on the Comptroller General, he filed a return, as follows:

Solomon L. Hoge, Comptroller General of the said State, upon whom has been served a rule issued by this honorable Court, ordering him to show cause before this said Court why a writ of mandamus should not issue commanding him to give notice to the several County Auditors of the said State of the rate per centum of three mills on the dollar on the assessed value of all the taxable property of the State for the redemption of the Treasury Certificates, (styled Revenue Bond Scrip,) alleged to be now owned and held by the petitioners, and to levy, and cause to be levied, the said tax, as provided for in and by the fourth Section of the Act recited in the said petition, and that such other order may be had in the premises as justice may require, to the end that the said tax, when levied and collected, may be applied to the redemption of the said Treasury Certificates, (styled Revenue Bond Scrip,) alleged to be now owned and held by the petitioners, for return and answer to the said rule, and for cause why a writ of mandamus should not issue as suggested, sets forth and shows as follows:

1. Because, by the provisions of the Act of March 2, 1872, no portion of the said certificates are required to be retired until after the expiration of twelve months from their date; that before the expiration of that time no suit can be had in behalf of any private individual under the said Act; and that if any wrong has been done, or any breach of duty required by the said Act, such wrong or breach is a public wrong, and can only be remedied at the suit of the Governor or Attorney General, or some officer of the Executive Department.

*190

- *2. Because no demand has ever been made upon the Comptroller General to give notice to the County Auditors of each County of the annual tax of three mills on the dollar on the assessed value of all taxable property in the State for the redemption of the said Treasury Certificates, (styled Revenue Bond Scrip,) held by the petitioners, and to levy and collect, and cause to be levied and collected, the said taxes provided for by the fourth Section of the Act of the General Assembly passed on 2d March, 1872, and recited in the petition filed in this case.
- 3. Because the General Assembly was induced to enact the Act of March 2, 1872, by the representation of the Blue Ridge Railroad Company that the conditions required by the Act of 15th September, 1868, entitled "An Act to authorize additional aid to the Blue Ridge Railroad Company, in South Carolina," had been complied with, and that the State of South Carolina had become liable to pay the bonds of the said Blue Ridge Railroad Company, authorized by the said Act; and this respondent avers, and for cause shows, that the said representation was not true; that the State was not liable to pay the said bonds, or any part thereof, and that the consideration had failed which had led the General Assembly to direct the issue of the certificates mentioned in the said Act of 2d March, 1872; that the said Blue Ridge Railroad Company, and all the persons who became holders of the said certificates, had notice before or at the time they received the same; and this respondent, as the chief fiscal officer of the State, is bound by his duty to interpose until the said defense of the State can be made in the proper tribunals, and to submit the same as a sufficient objection to the extraordinary remedy by writ of mandamus.
- 4. Because the Act of March 2, 1872, recited in the petition, is unconstitutional, null and void, in that it is repugnant to the Constitution of the State.
- 5. Because the said Act is null and void, in that it is repugnant to the Constitution of the United States, which ordains (Article 1, Section 10,) that "no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts."
- 6. Because the Act of March 2, 1872, evinces in its various provisions a design to effect what is declared unconstitutional by the in the State, is hereby levied, to be collected

the expiration of twelve months from their State and Federal Constitutions; that all its date; that before the expiration of that time provisions are connected in subject matter, no suit can be had in behalf of any private individual under the said Act; and that if gether for the same purpose, and are illegal

*191

and void; that more *especially the provision which makes the levy and requires the collection of the tax of three mills is intended to give effect to this violation of the Constitution, and is, therefore, unconstitutional and void; and that the said provision does not impose upon this respondent any duty which can be enforced by the judgment of any Court, either by writ of mandamus or otherwise.

- 7. Because, in conformity with the Constitution of the State, (Article II, Section 30,) this respondent has taken his oath of office, by which he has sworn to support, protect and defend the Constitution of the United States and the Constitution of South Carolina, and he cannot be required to levy or collect a tax, or perform any other act in furtherance of objects inconsistent with either of said Constitutions, or with this respondent's oath of office.
- 8. Because the annual Tax Act for the current year has already been passed by the Legislature, and the levy in pursuance thereof was actually made previous to the service of the rule in this case; and no further levy and collection of taxes for any purpose can be made until the lapse of the current fiscal year.
- 9. Because, under proceedings duly had in the Courts of this State, the said Act of March 2, 1872, has been declared null and void, and the said certificates mentioned in the petition have been declared illegal, and the various officers of the State in the Treasury Department thereof have been enjoined from receiving or issuing the same; that such proceedings are still pending, and it would have been, and is now, unlawful for this respondent to take the action prayed for in the petition.
- 10. Because, even should the said proceedings terminate in declaring the provisions of the said Act to be legal, it will become a financial question at what time to levy and collect the tax set forth in the said Act, the solution of which belongs to the discretion of the Executive Department of the Government.

To the above return the relators filed a reply as follows:

I. These relators, replying to the first cause set forth in the return of the respondent herein, say:

That by the fourth Section of the said Act of March 2, 1872, it is expressly enacted that "to provide for the redemption of said Revenue Bond Scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected

*192

in the same *manner, and at the same time, as may be provided by law for the levy and collection of the regular annual taxes of the State;" that this provision of the said Act imposes upon the Comptroller General the duty of giving notice to the County Auditors of the required tax, in the same manner and at the same time with the other annual taxes levied by the State, to wit, on or before the fifteenth day of November in each year; and that the said tax must be levied and collected prior to the expiration of one year from the date of the said scrip, in order to enable the State Treasurer, as required by said Act, to retire one-fourth of the amount thereof; that upon the neglect or refusal of the Comptroller General to give said notice, any holder and owner of said scrip is entitled to demand the aid of this Court to enforce said duty.

That the said neglect or refusal is a public wrong, in the sense only that it is a neglect and violation of duty by a public officer, of evil example to the community; but that, as a legal or pecuniary wrong, it affects only the rights of such as are owners and holders of the said scrip, and that they are entitled to seek redress for their private wrongs, growing out of the neglect and violation of duty by a public officer.

II. And for reply to the second cause set forth in said return, these relators say: That it is not required by law that these relators should have demanded from the respondent a performance of his duty as a public officer, to wit: the giving notice to the County Auditors of the said tax to redeem the said scrip, because, as a public officer, he is charged by law, and by his oath of office, with the performance of that duty, and no private individual is required to demand of a public officer the performance of a duty plainly enjoined by law.

III. And for reply to the third cause set forth in said return, these relators say:

1. That in said third cause respondent alleges that "the General Assembly was induced to enact the Act of March 2, 1872, by the representation of the Blue Ridge Railroad Company; that the conditions required by the Act of 15th September, 1868, entitled 'An Act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina,'" had been complied with, and that this representation was not true. To this the relators reply that they are ignorant if any such representations were made, but they deny, as matter of law, that it is of any conse-

quence whether such allega*tion be true or not, because, among other reasons, as matter of law, the said condition of the Act of September 15, 1868, had been, by a subsequent Act, anterior to the Act of March 2, 1872, repealed.

2. That, in said third cause, respondent alleges that "the General Assembly was induced to enact the Act of March 2, 1872, by the representation of the Blue Ridge Railroad Company, that * * * the State of South Carolina had become liable to pay the bonds of the said Blue Ridge Railroad Company, authorized by said Act," and that this representation was not true. To this the relators reply that they are ignorant if any such representations were made; but, if such representations were made, they deny that such allegation is material to the issue here made, because the consideration for the issue of said Revenue Bond Scrip, fully set forth in the Act of March 2, 1872, together with the admitted liability of the State, is recited as follows: "Whereas the State of South Carolina, &c., has endorsed a guarantee of the faith and credit of the State on four million of dollars of bonds, issued by the Blue Ridge Railroad Company, * * * which bonds are liable for the debts of the said railroad company; and whereas the present condition of the finances of the State, and of said company, is such as to make the further continuance of said bonds on the market inexpedient and unadvisable, and a serious injury and prejudice to the credit of the State; and whereas the existence of the said four million of dollars of bonds so guaranteed create a large liability on the part of the State, which the Treasurer may be required to meet at unforeseen and inopportune times; and whereas the liability of the State on account of such guarantee should be faithfully met and discharged; therefore, in order to secure the recovery and destruction of the bonds and coupons of the said company, issued under and in pursuance of the aforesaid Act, now pledged in the city of New York and elsewhere, and to relieve the State of all liabilities whatever, by reason of its endorsement and guarantee of said bonds," thus shewing that the consideration was the recovery and destruction of said bonds, and the relief of the State from the alleged and admitted liability therefor.

And the relators further say that this consideration was fully and completely received by the State in the return into the Treasury thereof of three million three hundred and ninety-four thousand of the said guaranteed bonds by the said Blue Ridge Railroad Com-

*194

*pany, which said bonds have been cancelled and destroyed by the State authorities, in pursuance of the said Act of March 2, 1872.

And this consideration the relators have fully stated in their petition, and the respondent has not and does not venture to deny it, which failure to deny is an admission of the truth thereof.

And the relators further say that they do not deny, but admit, notice of the consideration on which said scrip was authorized and

respondent, by his failure to deny their statement, that the consideration has been received by the State, is in law a full admission that the consideration had not failed, and he is bound thereby.

And, further, that upon the issue of the bonds, for the recovery and destruction of which the said Revenue Bond Scrip was issued, a preliminary injunction against the endorsement of said bonds was sought and obtained, but upon full hearing before Hon. S. W. Melton, Judge of the Fifth Judicial Circuit, the said injunction was dissolved, and the additional security of a judicial decision was thus given to the Act of the Legislature, and the highest sanction to the bonds, the delivery of which to the State makes the consideration of the present scrip.

The relators are not aware that the respondent is the chief fiscal officer of the State, and even if his office has assumed such extraordinary precedence, they are not aware of what duty of his office requires him to interpose his own construction of an Act of the Legislature between the recognized liability of the State and the payment of its creditors, thus driving those who trusted its pledges to the expense and delay of a costly and dilatory suit, and endangering the credit of the State itself.

IV. And for reply to the fourth cause, set forth in said return, these relators say:

That the said Act of March 2, 1872, is not unconstitutional nor void by reason of anything set forth or alleged in said fourth cause in said return contained, but, that, on the contrary, the said scrip is issued under the express authority conferred by the Constitution of the State upon the General Assembly.

V. And for reply to the fifth cause set forth in said return, these relators say:

That the said Act of March 2, 1872, is not repugnant to the Constitution of the United States, which ordains that "no State shall emit bills of credit or make anything but gold and silver coin a tender in payment of debts."

*195

*VI. And for reply to the sixth cause set forth in said return, these relators say:

That the said Act of March 2, 1872, evinces no design to effect what is declared unconstitutional by the State or Federal authorities; that the levy of the said tax of three mills was designed in good faith to protect the rights of those who should become, like these relators, the owners and holders of said scrip, and that whether said scrip be lawful or not, or whether said scrip be receivable for taxes or not, cannot affect the right of these relators, who are owners and holders thereof for good and valuable consideration, to claim its redemption in accordance with the said fourth Section of the Act of March 2, 1872;

issued, and they have already shewn that the but that, on the contrary, the said fourth Section imposes upon this respondent the duty of levying the said tax of three mills, irrespective of the question of the validity, or legality, or constitutionality of the said scrip, in respect to its issue, its original purposes, its receivability for taxes, or its re-issue in payment of dues from the State.

> VII. And for reply to the seventh cause set forth in said return, these relators say:

> That these relators do not seek to require or compel the performance by this respondent of any act inconsistent with either the Constitution of this State or of the United States, nor in conflict with his oath of office as Comptroller General, but that, on the contrary, they seek only to compel the performance of a duty which, by his said oath of office, he is required to perform.

> VIII. And for reply to the eighth cause set forth in said return, these relators say:

> That this respondent cannot, in law, be excused from the performance of his duty in this behalf, because, by his wrongful neglect and refusal to perform his duty, the annual taxes had been levied previous to the service of the rule herein; that such an excuse, if allowed, would put the rights of these relators at the constant mercy of this respondent, since it could never be charged that he was neglecting his duty in these premises until he had suffered the time to pass by when the regular annual taxes of the State are levied; that if this Court shall award the relief herein sought, the respondent can, without delay or legal impediment, proceed to give the proper notice of said tax, and cause the same to be duly collected.

> IX. And for reply to the ninth cause set forth in said return, these relators say:

*196

*That it is not unlawful for the respondent to levy the said tax because of any thing set forth in said ninth cause in said return; that said proceedings therein referred to, by which the said scrip has been declared null and void, do not have for their object to prevent the levy of the tax demanded by these relators, and that no decision can be rendered in said proceedings which will reach the subject-matter or object which the petition herein of these relators embraces.

X. And for reply to the tenth cause set forth in said return, these relators say:

That the right of these relators to demand the levy of the said tax is a right which depends upon the legal meaning and effect of the language used in the said fourth Section of the said Act of March 2d, 1872; that if it shall be adjudged that the said Section requires this respondent to levy the said tax, it will then become his legal duty to levy said tax without reference to the financial views of this respondent or of any State officers, and without the exercise of any discretion on his or their part.

To the reply the respondent filed a rejoinder as follows:

The respondent, by way of rejoinder to the reply of the relators, says that, by reason of anything in said reply stated, the said writ of mandamus should not be granted, because, he says:

- 1. That, as to the first ground taken in the return of this respondent, the allegations therein contained are sufficient in law to maintain the position of the respondent.
- 2. That, as to the second ground taken in the return of this respondent, the allegations therein contained are sufficient in law to maintain the position of this respondent.
- 3. As to so much of the reply of the relators as is in answer to this respondent's averment of the consideration for the issue, by the State, of the said Revenue Bond Scrip, this respondent rejoins that the consideration, as stated in the said reply, and in the recital made therein, is not truly stated; and that the consideration was the alleged fact that the State had become and was liable to pay the bonds that had been issued by the Blue Ridge Railroad Company, when, in truth, no such fact existed, and no such liability had been incurred.
 - 4. As to the fourth ground, this respondent

*197

avers the said Act to *be repugnant to the Constitution of this State, and, therefore, unconstitutional, null and void.

- 5. As to the fifth ground, this respondent avers the said Act to be repugnant to the Constitution of the United States, null and void.
- 6. As to the sixth ground, this respondent avers that the Act of March 2, 1872, does evince the design set forth in the return, and that all the provisions thereof are unconstitutional, null and void.
- 7. As to the seventh clause of the reply, this respondent rejoins: That the act sought to be performed is inconsistent with the Constitution of this State, and with that of the United States; is in conflict with respondent's oath of office, and is not a duty which he can be required to perform.
- 8. This respondent denies that, by reason of any thing set forth in the eighth ground of the reply, he can be required to proceed to give notice of said tax, and cause the same to be collected.
- 9. This respondent insists that nothing set forth in the ninth ground of the reply is a sufficient answer to the cause shewn in the ninth ground of his return.
- 10. This respondent insists that nothing set forth in the relators' tenth ground of reply is a sufficient answer to the cause shown in the tenth ground of his return.

On which said several matters and things this respondent prays judgment of this honorable Court. Memminger, with whom was Pope & Haskell, for respondent:

- I. This rule must be discharged, for the following reasons:
- 1. Because there is a subsisting judgment declaring these certificates, and the Act which authorized them, unconstitutional, null and void; and, until that judgment be reversed, no Court in the State can lawfully enforce their payment.
- 2. Because the relators have no present standing in Court to ask the issuing of a writ of mandamus.
 - 3. Because there is no demand.

Demand is absolutely necessary, and a refusal or something equivalent, (Tapping, 84:) and at page 283 it is laid down that both demand and refusal must be shown by the affidavits in support of the application.—King v. Navigation Co., 30 E. C. L., 81; King v. Leicester, 10 E. C. L., 466.

*198

- *4. Because, under the Constitution, but one annual collection of taxes can be had, and the arrangements for the present year were completed before the commencement of these proceedings.
- 5. Because there was no default in the Comptroller in not including this tax, as the injunction prevented any dealing with the scrip; and it is now a question of sound discretion whether, under such circumstances, any levy should be made.

In support of the first and second of the above reasons, the following authorities are cited:

The King v. Bishop of Chester, 1 Term R., 404. A mandamus is intended to give execution to a legal right where the legal remedy is inadequate. A legal right is the first essential foundation for the writ.

In The King v. Archbishop of Canterbury, 8 East., 219, Lord Ellenborough, C. J., says: "There ought, in all cases, to be a specific legal right as well as the want of a specific legal remedy, in order to found an application for a mandamus.

In The King v. Commissioners of Excise, 2 Term R., 465, the Court say an application for mandamus is addressed to the discretion of the Court. It is a prerogative writ, and not a writ of right, therefore the Court ought not to grant it, unless they see that the official (against whom it is asked) has done wrong.

Tapping, Mand., 15, 19. The object of the writ is to prevent a failure of justice. A strong political necessity for it must exist.

The relators in this case have nothing to do with the collection of the tax. Their scrip may never have any claim upon the tax. For, either it may all come into the treasury in payment of taxes, and it may never be paid out again, and no wrong could then be suffered by the holders, neither does it follow that

this particular scrip would be the first to be retired.

No default is committed by the State, or injury suffered by the holders, until a refusal to retire.

All the Pennsylvania cases cited on the other side are cases of past due liabilities, which the holders were entitled to have paid from the moneys which the mandamus ordered to be collected.

In those cases there was a specific legal right, while in this tax there is no specific right.

The tax was intended to construct a sinking fund to give credit to the new currency.

These considerations would compel the Court to discharge this particular rule.

*199

*But as we desire to have the Court decide the case on grounds so broad as to secure the best interest of the State, and also to prevent future litigation, we submit the following more extended views:

We submit, then:

- 1. That these certificates are illegal, being issued in violation of the State and Federal Constitutions.
- 2. That, being thus illegal, no obligation exists to pay them, and no Court can assist to enforce their payment, and a tax on the citizen, for the purpose of paying them, is illegal and cannot be collected.
- 3. That the certificates are in the nature of contracts—that, as such, they must be sustained by a legal and sufficient consideration—that the failure of the consideration, or a false representation of such consideration, vitiates the contracts as between the original parties and all subsequent parties with notice.
- 1. Is the issue of these certificates forbidden by the Constitution of the United States?

For the argument on this point I refer to the opinion of Mr. J. Willard.

The features impressed on these certificates, which distinctly bring them within the meaning of the Constitution, are:

- 1. The form which they take. They are to be of all denominations, and to be steel-plate engravings, which have been made of the size and form convenient for circulation—in fact, just like bank notes.
- 2. They are given currency by being receivable from any one for taxes or dues at the treasury.
 - 3. May pass to any holder.
- 4. They are not extinguished by being delivered in at the treasury, but remain with the Treasurer as money.
- 5. They may be re-issued, and probably will furnish the only means of payment at the treasury.

They, therefore, clearly come within the description given by the decided cases of what is meant by bills of credit.

Moreover, they produce the evils against which the Constitution intended to protect the country.

Being not redeemable in coin or in United States currency, they must necessarily constitute a debased currency, but with value sufficient to cause a circulation.

*200

*They will, therefore, inflict upon the country the evils of a depreciated currency similar to the Continental and State Bills during the revolutionary war—the assignats in France, and the late Confederate currency.

Their volume is so large that it must disturb values, and thereby affect all the relations of the country, the whole amount being more than is required for the entire circulating medium of the State.

The public creditors and all salaried officers will necessarily suffer greatly, as those certificates will absorb the entire treasury, and the Treasurer will have nothing else to pay with. The necessities of officers will compel them to receive payment in this scrip, and to submit to the loss arising from their depreciation.

It is obvious that it was to prevent such consequences that this clause of the Constitution was ordained.

But this issue is also a violation of the State Constitution.

This position, according to arrangement of counsel, has been referred to Messrs. Pope & Haskell for argument, and I refer to their elaborate and well considered arguments for the points and authorities in detail. I shall merely submit a condensed summary of the whole.

I. The sovereignty of the State does not reside in either of the three departments among which its powers are distributed, but each of them acts in virtue of a delegation of those powers.

This result follows from Article I, Section 41, which ordains that "all powers not therein delegated are reserved to the people."

"Inherent" power, therefore, can be claimed by none but by the people—all other claimants must show a delegation.

The Legislature, just like the Executive, must show the delegation of proper powers before they can exercise them; and where the delegation is attended by a direction as to the mode of exercise, the same effect will follow as in other cases of delegated authority.

The Legislature generally expresses its will in the same form in which it makes laws, and that has led to the mistaken conception that the power to make laws includes all functions that might be exercised in the same form.

But it is not so. For, a Bill of Pains and Penalties, or what is more familiar to the British Parliament under the name of a

*201

Bill *of Attainder, could not be enacted by our Legislature, simply because it is a judicial and not a legislative act.

So the erection of public buildings, and the levy of taxes, are not legislative, although generally executed in that form now in this country.

But in many countries these functions are performed by the Executive Department, and it was only after a long struggle that the taxing power was retained by the English Parliment.

Our State Constitution has not left this matter in doubt.

By Article IX it has settled the whole department of finance, taking it completely out of the general power to make laws, and strictly prescribing the extent of this power and the mode of using it.

The subject naturally divides into two primary classes: supply—expenditure.

The supply of a government can come from two sources only—taxes and loans.

Its expenditures fall into three classes ordinary expenses of sustaining the government, extraordinary expenses, and debts already incurred.

And, as nations are now constituted, these classes of financial matters must exist at the inception of any government or constitution, and must be dealt with by that constitution.

How does our State Constitution dispose of them?

1. As to the means of supply, to wit: Taxes and loans.

The subject of taxes is fixed by Art. IX,

It is confined to property and a poll tax, and is required to be equal on all.

2. It is required to be sufficient for ordinary expenses.

3. It must be annual, and if one year's supply prove insufficient, it cannot be called for in the same year, but must be deferred to and included in the next year.

Then, as to the other scource of supply, to wit, loans:

1. Their object must be to "defray extraordinary expenditures."

2. The power to make them is limited to two-thirds of the Legislature by year and nays.

3. The form of contract is prescribed. It must be by bonds in certain amounts, with not over twenty years to run, registered and identified.

4. A tax must be levied to pay the annual interest.

*202

*5. Their final payment or redemption is left to fall into the class of extraordinary expenditures.

But, at the date of the Constitution there are, as already stated, debts of the State

already existing; and these, too, when paid, would fall into the class of extraordinary expenditures.

But it may and probably would happen that whenever either of these two classes of debts become payable, the Legislature may not be able to do so, and, to meet that condition of things. Section 10 comes in and permits a substitution of other bonds, scrip, &c., for the other bonds or scrip which now call for redemption.

This exhausts the whole subject, and if the question be asked, can the State incur a new debt? the answer is that it can, if the Legislature comply with the above requisites.

1. As to the object, it must be to defray extraordinary expenditures.

2. It must be voted by two-thirds.

3. It must be in the form of registered bonds.

4. It must have a tax annexed to pay the annual interest.

Apply these requisites to the Revenue Bond Scrip, and not one will be found to have been complied with.

It necessarily follows that the scrip is void.

It cannot be authorized under the 10th Section, because it is not issued for the redemption of bonds or scrip already out and at maturity.

This disposes of the whole subject under the State Constitution.

And the result is that the Revenue Bond Scrip is declared illegal both by the Constitution of the United States and of the State.

2. The next proposition is that, being illegal, no obligation exists upon the State, or any of its citizens, to pay them, and no Court can assist to enforce that payment.

In fact, the scrip, being illegal, can furnish no consideration for any action, levy of taxes or judgment of a Court.—Story Const. § 159.

Every contract to do any act forbidden by law is void, and every act is illegal in itself which is expressly forbidden by State or common law, and the distinction between malum in se and mala prohibita, as to this point, no longer exists.

In Serg. Evans' note to Pothier on Obligations, page 1, the doctrine on this subject is thus summed up: "Whenever an engagement is entered into with a view to contra-*203

vene the general policy *of the law, no form of expression can remove the substantial defect inherent in the nature of the transaction; the law will investigate the real object of the contracting parties, and if that is repugnant to the principles established for the general benefit of society it will vitiate the most regular instrument which ingenuity can contrive."

Mr. Fonblanque, in his Treatise on Equity, B. 1, C. 4 and § 4, thus states the law: "It is indispensably necessary that we should

have both a natural and moral power of performing what we undertake, for it would 184,) where a party placed goods in the be absurd that an obligation, which derives its power from the law, should put us under a necessity of doing somewhat which the law prohibits.'

Evans' Pothier, 2 vol., p. 7, thus states the law also as to secondary contracts: "That a participation in carrying the illegal purpose into effect vitiates every contract, whether primary or secondary, of which it constitutes the object, is a point upon which no difference of opinion can be entertained."

Cooley, 188, that when a Statute is adjudged unconstitutional, rights cannot be built upon it.

A contract to do what the law forbids cannot be enforced, whether it be malum in se or malum prohibitum. Thus, in Bank United States v. Owens, 2 Peters, 527: "The charter of the U.S. Bank forbids the taking of more than six per cent, interest, but does not declare a contract to be void on which a larger interest has been taken. Held, that such contract is void upon general principles. Courts of justice are instructed to carry into effect the laws of a country, and they cannot become ancillary to the violation of those laws. There can be no civil rights where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

A bill of exchange, drawn for the purpose of carrying on a business prohibited by Statute, is void in the hands of a holder with

notice.—Davidson v. Lanier, 4 Wall., 447. Mr. Smith, in his Treatise on Contracts, (18,) says a contract not expressly prohibited by Statute is illegal, if opposed to the general policy and intent thereof, or if the contract be made to enable another to infringe that policy and intent.

If, says Lord Mansfield, (Holmes v. Johnson, Cowp., 343,) the contract appears to arise from the transgression of a positive law of the country, then the Court says he had no right to be assisted.

*An agreement entered into for the purpose of evading the provisions of a public Statute is void.—Prole v. Wiggins, cited—

Chitty on Con., 730, declares the test as to whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires to rely on such transaction in order to establish his case; and he cites as authority a case in the House of Lords of Fisher v. Brydges, where there had been an illegal agreement to convey land; the conveyance had been made, and afterwards, part of the purchase money being unpaid, the defendant made a new arrangement as to that; held that it could not be executed, being affected by the original trust.

So in Vermont, (Buck v. Arbee, 26 Ver., hands of a broker to sell, and the broker sold in violation of the license law, the owner was not allowed to recover the money received.

Sherman v. Barnard, 19 Barbour, 296.

The Act of the Legislature, set forth in the pleadings, having been pronounced unconstitutional, and contracts under it being void, the sale and transfer of such contracts does not constitute a good consideration for the promise to pay money.

2. The mere circumstance that the purchaser took the risk as to the validity of the Act of the Legislature, and of the contract, will not vary the law of the case.

3. The sale of an absolutely void chose in action will not form any consideration for a promise. If void, no legal obligation is created by it; and it is in the view of the law as if it did not exist.

4. The principle is the same, notwithstanding the chose is saleable in market for even the full value that would attach to it if valid. If the law does not recognize it as having some binding force, and will not enforce it, a note given upon the sale of it will be invalid for want of consideration.

Rodman v. Munson, 13 Barb., 188: The Act of July, 1858, is unconstitutional and void. and every debt or obligation contracted, or certificate issued under it, on behalf of the State, is also void and without binding force.

Newell v. People, 7 New York, 1: Contracts in pursuance of an Act declared unconstitutional are void.

As to what provisions of a Statute may

stand when others are *pronounced unconstitutional, Judge Cooley, at page 177, very clearly states the distinctions. He gathers the result of the decisions to be, that if a Statute attempts to accomplish two or more objects, and is void as to one, it still may be, in every respect, complete and valid as to the other; but, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion, and if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect, the Legislature would not pass the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.

3. The certificates are in the nature of a contract; that, as such, they must be sustained by a legal and sufficient consideration; that the failure of such consideration, or a false representation of it, vitiates the contract as between the original parties and all subsequent parties with notice.

There can be no doubt that all these cases of State aid to corporations are contracts. The corporation undertakes all the duties expressed and implied in the charter, and these furnish the considerations for the undertaking of the State.

In the Act of 1868, the Blue Ridge Railroad Company undertook to build the Blue Ridge Railroad, and to enable them to do so the State undertook to guaranty the bonds of the company on condition that the bonds should not be used until the amount of three millions were obtained for them, or as much as was required for the road.

The State, in fact, became, as it were, an accommodation endorser on condition that the accommodation paper should not be disposed of under par.

And this condition was, in the view of the law, on the face of the paper—for the bonds always refer to the Act which authorize the issue and guaranty.

Under the circumstances, they could not be pledged at all for a less sum than par. Such a pledge would be a fraud upon the guarantor, and the party taking them could not hold them lawfully.

*206

*Therefore, when the surrender of State bonds back to the State is suggested as a consideration for the issue of the Revenue Bond Scrip, it is simply absurd.

The State was under no kind of obligation to pay them. On all that were in the possession of the Blue Ridge Railroad Company, she had a clear right to cancel her guaranty; and any that the Blue Ridge Railroad Company had put in pledge, contrary to the condition of the Act of 1868 were simply fraudulent and void.

As to the danger to the credit of the State, that furnishes no consideration, and the case of Sherman v. Barnard, 19 Barbour, 291, cited above, expressly decides this.

But it is said that this clause of the Act of 1868 is repealed by the consolidation Act of 1871.

Suppose that to be true, for the sake of the argument, what would be its effect on the bonds.

It would leave them in the hands of the Blue Ridge Railroad, to be used for the purposes of the road.

For any bona fide purpose they might have pledged them, and the holder might claim the coupons on the bonds pledged, and if not paid by the Blue Ridge Railroad he could claim them of the guarantor.

But the bonds could not be claimed, and doubtless the State, on notice of the default, would fall back on her securities and protect herself.

And, in exchange for this liability, she gives \$1,800,000, payable almost in cash.

What a monstrous fraud! Could it be sustained in any Court of justice?

But the condition never was repealed.

The Act for consolidating the Greenville and Blue Ridge Railroads was never carried out.

No conceivable consideration is offered to the State for the release of this condition and her securities, but the benefits proposed by the consolidation.

And the one having failed, the other falls with it.

The Act was intended as a scheme for such consolidation, and the main point failing, the whole Act falls.

It was, in fact, an amended charter, which was never accepted, and so the whole Act falls.

And as to the equity claimed for those *207

who are said to have ad*vanced money on the bonds, those parties have an adequate remedy against the President and Directors of the Blue Ridge Railroad Company, who transferred or pledged the bonds "ultra vires."

Mr. Pope's argument:

It has been agreed by counsel in the argument that it should be divided so as to throw a portion of it upon each. The portion assigned to me will involve the questions arising under the Constitutions of the State and of the United States.

I. We announce, then, as our first proposition, that the Act of 1872, authorizing the emission of the Revenue Bond Scrip, is against the Constitution of the United States, and, therefore, null and void.

The clause of the Constitution is in these words: "No State shall * * * emit bills of credit."—10 Sec., I Art., Con. U. S.

1. In considering this clause, one of the first canons of construction is to arrive at the intention by the true meaning of the words, and the words must be taken in the sense in which they were used at the time. The intention must be drawn from the words, but the rule of evidence is to let in the light of surrounding circumstances. This rule may be gathered from the case of Sturges v. Crowningshield, 4 Wheat., 202; Fletcher v. Peck, 6 Cranch, 139.

If we go back to the Convention which framed the Constitution of the United States, we shall find the intention which actuated that body while using the inhibitory words, "No State shall emit bills of credit."

If we refer to the old articles of confederation, we shall find these words: "Congress shall have the power to borrow money and emit bills of credit of the United States." The report of a committee was made in the Convention of '89, in which was embodied a recommendation to incorporate the same power in the Constitution then under consideration.—Vide the Madison Papers, (2 vol.,

p. 1232,) and the letter of Luther Martin, (1 | mentaries on the Constitution, (2 vol., % vol. Elliott's Debates, p. 381.)

Now, what was done by the Convention? Mr. Curtis, in his History of the Constitution, (2 vol., p. 365,) says, referring to the Madison Papers: "Fears were entertained in the Convention that an absolute prohibition of paper money would excite the strenuous opposition of its partisans against the Constitution; but it was thought best to crush it, and, accordingly, the votes of all the States, but two, were given to a proposition to prohibit absolutely the emission of bills of credit."

*208

*If the history gives us the contemporaneous spirit which actuated the framers of the Constitution, as to withholding this grant of power to Congress, we are prepared to understand the energy with which, in express terms, it prohibited this power to the States. For Congress to have the power, it must be granted; for the States not to have the power, it must be inhibited. Hence the Constitution as it now stands: the power not granted to the one and inhibited to the other.

2. The next question is: What was the character of the thing called a bill of credit, which the framers of the Constitution wished to crush; to emit which they would not grant to Congress and prohibited to the States? Its character was well understood by Chief Justice Marshall, a contemporary of the Convention and of the Constitution.

When the Courts came to act upon this clause of the Constitution of the United States, two things were necessary: 1. It was necessary to discover the particular thing struck at and to be crushed. 2. Having discovered the thing, it became necessary in apt words to define the thing prohibited.

Some things were clear: The Constitution did not mean to include bills of exchange, bank bills of State banking corporations which had been long before, and were then, in circulation. All such were bills of credit, undoubtedly, in one sense; but they were not the "bills of credit" embraced within the meaning of the inhibitory words.

The history of what was meant had to be resorted to, and the thing itself thus traced and identified. This was first authoritatively done by Chief Justice Marshall in the leading case of Craig v. Missouri, (4 Peters, 437,) and by Mr. Justice Story, in his dissenting opinion, in the case of Briscoe v. the Bank of the Commonwealth of Kentucky, (11 Peters, 332 to 337,) and by Mr. Justice Mc-Lean, in the same case, delivering the opinion of the majority of the Court. In this connection, I refer to the case of the State v. Billis, (2 McCord, 14;) to the history of bills of credit, by Dr. Cooper, in his appendix to the Statutes at Large of South Carolina, (9 vol., p. 766;) and to Judge Story's Com- this bond scrip issued by the State? I refer

1358.)

But, as we have said, the Court was obliged to define a bill of credit within the meaning of the Constitution. The first authoritative case was by the Supreme Court of

*209

the United States in the *case of Craig v. Missouri, (already referred to.) In that case Chief Justice Mashall defined it to be as fol-"Bills of credit signify a paper medium intended to circulate between individuals and between government and individuals, for the ordinary purposes of society." The majority of the Court concurred in this definition. Three Justices-McLean, Thompson and Johnson-delivered separate opinions, each giving his own views upon a great question; each endeavoring to give a definition more complete, as will appear by the case; but none of which have ever been adopted as a rule.

The leading case of Craig v. Missouri has never been overruled, although a portion of the definition of Chief Justice Marshall has been somewhat narrowed by subsequent decisions. The chief of these decisions may be found in the cases of Briscoe v. The Bank of Kentucky, (11 Peters,) already referred to; Darrington v. The State Bank of Alabama, (13 Howard, p. 11;) and in several cases arising in State Courts, generally known as the cases of the Bank of Illinois, the Bank of Arkansas, and the State Bank of South Carolina, already referred to.

The points made in all these cases are made not to overrule the reasoning or conclusion reached in the leading case of Craig v. Missouri, but are intended at once to confirm the ruling in that case, and to show that the later cases do not come within the principle of the leading case. But the great argument of Judge Story, in his dissenting opinion in the case of Briscoe v. The Bank of Kentucky, in which he says that Chief Justice Marshall, then dead, had agreed with him, seems to overwhelm even the distinction taken in the latter class of cases. But the later cases are law. Let us, therefore, take the case of the Bank of the Commonwealth of Kentucky as our guide; and what are there declared to be bills of credit within the meaning of the Constitution? 1. They must be bills issued by the State. 2. They must be issued upon the credit of the State. 3. They must be intended to circulate as money.

We are willing to rest this argument upon the definition of a bill of credit, recognized by a majority of the Court in the Kentucky case. By that case let us test the Revenue Bond Scrip, issued under the Act of 1872. The name is nothing. The Constitution is dealing with things, not names, as Chief Justice Marshall has well expressed it. 1. Is

issued on the credit of the State? *Let the Act of 1872 answer this question. Is it intended to circulate as money? Again we refer to provisions of the Act of 1872. intention must be drawn from the words and general provisions of the Act. To these we appeal. As to what is "circulation," is also a question of construction; and the test is given by Chief Justice Marshall, which has never been departed from, viz: that which passed between "government and individuals, and between individuals;" and as to what is "money." I do not know that it is possible to improve upon what has been said in the judgment of Mr. Justice Willard in the case ex relatione Gary. I consider that complete. The form of the bill, its uses, the mode of its being handled, the denominations of the bills, from one dollar upwards, are all there, and distinctly and ably set forth.

We have, then, in this case, all the elements present-the issue by the State, on the credit of the State, with the intention that it should circulate, and that such circulation should be as money. At this point, it may be useful that the Court should compare the Missouri bill, which is called a "certificate," by the Missouri Act, and is set out in Craig's case, with the bond scrip, which is also called a "certificate," by the Act of 1872, a copy of which is in the possession of the Court.

3. The only remaining question under this general division of the argument is: Are these bills absolutely void? To say that they are unconstitutional is simply to say that the bond scrip is void for all purposes. An Act may be void in part under the Constitution, and good in part; but when the thing named in the Act itself has been declared unconstitutional, I do not understand how such thing can be separated into parts. The unconstitutionality taints it for all purposes.

Mr. Cooley, in his work on Constitutional Limitations, at page 180, says: "When a Statute is adjudged unconstitutional, it is as if it had never been." When the bond scrip itself is declared to be unconstitutional, it is the same as if it had never been. The case of Craig v. Missouri is full to the same point; the "certificate" in that case was adjudged unconstitutional, and the bills, together with the contract founded upon them, were utterly set aside as unlawful; and the contract itself was declared to be a void contract. Mr. Sedgwick, in his work on the construction of Statutes and the Constitution, is full to the same point. I refer, also, generally, to the New York cases, cited and commented upon by the counsel who preceded me, (Mr. Haskell.)

*In the petition, and in the argument, we have the words "State" and the "contract of the State," &c., used and repeated as if the

to several Sections of the Act of 1872. Is it, "State" and the "Legislature" were, in fact, the same thing: whereas the very point we make is that the "Legislature" is not the "State;" and that the "State" cannot be bound by an unconstitutional Act of the "Legislature.'

If the Act be unconstitutional, it is no law; and that which is no law cannot bind the State, nor can it support any contract. But strangely enough it has been seriously argued that the bond scrip may be unconstitutional, and yet that it may be good as a contract, and as such it should be received for taxes, because the State may direct in what the public dues may be paid. Direct what to be received? That which has no existence? We have heard the case of Woodruff v. Trapnell, (10 Howard, 308,) given as authority. It is true, in that case it was held that the bills of a certain corporation (bank bills) should be received for the taxes of the State, according to a previous Act of the Legislature; but it was first held that these bills were unconstitutional; that this being so, the Act was a contract, and that the subsequent Act repealing the provisions of the first Act was unconstitutional. A reference to the case will show that it is an authority in our favor on this point; and very much in our favor on another point hereafter.

II. Our next proposition is that the Act of 1872 (called the Bond Scrip Act) is in violation of the Constitution of the State of South Carolina.

1. This aspect of the case has been very fully presented (by Mr. Haskell;) but as it is so important, we shall enter upon it again.

To understand how this constitutional argument applies, it will be necessary to discuss, as a preliminary, some of the principles of the State Constitution of 1868.

One of the chief of these is that the Legislature is a body possessed of limited powers, well marked out by the Constitution itself. It is not a British Parliament, nor is it a Legislature sitting under the Constitution of

We refer to Article I, Section 41, of the State Constitution. These are the words: "The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people."

Whatever may be the construction of the word "delegated," as a general restriction upon legislative powers, we know that the *212

Legis*lature, under the Constitution of 1868, is most particularly limited and circumscribed in its power to contract debt, levy taxes, or bind the State. Its power here runs within narrow limits. It can no more go beyond those powers as marked out to it than a Court can go beyond its jurisdiction.

Now, what are these powers? How have

the Legislature may not go? What powers of taxation? What powers to contract debt? What powers to issue evidences of debt? I refer generally to Article IX of the State Constitution.

In discussing these questions, the Court will find these powers narrowly defined. They are first divided by the Constitution into two general classes:

- 1. The power to provide for ordinary expenses: Art. IX of the State Constitution, Secs. 3 and 4.
- 2. The power to provide for extraordinary expenses: Art. IX of the same Constitution, Sec. 7.

These embrace everything that could be necessary as a mere grant of power. All expenditures must be either ordinary or extraordinary. But underlying these are two other classes of power necessary to carry out the first two:

- 1. The power to levy taxes for ordinary expenses and such deficits as may occur.
- 2. The power to borrow money to defray extraordinary expenses.

These exhaust all of the powers, primary and secondary, under the 9th Article of the Constitution of the State.

But how shall these powers be exercised? The Constitution does not seem to have contemplated any great danger from taxation as such. The vote of the constituency was supposed to furnish a sufficient check upon the Legislature. Taxation is, therefore, limited in two respects only: 1. There shall be an estimate of the expenses, and the tax should be levied only to meet such expenses. 2. The tax shall be laid for a single object; that object shall be expressed in the Act, and the tax shall be applied to the object named.

But when the Constitution is dealing with the power to borrow money, then it puts limitation upon limitation. Great danger was apprehended here, and with reason.

- 1. It is directed that the cause of the extraordinary expenditure shall be pointed out.
- 2. That the Act to become a law shall be passed by a two-thirds vote.

*213

*3. That a tax should be at once levied to keep down the interest. All this appears in 7th Section of the 9th Article of the Constitution.

The next thing looked to by the Constitution was to the shape which the debt so contracted should assume. This is pointed out in 14th Section of the same Article. shall be by bonds and bonds only; not by stock, not by scrip, but by bonds; and these bonds shall not be under a certain sum named, and shall not run longer than twenty years. Each bond shall be numbered and registered, and the name of the party to whom the bond is made payable shall be re-

they been limited? beyond which limitations; corded. (Vide 14th Sec., 9th Art., Con. S. C.) The Constitution of 1868 intends that the bonds of the State shall not be hawked about in the stock market.

> The next thing the Constitution looks to is, how the debt thus created and represented by bonds shall be redeemed. This is pointed out in the 10th Section of the same Article, where two things are provided for:

> 1. The old debts of the State, due before the adoption of the Constitution of 1868. 2. The debts expressly authorized in that Constitution, then under consideration. For the first, scrip may be issued to redeem them; and for the second, scrip also, when the debts created and in the shape of bonds, according to the Constitution, shall become due. If the State finds itself, at the day, not in funds to pay the bonds, and if the holders of the due bonds will not take new bonds issued as for a new debt, to replace the due bonds, then scrip may issue to redeem such due bonds.

> In no other way can South Carolina now contract a debt, and no scrip can be issued except to redeem such a constitutionally created debt by bond. The 9th Article of the Constitution is intended to lead to this very result, viz: To make it difficult for the Legislature to involve the State in debt. Give us this ninth Article of the Constitution of South Carolina in its purity, and we could ask no more. It is absolutely perfect, if enforced, to prevent extravagance and fraud.

> Now, was the bond scrip ever a bond created under the limitations of the 7th and 14th Sections of the 9th Article of the Constitution? This will not be even pretended.

> Having shown how only a debt can be created, our next duty is to show that no such debt ever existed; and more than that, no debt of any kind ever existed; and more

than that, no liability ever *existed; and more than that, no contingent liability ever existed on the part of the State. We propose to show that there never was a debt due by the State, at any time, upon which to bottom this Revenue Bond Scrip, authorized (as it is said) by the Act of 7th March, 1872.

This involves some reference to the legislation touching the Blue Ridge Railroad:

1. We will commence with the Act of 1868. (Vide Act of that year, 15th September, page 25, Sections 1, 2 and 4.) That Act contained an express condition that the guaranty by the State of the bonds, and the bonds themselves, should be issued only in case the Congress of the United States or private capitalists should let the road have \$3,000,000 for \$3,000,000 worth of bonds, or a less sum at the same rate; in other words, every dollar of bonds was to secure and bring in a dollar of money. (Vide the proviso in the Act.)

This was a public Act, and this condition appear by the words of the Section of the went out with the bonds. Trapnel's case is authority on this point.

This Act, we say, created no debt by the There was not even a contingent liability until dollar for dollar was realized upon the bonds. Even then there would be no "debt" of the State; and, for the first time, the transaction would assume the shape of conditional liability. The Legislature did not regard the Act of 1868 as creating any debt, because they provided no tax to meet the interest, as they were compelled to do. if the Act created a debt. (Vide Section 7, Article IX, Constitution 1868.)

The bonds were prepared, and the State endorsed them. They were useless. State was a guarantor upon condition. company could not get one dollar of money for one dollar of bonds. With this condition unperformed, the State could at any time have withdrawn its conditional accommodation guaranty. When, therefore, the Act of 1872 was proposed to the Legislature, the only place in which these bonds could lawfully and honestly have been was under lock and key, in the iron safe of the Blue Ridge Railroad Company. To hypothecate them, even, would be a fraud upon the State, and an unlawful use of her guaranty.

But it is said that the State has repealed this important condition, found in the Act of 1868. When, where, and how? We are referred to the 6th Section of the Act of 1871.

Now, does this 6th Section repeal the "express proviso" of the Act of 1868? We answer, no-

*215

*1. Because the 6th Section of the Act of 1871 is in direct violation of the 20th Section of Article II of the Constitution of 1868. viz: "Every Act or Resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."

2. Because all of the provisions of the Act of 1871 are made to depend upon the consolidation of the Greenville and Columbia Railroad and the Blue Ridge Railroad into one road, with a new corporate name, which has not been done.

3. Because the consolidated road is required to endorse the bonds of the two old roads, respectively, which it is admitted has not been done.—(Vide Sec. 7, Act of 1871.)

4. Because the Act of 1871 was but a charter conferred or offered by one contracting party and not accepted by the other, which rendered the whole Act inoperative and void.

This last ground appears upon my notes of argument as a most important point, but by some means it escaped me while actually addressing the Court, and as it was most ably used by my friend (Mr. Memminger) in his concluding argument, I shall add nothing further upon that point.

Act referred to, and need not be enlarged upon in these notes required by the Court, The line of argument can, I doubt not, be readily recalled.

The second ground was elaborated in the argument before the Court very much, in reply to the views suggested by the counsel who opened the argument, (Mr. Chamberlain.) The words of the Act furnish the key to the reply. They can mean but one thing. The whole Act does but set out the terms of a contract. The consolidation was to be the consideration of the roads. With the nonperformance of that consideration the contract fell, and the whole Act became a nullity. If, therefore, the 6th Section of the Act of '71 had, in law, repealed the previous condition in the Act of '68, still the Act of '71 enacted a new condition, to wit; consolidation, which condition precedent has never been complied with.

The first ground turns upor the construction of the words of the Constitution as cited. The same words appear in the Constitutions of many o. the States; and in the Constitution of the State of New York are found the same words, except that in that State they are confined to local or private bills. The words have received judicial interpretation. The two leading prin-*216

ciples of these cases are: 1. *That the construction must be rigid and precise, to give them the value intended by the framers of the Constitution. 2. That words cannot be interpolated, but effect must be given to the clause as framed in the instrument.

The construction contended for by us is fortified by the following authorities, all agreeing, except one authority from California, which I have not been able to examine: The people v. McCann, (N.Y.;) The Town of Fishkill v. The Fishkill and Beekman Plank Road Company, (a leading case in New York, decided in 1856;) Smith v. The Mayor of New York, (decided in 1868,) 34 Howard, P. R., 508; Williams v. The People, 24 N. Y., 405; The Mayor of New York v. Colgate, 2 Kernan, 146; The Sun Mutual Insurance Company v. The Mayor of New York. I refer also to 4 Hill, N. Y. R., 418, for its general reasoning. The Court may also be aided by the case of Baldwin v. The Mayor of New York, in 1864, by the Supreme Court of that

In conclusion, we come to the most extraordinary argument of all, viz: That, under the Act of 1872, this Court may hold the bond scrip to be unconstitutional, and yet compel the Comptroller, by a mandamus, to levy the tax to redeem it. Under any law, to levy a tax to redeem that which does not exist would be an absurdity. But with one hand to strike the object out of the Act, and The third ground above stated will fully with the other to enforce that which has no

absurd, if possible. The 4th Section of the IXth Article of the State Constitution, apart from general reasoning, sets that matter at It directs that any Act laying a tax shall state the object of the tax, and that it shall contain no other object; that the tax levied shall be applied to that object, and to no other object. And yet it is gravely asked to strike the bond scrip (the only object) out of the Act of 1872, and still to levy the tax. The preamble to the Act (which is no part of the Act) we have shown to be false in fact and wholly unfounded in law. This Court cannot be deceived by false recitals, introduced to cover public robbery by the forms of law.

Other points of the argument will be discussed by counsel who are to follow me.

Mr. Haskell's argument:

We have agreed rather to divide the argument, so that I shall devote most of my attention to the Act of 1872, page 79, with reference to the Constitution of the State of South Carolina.

*217

*1. That the Act authorizing the issue of the Revenue Bond Scrip is in violation of the Constitution of the State of South Carolina; and, therefore, that the emission of the said scrip by the State Treasurer is contrary to law, and the scrip a nullity.

a. That the Legislature is not the State, nor has it the sovereign authority, but it is vested with only one branch of the sovereign power; and in wielding it, it is hedged in by important limitations, some of which are imposed in express terms, and others by implications, which are imperative.

And that, in passing the Act (p. 79, 1872,) which is now under discussion, the Legislature has done that which it has been forbidden to do.

What power does vest in the Legislature? Cooley on Con. Lim., p. 88, Ch. J. Denio; Cooley, p. 437 on Agents, p. 217-219; Con. Limit on Power to Incur State Debt; Sedgwick, p. 160-175, 414, 554.

"Plenary power then in the Legislature for all purposes of civil government being the rule," the specific and positive direction of the Constitution, on any particular subject, contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision.

And further is the declaration of the law itself, and deprives the Legislature of all power in the matter, except within the limits of the constitutional provisions. For "where the means for the exercise of a granted power are given, no other or different means can be implied as being more effective or convenient."—Cooley, 64, Ch. J. Marshall.

"All powers, therefore, on finance and taxation 'not herein delegated, remain with the

meaning without the object, seems to be more people." "-Vide Con., 1868, p. 6, Art. I, § 341; absurd, if possible. The 4th Section of the Art. IX, p. 29.

Is this Act then—the Blue Ridge Bond Script Act, p. 79, 1872—in accordance with the requirements and within the limitations of the State Constitution? Is it not in direct violation, and has it not trampled upon the restrictions of the Constitution?

The Constitution divides the expenses and the expenditures of the State into two classes: "Ordinary" and "extraordinary."—Art. 9, p. 20

The former, § 3, being the annual expenses of conduct and maintenance of the State Government.

The second, or extraordinary expenditures, is provided for and restricted as follows:

*218

*"For the purpose of defraying extraordinary expenditures the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each House, respectively; and every such law shall levy a tax annually, sufficient to pay the annual interest of such debt."—Con., p. 21, Art. IX, § 7.

Sec. 10. "No scrip, certificate, or other evidence of State indebtedness shall be issued, except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution."

Sec. 14, p. 22. "Any debt contracted by the State shall be by loan on State bonds, of amounts not less than fifty dollars each, on interest payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all such bonds shall be kept by the Treasurer in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally made payable."

Do these "Treasury Certificates of Indebtedness (styled Revenue Bond Scrip)" come within the restrictions or comply with the requirements above set forth? If they do not, I respectfully submit that they are unconstitutional.

One of the counsel for the appellants has, in the Court below, answered the argument which I am now about to submit as follows:

"To our mind, the Constitution expressly warrants and provides for such issue as the present.

"Section 10 of Article IX is as follows:
"No scrip, certificate, or other evidence
of indebtedness, shall be issued, except for
the redemption of stock, bonds, or other evidences of indebtedness previously issued,
or for such debts as are expressly authorized
by this Constitution.

"It appears to us too clear for serious argument that this is an express authorization of the issue of scrip, certificates, or other evidence of indebtedness for the purpose of redeeming stock, bonds, or other evidence of indebtedness previously issued.

"Assuming then—what seems undeniable—that this scrip was issued to redeem a previously issued evidence of indebtedness, it is expressly authorized by the Section now quoted."

*219

*Grant all his premises, and probably the conclusion will hold good, for he assumes as undeniable all that we have attempted to deny.

But we will take one point in his premises, viz: That the issue of the scrip must, to be legal, come under Section 10 of Article IX.

Under this Section 10, scrip or certificates can be issued for only two purposes:

- 1. "For the redemption of stock, bonds, or other evidences of indebtedness, previously issued."
- 2. "Or for such debts as are expressly authorized in this Constitution."
- a. The words "previously issued," in the first division, refer to and qualify the whole of the preceding portion of the sentence, and refer to the past liabilities of the State, as contra distinguished from the future liabilities which are provided for by Sections 7 and 14 of Article IX; and in the second division of this Section, can only refer to the words "other evidences of indebtedness," and can have but two constructions: the meaning of one being, evidences of indebtedness issued previous to the adoption of this Constitution; of the other, evidences of indebtedness previously issued for the redemption of "stock" or "bonds."

b. The words in the second division of Section 10 speak for themselves, and cannot be forced to mean any debt other than such as is provided for in Section 7, above quoted, and perhaps the annual expenses as provided for in Section 3 of the same Article.

There is no claim made that the Blue Ridge Scrip was raised to redeem "stock" or "bonds," or "for such debts as are expressly authorized in this Constitution;" but it is claimed by the appellants that the scrip was issued "for the redemption * * * of other evidences of indebtedness previously issued."

What proof do they set up? What does the Act say? "An Act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same."

The body of the Act does not mention a single bond of the Blue Ridge Railroad Company for which the State is liable, and therefore, does not accord with the subject set forth in the title.

The Act does not pretend that its object *220

is to redeem any "stock, *bonds, or other evidences of indebtedness previously issued," but in fact directs the Treasurer to issue the scrip on the delivery of certain Blue Kidge Kailroad bonds, to the amount of \$4,000,000, endorsed by the Comptroller General of the State. It is admitted that the said bonds had not yet become due; and it has not been contended that a guarantee of a bond not yet due can be other than a mere contingent liability—not yet a debt. It cannot therefore be called "evidence of indebtedness."

The statement of the facts is very simple, and yet startling. The Legislature has directed the Comptroller General to endorse, in the name of the State, \$4,000,000 bonds of the B. R. R. R. Co. This having been done, the Legislature, or the Financial Board, lends to the B. R. R. R. Co. \$220,000 in money and take a collateral security, \$600,000 of said bonds. The B. R. R. R. Co. holds the balance of the bonds. None of these bonds are yet near due-the members of the Financial Board or their Agent notd a large part as security for the State Loan and the State has a lien on the property of the company. The Legislature then, at this stage, proceeds to release the B. R. R. R. Co. from liability for \$220,000; releases it from the lien held by the State, and pays to the B. R. R. R. Co. \$1,800,000 in what these appellants are trying to make as good as money; to be let off from a liability, contingent and remote in any event, and notoriously fictitious under the view taken of it at the time this Act was passed. Those bonds could not be sold; they were worth nothing in the market; and had not been sold by the B. R. R. R. Co.; and if any besides the \$600,000 held by the State Financial Board were deposited as collateral, the debt they were used to secure did not exceed \$300,000.

These bonds cannot be called a State debt. The certificates cannot be issued except to redeem a standing acknowledgment of indebtedness. None such is shown. And the Act is clearly contrary to the State Constitution, Art. IX, Sec. 10.

2. Again, can it be said that the scrip has been or can be issued under this Act "for such debts as are expressly authorized in this Constitution."

Does such debt exist? We have striven to make it apparent to the Court that no debt yet exists against the State on these bonds. The Legislature is not the State, and cannot by its simple assertion cram any debt it pleases on the State. If it designs contracting a debt in the name of the State,

*221

that must be done which the State *commands to be done before her faith shall stand pledged. If the State has become liable

on the bonds, the Legislature must, under Section 7, Art. IX, raise money to meet this liability: and that can only be done by compliance with the requirements of Sections 7 and 14 of Art. IX, which it is not pretended has been done in this case.

If the Legislature can, under the Constitution of 1868, lend the name and credit of the State, Section 7, Art. IX, plainly and explicitly directs the manner in which the liability of the State can be met, and forbids any other.

We submit, therefore-

That this scrip is issued neither "for the redemption of stock, bonds, or other evidences of indebtedness previously issued," nor "for such debts as are expressly authorized in this Constitution."

In the next view we submit the legality of these bonds themselves will be considered.

What position do they hold? Have they been issued? And if so, has it been legally done?

If the bonds have gone out of the hands of the R. R. Co. illegally, with conditions unperformed, the guarantor cannot be held liable, and the issue of scrip to redeem a nullity is manifestly unconstitutional. bonds come into existence under the Act of 1868, p. 25, "An Act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," § 2. The terms of this Act, if the Legislature has the right to guarantee any bonds, are more in the spirit of the Constitution; the leading point in the Act being that the bonds shall not be used until their par value be given in exchange for The State then would be liable only for the actual amount of money borrowed on its credit, as directed in § 14, Art. IX.

The next Act affecting the bonds is entitled "An Act to promote the consolidation of the Greenville and Columbia Railroad Company, and the Blue Ridge Railroad Company," 1871, page 590.

§ 1 amends the Act of 1853.

§ 2 amends the Act of 1845.

§ 3—1. G. & C. R. R. may extend their line to Knoxville; 2. May build a branch to Aiken; 3. May build a branch to Washington, Georgia; 4. May build a branch to the North Carolina line.

§ 4. In view of consolidation—1, Bonds of *222

B. R. R. R., 1868, *and endorsement confirmed. 2. Mortgage to Henry Clews, et al., made prior.

§ 5. Treats of G. & C. R. R. bonds, and designates the rank of liens with regard to such bonds.

§ 6. Repeals Section 2 of Act of December 1868, p. 25.

§ 7. After consolidation, the bonds of each road shall be endorsed by the two.

§ 8. On failure to pay bonds, Comptroller General takes possession of the road.

§ 9. Act of incorporation.

§ 10. "That all Acts or parts of Acts inconsistent with this Act, or any part thereof, are for the purposes of this Act, but for no other purpose, hereby amended, modified or repealed, as the case may require, so as to conform to the true intent and meaning of this Act.

We will consider hereafter the question of the title of this Act; for the present we will examine its conditions.

1. The title expresses the purpose of the Act.—Section 10, Art. II, Cons., p. 9. "Every Act or resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title."

2. Section 4 states the essential condition on which all the other Sections pend.

3. And Section 10 reiterates the condition essential to the repeal of any other laws, and confines the Act to the purpose and intent expressed in the title.

* * * * * *

It is admitted, at the hearing of the Court below, that the two railroad companies have not consolidated themselves together, nor taken any measures to effect that end. We submit to the Court that where so many auxiliaries are compiled in one Act to promote one great general purpose set forth in the title, it would be monstrous to allow each, any or all of the said professedly auxiliary provisions to be executed to a distinct end, while the general purpose, for which they were all enacted, has been entirely neglected, is still so, and has been actually prevented by the very people who procured the passage of the Act, and have availed themselves of its subordinate provisions. Can the Act of 1868, p. 25, be considered as repealed? Can the guaranteed bonds be issued except as provided by the Act of 1868? And if they cannot, as the Court below has decided, and as we feel strong assurance that this Court *223

*will sustain, the bonds are still, in law, in the hands of the Blue Ridge Railroad Company, and the State is not liable. We repeat, that the Act of 1870 can only stand as an Act to promote the consolidation of the two railroad companies, and that the privileges, therein declared, cannot be enjoyed until the purpose for which they were promised has been accomplished. For, without such a tie to hold them together, each Section of the said Act would stand forth as an enactment in itself distinct from each of the others; and there would be ten subjects in one Act, or ten distinct Acts, and of them no one could be of force except the one expressed in the title, if such there be.

We have thus far endeavored to show:
1. That if the Legislature can, under the Constitution, give the aid of the State to enterprises and improvements, it can only do so by raising money as is directed in the

IX.—Rodman v. Munson, 13 Barb., pp. 63, 188; Sherman v. Barnan, 19 Barbour, p. 291; Newell v. The People, 3 Selden, pp. 9, 139.

2. That a guarantee is not a debt until the instrument guaranteed has fallen due, and the principal has failed to pay. And that these events not having occurred, the State is in no manner liable for the \$4,000,000, even if the guarantee be constitutional, and that the Act of 1872 is premature.

3. That should the moral obligation ever arrive, the Legislature can meet it in no other way than by appropriation, as provided in Section 7, and the issue of bonds, under

Section 14, to raise the money.

4. That no scrip, certificate or other evidence of indebtedness can be issued by the Legislature, or the officers of the government, in the name of the State, except for stock, bonds, or other evidences of indebtedness held against the State at the time of the adoption of the Constitution, or arising subsequently under §§ 3, 7 and 14 of Art. IX.

5. That the said \$4,000,000 bonds, whether due or not, do not come under any of the above classifications, and that the Legislature is, by Section 10, Art. IX, forbidden to issue the scrip, whether it be called for the redemption of the \$4,000,000 bonds, or to prevent a contingent liability.

6. That the intention of the Constitution. when not positively inconsistent with the words thereof, is the law by which this Court

*224

*will decide. Much stronger is it when the language and the intention are consistent, as in Sec. 14, Art. IX.

"Any debt contracted by the State shall be by loan on State bonds, of amounts not less than fifty dollars each."

That the meaning of this is, that the State shall raise money by borrowing it, and shall give for the said money its bond for the amount, dollar for dollar; and that the idea that the Legislature can issue ten millions of bonds to raise one million of dollars, or to be sold at low rates, disgraceful to the credit of the State, is monstrous, and we feel confident, will not be sustained by the judicial department of the government. That the Act of 1868, authorizing the guarantee of There \$4,000,000 bonds, recognized at least to this extent, the mandate of the supreme autherity, and insisted upon the essential condition, that if these bonds went out on the credit of the State, they should go for their full value, and that the State, if it ever paid them, should pay only for actual money in the amount received.

And that consequently any Act, such as the Act of 1870-71, page 590, which undertook to repeal this essential condition, is, in that, unconstitutional, null and void, and that if these bonds went into market by sale,

Constitution in Sections 7 and 14 of Art. or as collateral securities, under any terms or conditions other than that contained in the Act of 1868, the guarantor was, thereby, positively discharged, and the guaranty no longer exists. And such is the case, as reference to the brief will show.

> In conclusion, we respectfully submit that the Act of 1872, page 590, and the Acts of 1872, page 80, are unconstitutional, null and void, in and as to all clauses and parts thereof which do not come under and within the scope of their respective titles, in accordance with Sec. 20, Art. II, p. 9 of the Constitution.

> "Every Act or Resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title." We refer to Cooley on Con. Lim., pp. 80, 81, 84; Sedgwick on Con. and Stat., p. 567, and their treatment of the subject.

> The decision, almost without exception, sustaining the mandatory character of the constitutional provisions, and making "the title to control, and exclude everything from effect and operation as law, which is incorporated in the body of the Act, but is not within the purpose indicated by the title."-Cooley, p. 141.

If, then, the Act of 1871, p. 590, or the Act *225

of 1872, p. 80, be *held to be unconstitutional, the prayer of our complaint must stand, and the petition of the holders of the scrip must fall, for the last Section of the Tax Act of 1872, p. 276, so far as it directs that the Revenue Bond Scrip be taken for taxes, is a nullity.

"When a Statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void in toto is true also of any part of an Act which is found to be regarded as having never, at any time, been possessed of any legal force."-1 Strong v. Daniel, 4 Ind., 348; Astrom v. Hammond, 3 McLean, 107.

April 18, 1873. The opinion of the Court was delivered by

MOSES, C. J. 'The relators, by their petition, seek a writ of mandamus to compel the Comptroller General of the State to levy, and to cause to be levied, the tax for the redemption of the treasury certificates (styled "Revenue Bond Scrip") held by them, as provided by the fourth Section of the Act of March 2, 1872, (15 Stat., 79.) entitled "An Act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the

The four first Sections are set out in the petition; as the fifth has an important bearing on the points made by the return, it may be proper to insert it here. It is in the following words: "That if any such Revenue Bond Scrip is received in the treasury for the payment of taxes, the Treasurer be, and he is hereby, authorized to pay out such Revenue Bond Scrip in satisfaction of any claims against the treasury, except for interest that may be due on the public debt."

Various causes are alleged in the return of the respondents, of which we propose to confine our consideration but to two. apply substantially to the merits involved, and are regarded by the Court as objections which must preclude the issuing of the writ. Whether it is to be viewed as a prerogative writ, not demandable of right, or at the present day as an ordinary process in an action between parties, it will be refused, if it is manifest that it must be "vain and fruitless" or "useless," (Tapping, 15.) Nor should it be granted "if it will introduce confusion and

*226

disorder," or "where it *is manifestly improper," (Ibid, 16.) The cases referred to sustain the propositions, which recommend themselves to adoption by the common sense which is intimated in their very expression. The judgments of Courts are intended to have effect by accomplishing the purposes which are proposed by the remedies through which they are attained. If they cannot have complete operation by not only enforcing the act which they command, but of making it productive of the benefit which they propose, they fail in the very capacity or ability which, to give value to judicial orders, must attach.

The object of the application is to cause a levy of the tax for the redemption of the treasury certificates (styled Revenue Bond Scrip) held by the petitioners, and if the suit would be unavailing to this end, or its execution introduce confusion or disorder, it should not be granted.

The respondent, among the causes enumerated in his return against the motion, submits: "That, under proceedings duly had in the Courts of this State, the said Act of March 2, 1872, has been declared null and void, and the said certificates mentioned in the petition have been declared illegal, and the various officers of the State, in the treasury department thereof, have been enjoined from receiving or issuing the same; that such proceedings are still pending, and it would have been, and is now, unlawful for this respondent to take the action prayed for in the petition." To which the relators reply: "That the said proceedings therein referred to, by which the said scrip has been declared null and void, do not have for their object to prevent the levy of the tax demanded by these relators, and that no decision can be rendered in said proceedings which will of the year, and before any opportunity has

reach the subject matter or object which the petition herein of these relators embraces."

The object of the said proceedings was to enjoin the State and County Treasurers from receiving the said scrip for past due taxes, and for the taxes thereafter to be collected. and from paying out the same, and the Court so accordingly ordered. The judgment, which stands in full force, and, until reversed, should be accepted as the law by which the State and County officers connected with the levy and collection of the taxes must be governed, holds the emission of the scrip void for its repugnance both to the Constitution of the State and that of the United States. It is attempted to avoid the effect of the said

*227

judgment by insisting that the claim *now made is for a levy of the tax for the redemption of the scrip, thus seeking entirely to ignore so much of the third Section of the Act as makes "the scrip receivable in payment of taxes and all other dues to the State except special tax levied to pay interest on the public debt," and the whole of the fifth Section, which authorizes "the payment of the scrip so received for taxes in satisfaction of any claims against the treasury, except for interest that may be due on the public debt."

To authorize the collection of the tax for the redemption of the particular portion held by these relators would be at variance with the mode provided by the Act for the redemption of the Revenue Scrip to the amount of \$1,800,000, or such amount as shall be proportioned to the amount of bonds delivered. That contemplated its reception into the treasury for taxes and other debts, and its payment for claims against the treasury, and the aid of its employment in carrying on the State finances for at least four years, for it was not until the end of each year from their date that a fourth part of the certificates was to be retired. It looked to an annual tax for its redemption, thus having regard to the whole amount to be issued, and to the retirement annually of the one-fourth. The retirement of one-fourth per annum might have been effected by the retention of that amount annually in the treasury, if so much should be received in one year. It proposed no preference among the scrip holders, nor was any advantage to any particular class intended. The relators allege in their petition "that, on the surrender of the bonds, the State Treasurer did deliver to the President of the Blue Ridge Railroad Company, in South Carolina, Treasury Certificates of Indebtedness (styled Revenue Bond Scrip) to the amount of one million seven hundred and ninety-six thousand eight hundred and twenty-three and fifty-three one-hundredths dollars." particular privilege can these relators claim to have their scrip retired even before the end

been afforded to other holders on the same it was not designed to circulate as money. footing with them to come in and participate? The opinion of Mr. Justice Willard in the These views apply to the case, made by the State ex rel. Gary v. Parker, Treasurer, and relators as against this respondent, entirely unaffected by the judgment of the Court already referred to, declaring the scrip unconstitutional and therefore void. Viewed, however, in connection with that judgment, how can the Comptroller General, a sworn officer of the State, direct the levy of a tax for the redemption of an obligation declared by a Court of competent jurisdiction to be illegal?

*228

*That the Treasurer and not the Comptroller was the party to the cause can make no difference. The judgment acted upon the scrip, which was pronounced "wholly unauthorized, illegal, and without value for any purpose whatever," and the Treasurers were enjoined "from receiving it for taxes for any debt or obligation due the State, and from paying it to and for any liability of the State.'

If the scrip was illegal, it can furnish no consideration for any action, levy of taxes or judgment of a Court.—Story on Const., Sec. But suppose the Comptroller General had ordered the levy of the tax for the purpose prayed by these relators. While his act might have caused great hardship and suffering to the people by exacting another in addition to the annual tax, and surely prejudiced the monetary condition of the State, as to these relators, it would have been but a mere ceremony without avail of benefit to them. for the State and County Treasurers were all parties to the proceeding which declared the scrip illegal and void. In the face of that judgment could the Treasurer have ventured its redemption? Was it not forbidden, if not in express terms, by an implication too plain and clear for resistance or even doubt? Was it not to be made through the money which was to be raised by the levy? The writ is. therefore, claimed, where, in the language of Mr. Tapping, "it would be vain and fruitless. and without any beneficial effect."

But the respondent, not only insisting on the cause heretofore noticed, submits "that the said Act is null and void, in that it is repugnant to the Constitution of the United States, which ordains that 'no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts." A careful consideration, induced by the large pecuniary interests involved in the question, together with the fact that provisions both of the State and United States Constitutions have been brought into its discussion. has satisfied us that the Act, so far as it authorizes the emission of Revenue Scrip, is in violation of the clause of the Constitution of the United States already referred to. The argument which holds it valid as a subsisting obligation, and repels the character of a bill of credit, under which it is classed by the respondent, seems to rest upon the fact that Dupre v. County Treasurers, which was brought to our notice in the case before us.

*229

and which will be re*ported with it, (a) is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community like money that it is to be held a bill of credit, nor does the fact of currency so constitute it. A State might well make the coupons attached to its bonds receivable for taxes without subjecting them to the disabilities of bills of credit as used in the Constitution, even although they might readily pass in payment of debts or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope

(a) The opinion of Mr. Justice Willard, to

which reference is here made, is as follows:
This motion comes before me under Section
241 of the Code, authorizing a Justice of the Supreme Court to entertain a motion for an injunction in case of the absence of the Circuit Judge from his Circuit, or his inability from any cause.

The question involved is, whether an Act of the Legislature entitled "An Act to relieve the State of South Carolina of all liability for its guarantee of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same," passed March 2nd, 1872, 15 Stat., 79, is unconstitutional so far as it attempts to authorize the issue of certain obligations from the Treasury of the State, designated therein as Revenue Bond Scrip, on the ground that such Act contravenes so much of the tenth Section of the first Article of the Constitution of the United States as declares that no State shall "emit bills of credit."

It is claimed by the plaintiff that the obliga-tions contemplated by the second and third Sec-tions of that Act are bills of credit within the meaning of the Constitution of the United States, and that the provisions of such law for the issue of such obligations, intend an emission within the sense and meaning of that Constitution.

Section 3 provides as follows: "That, to carry out the purposes of this Act, the State Treas-arer is hereby authorized and required to have printed or engraved on steel, as soon as practicable, Treasury Certificates of Indebtedness, to be known and designated as Revenue Bond Scrip of the State of South Carolina, in such form and of such denominations as may be de-termined on by the State Treasurer and the President of the Blue Ridge Railroad Company, in South Carolina, to the amount of one million eight hundred thousand dollars; which Revenue Bond Scrip shall be signed by the State Treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the hearer thereof, and that the same will be received in payment of taxes and all other dues to the State except the special tax levied to pay interest on the public debt."

The execution enjoyee are, the obligations con-

The question arises, are the obligations con-templated by this Section bills of credit within the meaning of the Constitution of the United States?

The proper definition of the term "bills of

of the Act, the emission is a bill of credit *230

*within the terms of the Constitution. To the many indications in the Act to show the intended design, which have been pointed out in the opinion of Mr. Justice Willard, it

credit" has been settled in the Supreme Court of the United States, after much able and earnest discussion, eliciting marked differences of opin-

Chief Justice Marshall, in delivering the opinion of the majority of the Court in Craig v. Missouri, 4 Peters, 410 [7 L. Ed. 903], declares that the term "bills of credit," as employed in the Constitution of the United States, "signify a paper medium intended to circulate between individuals, and between government and individuals for the ordinary purposes of society," "that the prohibitions against such emissions comprehends the emission of any paper medium by a State government for the purpose of common circulation."

This definition received much consideration as

*230

to its accuracy in the subsequent case *of Briscoe v. Bank, 11 Peters, 257 [9 L. Ed. 709], but was enforced rather than impaired by the de-

cision in the last named case.

The opinion of the majority of the Judges in Briscoe v. Bank was delivered by Justice Mc-Lean, who, it will be observed, was one of the Judges who dissented in Craig v. Missouri. He declares, after reviewing the various definitions of the term in question that had been brought into discussion in Craig v. Missouri, that, 1st. "The definition then which does include all classes of bills of credit emitted by the colonies or States is a paper medium issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

It is not necessary for the purposes of the present case to inquire whether the foregoing definition is exhaustive of the whole sense and meaning of the constitutional prohibition, for the present case will be found fully within that definition, and, therefore, covered by the authority of the Supreme Court of the United States

in the case already cited.

It remains, then, to inquire whether the obligations contemplated by the Act under consideration are intended to have the following characteristics:

1st. That they are to be issued by a State in

its sovereign character.

That they were to contain a pledge of its faith; and 3d. That they were intended to circulate as

The first and second propositions are settled in the affirmative by the terms of Section 4, which provides, as we know, for a paper to be issued by the State Treasurer, importing to be an obligation on the part of the State to pay a certain sum of money to the bearer. It will, therefore he recovery only to inventor the state to pay

fore, be necessary only to inquire whether it was the intention of the Act that this paper

should circulate as money.

An inquiry of this nature calls into exercise one of the most important and responsible judicial powers incident to a constitutional government. It involves the examination of an Act of the Legislature, with the view of fixing the purpose and intent of the Legislature in the passage of such Act, not merely as a means of effectuating such purpose and intent of the lawmaking power by means of the judicial authority, but for the purpose of testing the authority of the law-making power itself in the case, under the supreme law of the land.

The principles that should govern such an enquiry are well illustrated in the case of Craig v. Missouri, already referred to, and the mode

might be added that the *Revenue Bond Scrip could never have been intended or proposed as a State security for investment, because it bore no interest, and its value consisted in the fact of its ready capacity and facility in

in which they are there applied to a case remarkably similar to the one in hand, marks out very clearly the line of inquiry appropriate to

be pursued.

To fix this meaning of the term "money," it must be taken in the ordinary sense understood by the community in their mutual dealings. strenuous attempt was made in the case of Craig v. Missouri, and in Briscoe v. Bank, to limit the sense of the term "money" as entering into the question of what constitutes a bill of credit to the legal or technical sense of the term, which embraces only the legal coinage of the country, and that which is its legal equivalent, or, in other words, is made legal tender; but that line of argument did not prevail.

The question, properly stated, is whether a particular obligation is what the community regards and deals with as money. The answer to it is that whatever is current in a form convenient to pass from hand to hand and that may be used to pay debts or purchase commodities is, in this sense, money. It is not essential to such character that tender of payment in such to such character that tender of payment in such substituted medium should have the force and effect of a legal tender, nor that it should have an actual capacity for paying debts and purchasing commodities equal to that of money possessing intrinsic or legal value. That which passes current as money may be depreciated with the legist in the starter of the second definition of the such that the second definition is the second definition of th without losing its character as money, and depreciation necessarily implies a diminished capacity for paying debts and purchasing commodities.

*On the other hand, it is not enough to characterize an obligation as money merely because certain individuals have found it convenient to use it in place of money in their mutual transactions. There must be a dealing in the medium as money by the community as such, although the extent to which such dealing by the community is carried is, perhaps, unimportant to

the question. There are certain characteristics that tend to adapt a paper expressing a promise to pay money or representing money value, to become current in the community as money. It must be in a form convenient to pass from hand to hand. It must be based either on the credit of a government, a corporation, or an individual, or an association of individuals, or upon a fund pledged or set apart for its redemption. It must either have undoubted credit, such as arises from its ready convertibility into money value, or it must tend to supply some want, natural or artificial, of the community in which it is intended for circulation. It must be placed upon the community in quantity or volume sufficient to create an adequate interest and motive to secure its currency; and, finally, it must have a certain denominational character adjusted to the wants of the community in respect to a circulating medium.

An examination of the Act in question will disclose a clear intent to clothe the obligations in question with attributes fitting them for general circulation as money. These attributes will be considered in the order just stated.

1st. Was it intended that the Revenue Bond Scrip should be issued in a form convenient to pass from hand to hand in ordinary transactions of the community?

Section 3 gives to the scrip the form most usual and convenient to serve as paper money,

*supplying all articles necessary for use or would cause a demand for it *which a State consumption. Its capacity for circulation and its easy convertibility, together with its adaptation to immediate and ready use.

viz: That of the usual bank or treasury note. It is to be printed or engraved on steel in such form and or such denominations as the State Treasurer and the President of the Blue Rage Railroad Company shall determine. The object of referring this authority as to form and denomination to the Treasurer and the President of the railroad company is obvious. The Treasury is, by the Act, to receive and pay out this scrip from the treasury as money; and the President of the railroad company is to receive the serip as the representative of his company, and to realize from its employment, and they are most likely to know what qualities as to form and denomination would have the tendency to give the greatest currency to the scrip at the time of its issue. A certain discretion is left with them for such purpose, While the third Section determines what shall be the substantial character of the scrip, as importing a pledge of the public faith and credit, the form of the instrument, as adapting it in external appearance to the common notion of money, is left with those most concerned with its currency.

2nd. It is to be based by the terms of the Act on the credit of the State Government in its

sovereign capacity.

3rd. The Act attempts to confer upon it not only the full credit capable of being conferred by the use of the full faith and credit of the State, but to create an artificial want in the community, tending to give it currency. In the first place, it is made receivable in payment of taxes and all other dues to the State, except the special tax levied to pay interest on the public debt. (Sec. 3.) Again, it is provided that if any such scrip is received in the Treasury for the payment of taxes, the Treasurer is authorized to pay out the same in satisfaction of any claims against the treasury except interest that may be due on the public debt. (Sec. 5.)

These provisions contain two distinct features. The first is a permissive feature affecting each individual in the community who is a tax-payer, and supplying to him a motive to become a purchaser of the scrip. A more energetic means of creating an interest and motive in the community to deal with the scrip, as money, could not be affected when the scrip, as money, could not be offered short of making the scrip compulsory payment of all debts as between individ-uals. The other feature involves the communication to the scrip of the capacity of performing all the functions of money in all dealings be-

*232

tween State and individuals, *excepting only the case of the payment of interest on the public debt. This last feature can have no other significance than that of giving currency to the

scrip as money.

It will be observed from the language of the fourth Section, in which the faith and funds of fourth Section, in which the faith and funds of the State are pledged, that such is not in terms that such scrip shall be redeemed by the pay-ment to the bearer on presentation of the amount of money called for by it, but the lan-guage is, "that the faith and funds of the State are hereby pledged for the ultimate redemption of said Revenue Bond Scrip."

It is only ultimate redemption, not payment on demand, that is covered by this pledge. What is meant by ultimate redemption is made clear by the succeeding clauses of that Section. It is provided that a certain tax shall be annually levied for the redemption of the scrip, and it is also provided, that the State Treas-

bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the State, the

their date one-fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be recited, and to apply to sach purpose exclusively the taxes hereby required to be levied. The elect of these provisions is that the holder of the scrip must not look to payment according to the tenor of his scrip, but must seek a market for its circula-tion under the inducace of the pledge of faith and funds for its attimate redemption. In other words, an attempt is made to give currency to the issue, notwinstanding the absence of any intention or ability to redeem according to the tenor of the promise by obtaining a credit with the community for the amount of scrip put in circulation on the strength of certain special provisions and a general pledge of the faith and runds of the State for its unmate redemption.

4th. The quantity or volume of the contemplated issue is such as tended to create a strong motive and interest in the community to keep the scrip in circulation as money. The amount, \$1,800,000, as compared with the extent of the commercial transactions of the community on which that amount was intended to be placed, affords the clearest indication of an intention so to affect the interest of the community as to secure its circulation as money. It was to be placed at once in private hands as valid obligations on the part of the State. The various tions on the part of the State. The various provisions of the Act that looked to a distribution among the people preclude the idea that it was intended that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders. On the contrary, it was clearly intended for dispersion, and the magnitude of the interest in the hands of the first receivers of the scrip was sufficiently large to warrant the assumption that it would become thus diffused throughout the community.

5th. As it regards its adaptation in respect of denomination, we have already seen that authority was conferred on those most concerned with its circulation, to adapt the issue in that respect to the wants of the community. Such a provision shows additional evidence of an intent that the scrip should circulate as money.

Considering the Act in its entire aspect, as well as its integral parts, it is clear that the Legislature intended that the scrip should circulate as money, and that for this reason the provisions of the Act authorizing the issue of scrip are in conflict with the prohibitions of the Constitution of the United States, as to the emission of bills of credit by States.

The Act being unconstitutional, it is void so far as it contemplates the issue of Revenue Bond Scrip. It is unimportant, therefore, to inquire whether the scrip that was actually issued was conformable to and authorized by the

The injunction heretofore issued must be continued until the final hearing and determination

of the action.

But it is said that one part of an Act may be declared unconstitutional, and the other parts constitutional. There can be no question as to this, nor to the consequence that follows, which Mr. Cooley, at page 77 of his work on limitations, thus announces: "If, when the unconstitution of the consequence o tutional portion is stricken out, that which remains is complete in itself, and capable of being executed wholly independent of that which

*233

was rejected, *it must be sustained." The reurer shall "retire at the end of each year from lators seek to apply it here as sustaining the

purpose was to furnish a fund for payment! and not a circulating medium. But may not the two coexist? May not the medium of payment be of such a kind and character as to create in itself a circulating currency? It is not the end which the assumption is to accomplish, but the mode and manner designed and the use contemplated. The State might issue certificates of indebtedness for the redemption of its bonded debt, but if it did so in the form and manner and design proposed by the Act of March 2, 1872, would they be less obnoxious to the objection urged against the Revenue Bond Scrip, because they were issued to pay or meet a debt? It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach to it as a provision and recommendation for a circulating medium.

scrip, "not indeed as a bill of credit, but as a valid obligation of the State, which must be re-deemed in the manner fixed by the law, which which sets forth the terms and obligations of the contract." The relators claim a writ of mandamus to require the levy of a tax to pay the Revenue Bond Scrip which they hold. If it is void, and the respondent cannot, therefore, be void, and the respondent cannot, therefore, be required to direct it, for what purpose can he order the levy of the tax, the benefit of which is to inure to them, "not as holders of a bill of credit, but of a vested obligation of the State?" The Act provides for the collection of the tax to pay the Revenue Bond Scrip, and if this is void can the respondent look behind it to the consideration on which it was founded, and provide for that in substitution of the void paper? Is the ministerial officer to assume legislative functions?

It is said that "the most startling of all the various propositions stated in the argument of this case is that which it is urged must be the result of the Act being unconstitutional. It is that, the Act being void, and the scrip thereby void, the State may retain the consideration received for it, and judicially repudiate its pay-ment." The duties and powers of a Court are of a widely different character from those of the legislative department. The one gives conthe legislative department. The one gives construction to Statutes as they find them, without looking to the effect of their conclusion upon either the State or individuals, through the apeither the State or individuals, through the application of principles by which they are bound to be governed. The other is invested with the general power of enacting laws according to their own sense of justice and of policy, provided they are not within the inhibitions of the constitutions of the State and the United States. If they transcend either of these, a duty more delicate than any other which the Judiciary is called upon to perform, devolves upon it the necessity of declaring their action void. It is not within the province of the Court to inquire into the consideration which these relators may have paid for the scrip, to see how far the State may be bound to compensate them for a loss inthey say, in a contract into which they entered with it on the faith of the Act, which, as they contend, expressed the terms designated by the State itself. We are to decide the case before us. If the issue of the Revenue the case before us. If the issue of the Revenue Bond Scrip by the Treasurer involves the State in some obligation to the holders, which good faith requires it to meet, the duty rests with the Legislature, not the Courts, to measure its extent and declare the mode in which it shall be fulfilled.

The order dismissing the motion has been already filed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

4 S. C. *234

*LEVY v. SOUTHERN EXPRESS COM-PANY.

(Columbia. Nov. Term, 1872.)

[Carriers \$\infty\$180.]

Where goods are delivered to an express company under a written contract, which limits their liability as common carriers, and provides that the goods may be delivered to another company to be carried, and that such other company shall be entitled to all the stipulations and conditions of the contract, another company whom the goods are delivered become entitled to the benefit of the limitations of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 825; Dec. Dig. \$20.]

[Carriers \$\infty\$180.]

A shipper having authority to ship must be regarded as authorized to bind the owner by a contract containing special terms of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 825; Dec. Dig. \$\infty 180.]

[Carriers \Leftrightarrow 156.]

Where a trunk containing money and jewelry to the amount of \$350 was delivered to an express company without notice of the contents or value, and the receipt contained stipulations that the company would be liable for loss or damage to goods only when specially insured by the terms of the receipt, and in no case for more than \$50, unless a greater value be specified: Held, That it was not error to refuse to charge the jury, as matter of law, that the company had the right to assume that the trunk did not contain articles of special value, and for such articles they were not then liable, nor for any injury to the trunk beyond \$50.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 697-719; Dec. Dig. 🖘 156.]

[Carriers 5.3]
Held, That it was error to charge, in substance, that defendants were liable for the value of articles of special value in the trunk, whether known to them or not, and that, to charge defendants, it was enough to show that the goods were in the trunk, and lost therefrom when in their possession.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 697-719; Dec. Dig. \$\sim 156.]

Before Graham, J., at Charleston, March Term. 1872.

This was an action to recover the value of articles alleged to have been lost from the trunk mentioned in a receipt therefor given by an agent of the Adams' Express Company. The receipt bore date Philadelphia. April 14th, 1870, and is as follows:

"Received of R. Levin, one trunk, value -, for which the company charges ---, marked Miss R. Levy, Charleston, S. C., which it is mutually agreed is to be forwarded to our Agency nearest or most con venient to destination only, and there delivportation. It is a part of the consideration property to him after the expiration of that of this contract, and it is agreed, that the time, subject to the conditions of this resaid Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by the said Express Company entrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots or in transit, leaking, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of the said company or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so

*235 specified in this *receipt, which insurance shall constitute the liability of the Adams Express Company; and if the same is entrusted or delivered to any other Express Company or agent (which said Adams Express Company is hereby authorized to do,) such company or persons so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable; and the Adams Express Company shall not be in any event responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and enure to the benefit of each and every company or person to whom the Adams Express Company may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or In no event shall the A. E. C. be person. liable for any loss or damage, unless the claim therefor be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at the shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not in any event be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection or riot, or the dangers incident to a time of war, or by any riotous or armed assemblage. If any sum of money besides the charge for transportation is to be collected from the consignee for delivery of the above described property and the same is not paid within

ered to other parties to complete the trans- per agrees that this company may return said ceipt, and that he will pay the charge for transportation both ways, and the liability of the company for such property, while in its possession for the purpose of such collection, shall be that of warehousemen only."

The case is stated in the following case and exceptions:

The plaintiff having shown that the trunk was delivered to Adams' Express Co., containing the jewelry and money in question, but without notice of its contents, and the re-*236

ceipt of Adams' *Express Co. therefor, containing stipulations that the company would be responsible for loss or damage to the property from the dangers of railroad, steamboat, river and ocean navigation, and fire, only when specially insured, and that mentioned in the receipt, and in no case for more than \$50, unless a greater value be specified therein, in which receipt there was no insurance mentioned, nor any value to the trunk; that, in the course of business, the trunk was received at Richmond by the Southern Express Company, under a way bill from Philadelphia to Charleston, which indicated no exceptionable condition to the trunk, but also no special value to the articles it contained; that, when delivered in Charleston, it did not contain the jewelry and money, and appeared, when here, broken from the bottom; also, there was no testimony adduced of assent by plaintiff to the stipulations of the receipt. Further, it appeared that freight for the trunk was paid by plaintiff to defendant at Charleston; and it also appeared that the signature to the receipt was in lead pencil, and it is not clear what name was intended-

And upon these facts, the case being about to be submitted to the jury, the defendant moved the Court to instruct them:

1. That the defendant was entitled to the benefit of any contract appearing in the receipt, and any transaction between Adams' Express Co. and the plaintiff in reference to the trunk:

2. That from these it had the right to assume that it did not contain articles of special value, and for such articles it was not then responsible, nor for any injury to the trunk beyond \$50, the limit of responsibility, without notice stated in the receipt;

Which were refused; and to the contrary thereof, His Honor charged that the defendant was responsible for articles of special value in the trunk, whether known to it or not; and that it is enough to charge them that the goods were in fact in the trunk, and lost therefrom, while it was in the possession of the defendant, and that the foot notes to the receipt of an Express Company are not to be considered, and that notwiththirty days from the date hereof, the ship-standing the limitation of loss to \$50, in the alsence of any other value mentioned, the defendant was responsible for what may have been the real value of the articles.

To which refusal of instructions prayed for, and to the instructions given, the defendant excepted.

The jury found for the plaintiff \$350, and judgment having been entered thereon, the defendant appealed.

*237

*Brewster, Spratt & Burke, for appellant, submitted the following points and authorities:

If concealment of the fact that there are articles of special value in a package committed to an express company constitute a defence to an action for their loss, or if by stipulation in a receipt the company can protect itself from responsibility beyond a certain amount for the loss of a package without notice of a higher value, there was misdirection by His Honor. And if there was any evidence of concealment, or of such stipulation without notice, the defendants are entitled to a new trial.

There was some evidence of concealment. The articles, jewels and money, were unusual in a trunk—not attendant upon the owner, at least. In the receipt taken by the plaintiff there was the stipulation that the package should be valued at \$50, if no higher value be stated. The commission of the trunk to an express company with such articles, and expressly with such stipulation, was some evidence of imposition.

There was also some evidence of a limitation of liability without notice. The stipulation in the receipt that the company will not be responsible in case of loss for more than \$50, without notice of a higher value to be stated therein, is plain. There is no notice of a higher value stated in the receipt; there was no evidence of other notice.

Of both facts, therefore—the concealment and the limitation—there was some evidence. If either constitute a defence, of the benefit of that the defendants were defeated by the charge of His Honor.

1st. Concealment does constitute a defence to an action for the loss of articles of special value, and that concealment may consist, simply, in withholding notice of facts the carrier has the right to know, or a notice he has reason to expect.—Story on Bail., §§ 565, 568, 569; Gibbon v. Peyton, 4 Burr., 2298; Tichborne v. White, 1 Str., 145; Boston v. Dunoyant, 4 Barn. & Ald., 21.

Nor does actual knowledge defeat the defence, if, by the terms of the carrier's notice, the shipper be required to pay for the higher value, and he fail to do so.—Marsh v. Hern, 5 B. & C., 322; Harris v. Pockwood, 3 Taunt., 264; Levi v. Waterhouse, 1 Price, 280; So. Expr. Co. v. Everett, 37 Ga., 688.

2d. The Express Company may limit its liability for loss to \$50.

The Express Company is not a common carrier. Of that capacity, it is the condition *238

that the carrier shall own or control the *vehicles for transportation.—Story on Bail., §§ 495, 501-2, 496; Roberts v. Turner, 12 Johns. Rep., 232; Platt v. Howard, 7 Cowan, 497; Hartfield and Others v. Adams' Ex. Co., 19 Barb., 577.

And there is, therefore, no pretence of inability to limit a liability at common law which never did exist.

But the common carrier may limit his liability by agreement, and that may be implied from the delivery of goods, with public notice of the terms of transportation, or it may be expressed in the receipt, with stipulations.—Story on Bail., §§ 551, 549; Riley v. Horn, 5 Bing., 217; 15 Eng. C. L., 422; Clay v. Miller, 1 H. Black., 298; Cobden v. Bollen, 2 Camp., 108; New Jersey Man. Co. v. Ill. Cent. R. R., 3 Wall. 107; Kilman v. U. S. Express Co., 3 Kansas, 205; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How., 344; Swindler v. Hilliard & Brooks, 2 Rich., 303; Singleton v. Same, 1 Strob., 214; Patton v. Magrath & Brooks, Dud., 159.

The Act of 1864, second Section, 13 Statutes, 262, providing "that no public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers," &c., does not preclude the common carrier even from limitation of his liability by contract, but only of such contract the public notice be not evidence. The right to limitation by special contract remains.

The receipt, with stipulations, is a special contract.—New York Man. Co. v. Ill. Cent. R. R., 3 Wall., 107; Kilman v. U. S. Express Co., 3 Kansas, 205; Parker v. Dinsmore, 24 How., 290; Myers v. Harndon's Express Co., 1864, Sup. Ct., N. Y., MS.; Van Winkle v. Adams' Ex. Co., 1865, Sup. Ct., N. Y., MS.; Boorman v. Adams' Express Co., 21 Wisconsin, 152, MS.; Shaw v. York, 13 Q. B., 347; York v. Crisp, 14 Com. B. Rep., 527; Wayland, Administrator, v. Mosely, 1865, Sup. Ct., Alabama, MS.

But the Act is applicable only to common carriers, which the defendants are not, and they may yet limit by public notice, even in this State.

That limitation is admissible in Philadelphia, where this contract was made.—Wise v. Adams' Ex. Co., Court Appeals, Pa., 1863, Ms., p. 12.

In case of limitation, the burthen of proving the gross negligence, to charge the carrier, is on the plaintiff.—Story on Bail., §§ 573, 410; Marsh v. Horn, 5 Barn. & Cress., 322; Riley v. Horn, 5 Bing., 217; Harris v.

*239

Pockwood, 3 Taunt., 264; Kollman v. *U. S. Express Co., 3 Kansas, 205; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How., 344; R. Smith v. Adams' Ex. Co., Ala. Sup.

§§ 2, 6; Finacune v. Small, 1 Esp. Rep., 314; Cooper v. Burton, 3 Camp., 5.

Nathans, contra:

Express companies are common carriers.-Stadecker v. McCombs. 9 Rich., 199.

If appellant is responsible as common carrier, and relies upon a limitation of common law liability, then "the onus of showing not only that the cause of loss is within the terms of exception, but also that there was no negligence, is on him."-Baker v. Brinson, 9 Rich., 201.

The appellant maintains that, even if liable for negligence, the limitation in receipt that company will not be liable above fifty dollars, unless especially insured, restricts the respondent's right to recover, to that amount. But it is submitted, on behalf of respondent, that the policy of law which precludes carrier from protection of a limitation as to a specified class of risks, where there is a negligence, is equally applicable where there is a restriction as to value. The law will not permit carrier to stipulate for fraud or negligence.—Duff v. Budd, 3 Brod. & Bing., 177; Garnet v. Wilan, 5 B. & Ald., 53; Sleat v. Fagg, 5 B. & Ald., 342; Beck v. Evans, 16 East., 243; Wyld v. Peckford, 8 M. & W., 443.

In this case there is not only entire absence of proof exonerating company from negligence, but the testimony establishes that trunk was robbed while in custody of the appellant. Upon the case made the authorities fully sustain the verdict, and it is submitted that a verdict will not be disturbed for an error of the Judge in point of law, if there be other sufficient grounds to support it .- Ingraham v. Ins. Co., 2 Tr. Con. Rep., 707.

The respondent denies that the receipt of the company constituted a special contract limiting the liability of the company, because there is no evidence of assent on her part to such limitation, and the complaint rests upon common law liability. In Stadecker v. Mc-Combs, it is said, in reference to this class of carriers: "The responsibility of all risks is assumed by them except such as results from the act of God and the public enemy. They are bound to the utmost care of goods in their custody, and cannot limit their liability

either by *a general notice or special acceptance." That this was designed to define the rule of law applicable to this class of carriers is the more apparent because the case immediately succeeding it, Baker v. Brinson, recognizes rule previously laid down in Swindler v. Hilliard & Brooks "that a carrier may limit by special contract his common law liabilities.'

*240

Swindler v. Hilliard, Baker v. Brinson, and other cases in this State, were cases of water carriage, and the exceptions contained in bills of lading may rest upon well known and recognized usage.-1 Smith's L. Cases, (6 Am.

Ct., 186, MS., p. 49; Angell on L. of Carriers, (Ed.) 321-405; Belger v. Dinsmore, 51 Barbour, 69.

> In Georgia (appellant is a corporation created by a law of that State) it has been held that the receipt alone of the company did not make a special contract.—The Southern Express Co. v. Barnes, 36 Geo., 532; Same v. Newby, 36 Geo., 644. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not, but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, &c., the mere fact of such a notice is no certain ground of inferring that owner of goods consented to waive some portion of his legal rights."-2 Red. on Rail., 89. The Act of 1864, Revised Stat., 303, enacts that "no public notice or declaration shall limit or in any wise affect the liability at common law of any public carrier;" and this respondent contends that if said Act does not preclude a special contract, yet a fair construction, in reference to the mischief it was intended to remedy, requires that where a special contract is invoked for the protection of the carrier, he should show affirmatively the assent of his employer to such contract, and not rely upon the mere delivery of a receipt containing at the foot in very small print an embarrassing multiplicity of exceptions.

> Money and jewelry in trunk containing wearing apparel allowed .- Merrill v. Ginnel, 30 N. Y. 594.

> April 26, 1873. The opinion of the Court was delivered by

> WILLARD, A. J. Plaintiff's trunk was delivered to Adams' Express Co., at Philadelphia, to be transported from that place to Charleston, and a bill of lading taken containing the following clause, introduced after a stipulation of the terms of carriage and *241

> *liability, as between the shipper and Adams' Express Co., viz: "And if the same is entrusted or delivered to any other express company, or agent, (which said Adams' Express Co. is hereby authorized to do,) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable; and the Adams' Express Co. shall not be in any event responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and enure to the benefit of each and every company or person to whom the Adams' Express Co. may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person."

Under this agreement, the Adams' Express

Co. delivered the trunk to the defendants at plies that, as matter of legal conclusion de-Richmond, to be conveyed by them and delivered at Charleston. Delivery was made accordingly. The plaintiff now sues the defendants, alleging the loss, through negligence of defendants, of valuable jewelry contained in the trunk at the time it was delivered to Adams' Express Company.

The Circuit Judge was requested to charge "that the defendants were entitled to the benefit of any contract appearing on the receipt, and any transaction between Adams' Express Co. and the plaintiff in reference to the trunk." This request to charge was refused, and the refusal was clearly erroneous. As between the Adams' Express Co. and the owner the terms of the bill of lading are to be regarded as modifying, in certain particulars, the common law liability of the company as common carriers.-Stadhecker v. Combs, 9 Rich., 193; Singleton v. Hilliard, 1 Strob., 205; Swindler v. Hilliard, 2 Rich., 286 [45 Am. Dec. 732]; Baker v. Brinson, 9 Rich., 201 [67 Am. Dec. 548].

The shipper having authority to ship must be regarded as authorized to bind the owner by a contract containing special terms of shipment.-York Co. v. Railroad, 3 Wall. U. S., 107 [18 L. Ed. 170]. Adams' Express Company had express authority to employ the defendants as common carriers, and to fix the terms of the contract in conformity with the terms stipulated between the shipper and themselves. It is to be presumed, as the case stands, that the defendants accepted the trunk on the terms of the original bill of lading, and such acceptance is accordingly special, and subject to such terms. The last clause of this request to charge is broadly *242

stated, but must *be construed as confined to such transactions as appeared in evidence. The case shows no transaction between Adams' Express Company and the plaintiff or shipper that could be drawn into improper consideration by the concluding clause of the request. If anything appeared on the trial that would be placed in an improper light before the jury by such concluding clause it was for the parties to bring it before us. As the case stands, we must regard the "transactions" spoken of in the request as the contract itself, and such matters as formed part of the res gestæ.

The refusal to charge was clearly errone-

The second request to charge was "that from these" (namely, the transactions between Adams' Express Company and the shipper,) "it had the right to assume that it did not contain articles of special value, and for such articles it was not then responsible, nor for any injury to the trunk beyond the \$50, the limit of responsibility without notice stated in the receipt." This request to charge was also refused. This request im- ed before us, the terms in contest are in the

rived from the terms of the contract itself, the defendants must be regarded as in the same position as if the shipper had informed them that the whole value of the trunk and its contents did not exceed fifty dollars. Such a representation would, doubtless, affect the liability of the defendants, for they are bound to a greater degree of care where articles known to be of large value are committed to their care than when the value is small. The rule of ordinary care and diligence leads to this result. Especially is it so in a case of loss by robbery when the risk increases with the temptation as the value of the goods increases. But the bill of lading here will not bear the construction thus attempted to be put upon it. It is not to be assumed that the amount of fifty dollars was put into it with any special reference to the trunk in question, as the result of any estimate of its value; on the contrary, it must be assumed to have been placed there in conformity with some general regulation of the Adams' Express Company by which their liability was to be limited in all cases. in the absence of special circumstances, or of the payment of a special rate covering insurance to a larger amount.

It cannot, therefore, be considered equivalent to a guaranty as to value, nor a representation of value made by the shipper. If the defendants were warranted in concluding that the trunk did not contain articles of special value calling for particular care, that,

*regarded as an inference from attending circumstances, can only be drawn by the jury, and under this view the matter requested to be charged and refused could not have been charged without an assumption on the part of the Court of functions proper to the jury.

The Circuit Judge charged "that the defendants were responsible for articles of special value in the trunk, whether known to it or not, and that it is enough to charge them that the goods were in the trunk, and lost therefrom while it was in possession of the defendants, and that the foot notes to the receipt of an Express Co. are not to be considered, and that, notwithstanding the limitation of loss to fifty dollars, in the absence of any other value mentioned, the defendant was responsible for what may have been the real value of the articles." This proposition virtually holds that the defendants are liable as insurers, without proof of negligence, for the full value of the trunk and its contents, without regard to the limitation of fifty dollars. This charge was contrary to the settled law of this State, defendants' liability as insurer being limited to that sum.

According to the bill of lading, as produc-

body of the instrument, and not attached said J. B. O'Neall. M. J. Jenkins insists merely as forms of notice; but had it been otherwise, the position of the terms on the paper would not have been decisive of the question whether they entered into the contract evidenced by it, but, in addition to that, the character of the terms and their relation to the body of the bill of lading would have to be considered as bearing on that question.

The limitation of fifty dollars forms part of the contract in this case, and affords ground sufficient for holding the charge to be erroneous. As the question of negligence on the part of the defendants is not involved in the exceptions, we are not called upon to consider that aspect of the case. In the event of a new trial it may become important, in pursuing the enquiry, whether the defendants exercised the amount of care and diligence to which they were bound, are chargeable either directly or inferentially with the knowledge of the fact that the value of the trunk and its contents greatly exceeded the amount of fifty dollars, the limit of their liability as insurers; but for want of a proper basis of fact to apply them to, the rules of law controlling such enquiry cannot be appropriately stated at this time.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *244

*O'NEALL v. HUNT.

(Columbia. April Term, 1873.)

[Payment =14.]

H. purchased, in 1863, with his own money, certain notes of J., given in 1857 and 1860, and in 1864 J. gave to H. a new note for the amount then due on said notes: *Held*, upon the evidence, that H. acted in the transaction as the agent of J., and that H. could only recover on the note as a Confederate transaction. the note as a Confederate transaction.

[Ed. Note.—For other cases, se Cent. Dig. § 93; Dec. Dig. € 14.] see Payment,

Before Moses, J., at Newberry, May Term, 1872.

The bill in this case was filed 22d May, 1866, by Helen O'Neall, plaintiff, against Walter H. Hunt and M. J. Jenkins, defendants, for plaintiff's dower in a lot of land described in the bill, which was decreed to her.

The bill was retained for the purpose of adjudicating the questions raised by the answers of the two defendants.

The answer of M. J. Jenkins states that he purchased said lot of J. B. O'Neall and gave his note for the credit portion and took an obligation for titles, which note was paid off by W. H. Hunt, with Confederate money,

that W. H. Hunt shall be required to make him titles upon the payment of the value of the Confederate money in national currency.

The answer of W. H. Hunt admits that he did purchase said lot from J. B. O'Neall, on 27th October, 1863, by taking up, with the funds of Ann Oregon Garmany, three notes on M. J. Jenkins, given for the rent and part purchase money of said lot, and at the request of the said M. J. Jenkins did sell and convey to him the said lot, about 1st August, 1864, and took his note for the amount of the said three notes, and a mortgage of the said premises to secure said note.

He insists that he is entitled to have his mortgage foreclosed.

It was referred to John T. Peterson to report the amount due on said mortgage, and he reported as follows:

It having been referred to the undersigned, by an order from the Hon. M. Moses, dated 14th October, 1871, to inquire and report the amount due and owing by M. J. Jenkins to W. H. Hunt, the character in which W. H. Hunt claims payment thereof, and the liability of the lot of land described in the bill for the payment of the same, also, whether or not Walter H. Hunt has conveyed said lot, by a good and sufficient title, to M. J. Jenkins, and the validity of the mortgage exhibited by said Hunt with his answer, the Referee respectfully submits the following as his report:

*245

*I find, from the pleadings, that M. J. Jenkins purchased the lot of land described in the bill from the Hon. John B. O'Neall, on the 22d day of August, 1860, for the sum of fifteen hundred dollars, eight hundred of which was paid in cash, and a note given for the remaining seven hundred; said note is drawn payable on the 1st July, 1861, with interest from the 1st July last, and specifies that the title of said lot is to remain in the said J. B. O'Neall until the said purchase money is paid, and that, if default of payment occur, he is to have possession on demand, and may sell in satisfaction. The Hon. J. B. O'Neall also held two other notes on said Jenkins, given for the rent of said house and lot previous to the purchase.

One of these notes is dated on the 25th February, 1857, for \$150, due one day after date, with interest from 1st January last, and is credited on 21st June, 1859, with \$75, and on 24th March, 1860, with \$50. other note bears the same date, is also for the sum of \$150, and payable on the 1st January next.

It further appears from the pleadings, and from the testimony of James F. Glenn, that some time in the year 1863 M. J. Jenkins (leing then in the army) wrote to Glenn, and and titles for said lot made to him by the to W. H. Hunt, instructing them to sell a pay off the demands held by O'Neall; that Glenn and Hunt, conferred together, and Hunt proposed that they should raise the money between them, pay off the demands and keep the negro girl for the benefit of Jenkin's children, to which Glenn consented.

About that time an amount of Confederate States currency was placed in the hands of the said Hunt for the purpose of investment for the benefit of his niece, Miss Ann O. Garmany, with which money Hunt paid off the whole of Jenkins' debt to O'Neall, on the 27th of October, 1863, and took title in his own name. It further appears that on the first of August, 1864, a settlement was had between Hunt and Jenkins, and that the notes which Hunt had taken up amounted at that time to \$1.153.07, for which amount Jenkins gave his obligation to Hunt, securing the same by a mortgage of the house and lot, and Hunt, at the same time conveyed to Jenkins.

From the above statement of fact the Referee is of the opinion that Hunt was in some sort acting as the agent of Jenkins when he paid off the notes, and that, having done so with Confederate currency, he can only recover the value of said currency, to be ascertained from the provisions of an Act of the Legislature, ratified on the 26th March, 1869, and commonly known as the Corbin

*246

*Having had a settlement with Jenkins on the 1st August, 1864, as before stated, and taken his obligation at a time when Confederate currency alone was in use, and for a consideration for which he had paid Confederate currency, the Referee can see no cause why the provisions of the aforesaid Act does not apply, and he has made up the following statement accordingly:

On the 1st August, 1864, the value of Confederate currency, as laid down in said Act, was as seven eighty-four to one of lawful money, making the demand on that day worth, in present currency, the sum of \$147 .-87, to which add interest up to the first day of June, 1872, makes the sum of \$227.72, which, in the opinion of the Referee, is the amount due and owing by the said M. J. Jenkins to the said Walter H. Hunt; and that the said Walter H. Hunt claims said amount as the agent of Ann O. Garmany; and that the house and lot is liable under the mortgage given to the said W. H. Hunt by the said Jenkins, for the amount above The Referee is of opinion that the deed made to M. J. Jenkins, by the said W. H. Hunt, on the 1st August, 1864, is a good and valid title, unless the Court should be of the opinion that the deed from J. B. O'Neall to W. H. Hunt, of 27th October, 1863, vests a right of dower in the wife of the said Hunt, in which case the Referee would rec- of contracts, made in Confederate States

uegro girl, and with the money so obtained to commend that Jenkins be protected in some way from such right of dower.

The following is the decree of the Court:

Moses, J. The plaintiff, Helen O'Neall, has obtained, heretofore, all the relief sought by her herein in the admeasurement of her dower in the lot of land described in the bill, and her interest in these proceedings is at an end; and the case now being a suit between the co-defendants, in which Walter H. Hunt is the actor and Marcus J. Jenkins is the respondent, was heard on the report of John T. Peterson, Special Referee, and exceptions thereto by Walter H. Hunt.

The facts are clearly and fully set out by the Referee in his report, and his statement is unquestioned.

Hunt, however, excepts to the conclusions of the Referee, and insists that he is in error in determining that the contract represented by the note and mortgage from Jenkins to Hunt comes within the provisions of the Act of Assembly entitled "An Act to determine the value of contracts made in Confederate States notes, or their equivalent."

*247

*Upon a careful examination the Court finds nothing to weaken the conclusions of the Referee, as to the amount due on the mortgage.

It is, therefore, ordered and adjudged, that the exceptions to the report herein be overruled and the report be confirmed, and that Walter H. Hunt, in his character of trustee for Ann Oregon Garmany, (now Mayes), as established by proof, have a decree for two hundred and twenty-seven dollars and seventy-two cents, with interest thereon from the first day of June, 1872, together with the costs of this suit between the co-defendants, (except the cost of exceptions overruled, which must be paid from the recovery herein had), for the payment of which decree, including costs, the house and lot described in the pleadings are held liable, and upon the payment of which the mortgage from Jenkins to Hunt shall be fully satisfied, and must be so marked, according to law, if ever recorded, otherwise it must be delivered up and cancelled.

It is impossible to adjudicate any claim which the wife of Hunt may have for dower in the lot described in the bill, but that Hunt held the lot as trustee should leave Jenkins without apprehension on that subject.

Hunt appealed, and now moved this Court to review and reverse the decree, on the grounds:

First. Because the Circuit Judge erred in sustaining the decision of the Referee, that the note and mortgage given by Jenkins to Hunt, trustee, and set forth in this case, came within, and should be scaled by, the provisions of the Act of the General Assembly, entitled "An Act to determine the value notes, or their equivalent," although it ap-jother than Jenkins, he was bound to inform peared by the pleadings, and by the report of the Referee, and was disputed in the trial, that the consideration of said note and mortgage was three notes, given by the said Jenkins, to Hon. J. B. O'Neall, one for part of the purchase money of the house and lot described in the said mortgage, dated 22d day of August, 1860, and the other two for the rent of the said house and lot, dated 25th February, 1857.

Second. Because his Honor the presiding Judge erred in not deciding that Hunt, trustee, was entitled to the whole amount of this note and mortgage, upon the ground, in addition to the one just stated, that the said Jenkins had forfeited his right to the said house and lot, by not complying with the *248

conditions contained in the note for *\$700, given by him to the said J. B. O'Neall, for the credit portion of the purchase money of the said house and lot, and the said J. B. O'Neall had claimed said forfeit, and asserted and exercised the right therein vested in him to sell, by selling and conveying said house and lot to W. H. Hunt, which sale was sustained and confirmed by the said M. J. Jenkins, by his giving the aforesaid note and mortgage, and taking a deed for said lot from W. H. Hunt.

Third. Because, if neither of the foregoing grounds of appeal is sustainable, that then his Honor should, at least, have ordered said house and lot sold, and the proceeds divided between the said M. J. Jenkins and the said W. H. Hunt, in proportion to the amount of the purchase money of said house and lot, paid by them, respectively, including the rent notes paid by the said W. H. Hunt.

Jones & Jones, for appellant. Baxter, contra.

April 25, 1873. The opinion of the Court was delivered by

MOSES, C. J. The question between Hunt and Jenkins, the only parties interested in the remaining issue in the case, depends, for its determination, on the agency of the latter in the purchase, transfer or payment of the notes. To hold that he procured them independent of any interest for or on behalf of Jenkins would subject him to a position at least not enviable.

Jenkins, being absent in the army in 1863, wrote to Hunt and one Glenn to sell a negro girl he owned, and with the proceeds to pay off the demands held by Judge O'Neall against him. They conferred on the subject, and the former proposed "that they should raise the money between them, pay off the demands and keep the negro girl for the benefit of Jenkins' children," to which Glenn assented. Before Hunt could treat in good faith for the notes for himself or any

him that he could no longer represent him in that behalf. He had induced Glenn to believe he would pay the notes for Jenkins, and he would indeed have been lulled into a false repose, if, without any notice to him, Hunt proceeded to purchase the notes for himself or as the friend or trustee of Miss Garmany. The uncontroverted facts clearly show that Hunt had led Glenn to suppose that he was acting for Jenkins-that he was paying the

*249 notes *for him. The extent of the indebtedness of Jenkins on the note of 1st August, 1864, so far as the consideration was involved, was the sum advanced by him, looking to and measured by the currency he paid.

The great and good man who was the owner of the notes was content to receive for them the prevailing circulation, although they were executed before the war, and payable in coin, and to entitle Hunt to a speculation not only at his, but also at Jenkins' expense, must depend on a very different state of facts from those which have been disclosed in the testimony.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 249

MEANS v. FEASTER.

(Columbia, Nov. Term, 1872.)

[Appeal and Error \$\sim 1009.]

In an action for equitable relief, tried by the Judge without the aid of a jury, his con-clusions upon doubtful questions of fact will not be overruled by the appellate Court, though that Court might not have reached the same conclusions he did.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. € 1009.]

[Fraud @=64.]

Fraud is a mixed question of law and fact. [Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67–71; Dec. Dig. €=64.]

[Appeal and Error \$\sim 204.]

Where evidence is received without objection its admissibility cannot be made ground of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. €=204.]

[Fraudulent Conveyances \$\sim 158, 162.]

Where a conveyance of land for valuable consideration is impeached by creditors of the grantor for fraud, it is not enough to show a fraudulent intent on his part, but the grantee's knowledge of such intent may be inferred from the circumstances.

[Ed. Note.—Cited in Tucker v. Weathersbee, 98 S. C. 409, 82 S. E. 640.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 500, 504; Dec. Dig. \$\simes 158, 162.]

[Limitation of Actions = 100.]
The Statute of Limitations runs only from notice or discovery of the fraud. Notice of the deed and its contents is not enough, nor is it enough, it seems to show notice to a Commissioner in Equity, in whose name the debt was contracted for the benefit of the real creditors.

[Ed. Note.—Cited in Suber v. Chandler, 18 S. C. 528.

For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. \$\sim 100.\$]

Before Thomas, J., at Fairfield, August Term, 1872.

Action by Mary H. Means, B. Hart Means, Julius R. Polenitz and Claudius M. Polenitz, against Trezvan D. Feaster, Julia A. Coleman, M. Narcissa Feaster and Elbert H. Feaster. Annett G. Feaster was also a plaintiff, but when the case came on for trial she acknowledged satisfaction of her claim, and the complaint was amended by striking out her name as plaintiff.

The action was commenced in October, 1870, and the complaint alleged-

That, on the 18th of September, 1866, one Andrew Feaster, now deceased, confessed a judgment to S. G. McClanaghan and John C. *250

*Feaster, for the use of Annett G. Feaster, for the sum of three thousand four hundred and ninety-nine 31-100 dollars, and that execution thereon was issued and lodged in the offices of the Sheriffs of Greenville and Fairfield Counties; that Henry A. Gaillard, Commissioner in Equity for Fairfield District, on the 22d day of July, 1868, suing for the benefit of all the plaintiffs, except the said Annett G. Feaster, obtained a money decree in the Court of Equity for Fairfield District against the said Andrew Feaster and others, for the sum of six thousand seven hundred and thirty-nine dollars, and that execution was issued thereon and lodged in the office of the Sheriff of Fairfield County on 10th day of August, 1868; that certain deeds of conveyance, executed and delivered to the defendants in January and February, 1866, by the said Andrew Feaster, before the said judgment and decree were obtained, of certain tracts of land situated in Fairfield County, particularly described in the complaint, and purporting to be upon valuable consideration, expressed in said deeds, respectively, as paid, were executed and delivered without adequate consideration, and with the avowed purpose of hindering and preventing the plaintiffs in and from collecting their claims, and are, therefore, fraudulent; that by reason of the said conveyances the plaintiffs have been defrauded in the collection of their said debts; and that there is no other property of the said Andrew Feaster which can be subjected by the plaintiffs to the payment of their claims. Wherefore the plaintiffs demand judgment that said conveyances be set aside and declared null and void.

All the defendants answered separately except the defendants, Julia A. Coleman and M. Narcissa Feaster, who joined in their answer, and all deny each and every allegation of the complaint, whereby the plaintiffs seek to set aside their respective deeds of conveyance as fraudulent, and as having been made without adequate consideration, and allege that their respective deeds of conveyance were executed and delivered to them by their father, the said Andrew Feaster, in good faith, and for full and valid consideration, amounting even to more than the sums therein respectively expressed as paid, and are free from, and unaffected by, fraud upon the rights of the plaintiffs, so far as the knowledge and acts of the defendants are concerned: that the defendants bargained for their respective tracts of land at the stipulated price of five dollars per acre, and upon this valuation the sums expressed as the

*251

*consideration in said deeds were made up. The defendant, Trezvan D. Feaster, alleges that he gave up to the said Andrew Feaster, at the time his deeds were executed and delivered to him, in payment for the tracts of lands conveyed to him and some personal property which he bought from said Andrew Feaster at the same time, several sealed notes which he held on him and which had been given by the said Andrew Feaster for the services and labor of said defendant and two negroes belonging to him, and for money lent before the late war, amounting to at least seven thousand dollars. The defendants, Julia A. Coleman and M. Narcissa Feaster, allege, in their answer, that the said Julia A. Coleman delivered up to the said Andrew Feaster, in payment for the land conveyed to herself and said M. Narcissa Feaster, at the time of the execution of the deed, an agreement in writing signed by the said Andrew Feaster, dated 27th December, 1862, whereby the said Andrew Feaster undertook and agreed to account for and pay to the said Julia A. Coleman and Lewis A. G. Coleman and R. H. Coleman, Jr., her two minor children, as the heirs of Robert H. Coleman, deceased, the sum of two thousand three hundred and ninety dollars and seventy-five cents, with interest thereon from the first day of January, 1863, for personal property taken at an appraised valuation, made on the 30th October, 1862, by three disinterested persons, and also the further sum of five hundred and thirty-two dollars and ninety-six cents, with interest thereon from the 30th October, 1862, for sundry notes of one Elizabeth Coleman, which were taken and received by the said Andrew Feaster, with the other personal property belonging to the said Julia A. Coleman and her said minor children: that said Julia A. Coleman, in behalf of herself and said minor children, delivered up to the said Andrew Feaster the said obligation or, The deeds of conveyance mentioned in the instrument of writing, and thereby released him from accounting for and paying to herself and children the said sums of money and interest as aforesaid, in consideration of the conveyance of said tract of land; and that the name of the defendant, M. Narcissa Feaster, was inserted in said deed, at the request of the defendant, Julia A. Coleman, through the love and affection she bore her as a sister. The defendant, Elbert H. Feaster, alleges that the said Andrew Feaster, in consideration of the tract of land conveyed to him, and in payment therefor, was released from accounting for and from the payment of one thousand and thirty dollars and sixty-*252

three cents, and interest thereon, which *he had received from Mrs. Elizabeth Teague, the mother of Caroline M. Feaster, the wife of said defendant, for the benefit of the said Caroline M. Feaster.

All the defendants, for a second defense, plead the Statute of Limitations, formally, alleging that no cause or right of action, by reason of fraud in the execution of said deeds of conveyance (if there was any such fraud) accrued to S. G. McClanaghan and John C. Feaster and Henry A. Gaillard, late Commissioner in Equity for Fairfield County, or his predecessors or successors in office, or to the plaintiffs, by virtue of their interests in the judgment obtained by the said S. G. McClanaghan and John C. Feaster and the decree obtained by the said Henry A. Gaillard, as Commissioner as aforesaid, as alleged in the complaint, or by virtue of their interests in the causes of action upon which said judgment and decree were founded, at any time within the space of four years before the commencement of this action; but if any cause of action, by reason of fraud in the execution of said deeds of conveyance ever accrued to the said S. G. McClanaghan and John C. Feaster, and the said Henry A. Gaillard, as Commissioner as aforesaid, or his predecessors or successors in office, or to the plaintiffs, by virtue of their interests in the judgment and decree aforesaid, or the causes of action upon which said judgment and decree were founded, the same accrued more than four years before the commencement of this action.

The complaint was amended by alleging that the fraud was not discovered until within four years before the action was commenced.

It was proved at the trial that the decree for \$6,739, mentioned in the complaint, was founded on a bond and mortgage to Isaac H. Means, Commissioner in Equity for Fairfield District, dated February 5th, 1865, and that it was rendered in a suit for foreclosure of the mortgage commenced early in 1867, by Henry G. Gaillard, as Commissioner in Equity and successor in office of Isaac H. Means.

pleadings were given in evidence, and it was further proved that they included all the lands of the grantor; that Andrew Feaster resided in Fairfield District until the year 1867, when he removed to Florida, where he died in the year 1868. The plaintiff then gave evidence tending to show that the deeds were executed with the intent to defraud the plaintiffs and defeat them in the collection of their

*253 claim; that de*fendants knew of the fraudulent intent, and that plaintiffs did not discover the fraud until a short time before the action was commenced. Annette Feaster, a witness for the plaintiffs, testified, without objection, that she was at the residence of Andrew Feaster in the year 1866. She then heard of the conveyances. "He said he had sold his farm to Trezvan; that he had done this to get rid of the Means claim, to keep from being broken up in his old age. He said they were then suing, or about to sue him. He said he had never given any thing to Narcissa, and that she had to make it appear that she had bought it. That he had to do it in the way of a sale to all these parties to make it stand in law, as it would not have been good if he had made a deed of gift. All the defendants were living in the house with the old man, or near to him, and are his children. He talked these matters over with me several times. He was living on the plantation. The defendants were frequently passing in and out during the conversation, and ought to have heard what was said, but witness does not know whether they did or not."

For the defendants evidence was given tending to prove that the deeds were executed for full and valuable consideration; and that defendants had no knowledge of any fraudulent intent, if any such existed.

His Honor the presiding Judge made and filed the following conclusions of fact and law, and decree:

I, the said Judge, do find as matter of fact:

I. That the conveyances set forth in the complaint were not made bona fide and upon good consideration, and that they were made for the purpose and intent of delaying, hindering and defrauding creditors.

II. That, considering the time, place, relationship of the parties, and all the circumstances attending the transaction, the conveyees must be held to have had a knowledge of the above purpose and intent.

III. That the plaintiffs, Mary H. Means, B. Hart Means, Julius R. Polenitz and Claudia M. Polenitz, did not discover the fraud attending the said conveyances until within four years before the bringing of their action.

And as matter of law, I find:

I. That the plea of the Statute of Limitations must be overruled.

*254

*II. That said conveyances are void as to

the plaintiffs and other creditors in like posi-1 upon inquiry, and the Statute of Limitations tion.

I therefore adjudge and decree:

I. That the plea of the Statute of Limitations be, and is hereby, overruled.

II. That the conveyances mentioned in the complaint are hereby adjudged and decreed to be void, and are hereby set aside and annulled.

To which aforesaid findings of fact and conclusions of law, and the decree or judgment thereupon, the defendants duly excepted, separately, to each and every part thereof, as follows:

I. To the first of said findings and conclusions of fact:

1. In that it is not found, according to the evidence and the law in the case, that the conveyances set forth in the complaint were made bona fide.

2. In that it is not found that said conveyances were made upon good and valuable and adequate consideration.

3. In that it is not found that there was, at most, only a legal preference of creditors in the transactions between the defendants and Andrew Feaster, the conveyor.

II. To the second of said findings and conclusions of fact:

In that it is not found that, if there was any fraud connected with said conveyances on the part of the conveyor, there was no proof that the defendants, the conveyees, were parties thereto, or had a knowledge thereof.

III. To the third of said findings and conclusions of fact:

1. In that it is not found that said deeds of conveyance were duly recorded on the 8th of March, 1866, in the proper office of registration, over four years before the commencement of this action.

2. In that it is not found that Isaac H. Means, to whom, as Commissioner in Equity, and his successors in office, was payable the bond upon which the decree in the case of H. A. Gaillard, Commissioner in Equity, v. Jacob Feaster, Andrew Feaster, and Edith D. Lyles, was founded, was Commissioner in Equity at the time of the execution of said conveyances, and for five or six months thereafter, and lived in the neighborhood of the lands described therein, and of the conveyor and conveyees.

*255

*3. In that it is not found that said Commissioner in Equity and his successors in office, from all the circumstances of the transaction, must have had such knowledge as would put a creditor upon inquiry to ascertain if there was any fraud connected with said 'conveyances.

IV. To the first of said conclusions of law:

1. In that it is not decided that the recording of the said deeds of conveyance within the statutory period imparted the notice necessary to put the creditors of the conveyor

ran against them from that date.

2. In that it is not decided that, where a trustee has the legal title, or may prosecute a suit in behalf of his cestui que trust, and is barred by the Statute of Limitations, the cestui que trust, even though an infant will also be barred.

3. In that it is not decided that the Commissioner in Equity, or his legal successor in office, whose duty it was to receive and collect the money on the bond and the decree thereon for the plaintiffs, was such trustee.

4. In that it is not decided that the plea of the Statute of Limitations must therefore be sustained.

V. To the second of said conclusions of law:

In that it is not decided, upon the evidence and the law, in this case, that said deeds of conveyance are good and valid as to the plaintiffs and all other creditors in like position.

VI. To the first part of said decree or judgment:

In that it is not adjudged and decreed that the plea of the Statute of Limitations be sustained.

VII. To the second part of said decree or judgment:

In that it is not adjudged and decreed that the complaint be dismissed on its merits.

The defendants appealed.

McCants & Douglass, for appellants. Rion & Hamilton, contra.

April 29, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. The case, being strictly one for equitable relief, was tried by the Judge. He did not think it necessary to call *256

a *jury to his aid, nor did either of the parties ask that the issues of fact might be decided through the intervention of one. To sustain the judgment of the Circuit Court, it is not necessary for the respondent to show that the testimony to that end was conclusive, or that this Court would have reached the same result. If there was evidence sufficient to warrant the judgment of the Court below on the facts we should not overrule it. even if a close and careful examination might lead us to believe that the weight was the other way. The judgment of the Court on the facts must be accepted and treated as the conclusion of a tribunal not only vested with the power to pass upon, but, by reason of its position, having a better opportunity to judge of the credibility of the witnesses through whose testimony they are received. In a case on the equity side of the Court we would feel ourselves at greater liberty to review the facts upon which the decree rested than we would be when they have been passed upon through the verdict of a jury. Over the

last our jurisdiction is of a different and quate the consideration, if it be not bona more limited character. It is proper to separate the questions which we consider involve facts from those of law. Whether the appellants had knowledge of the purpose and intent of the execution of the conveyances, was a fact to be collected from the whole evidence. It is not, by any means, however, certain that, so far as they may be regarded void under the Statute of 13 Eliz., C. 5, as made to delay, hinder and defraud creditors, the Judge was right in supposing that question was to be solved as one purely of fact.

Fraud is a mixed question of law and fact, and the mode by which its prevalence is ascertained in Courts of justice depends on well recognized and established principles.

Exception is taken to the admission of the declarations of Andrew Feaster, testified to by the witness, Annette Feaster.

It is enough, as to their mere admissibility in this case, to say that they were introduced without objection. How far such declarations may be competent, would depend entirely on the time they were made. If, at the time of the conveyance, when the grantor had title, or at a period when they can be held to constitute part of the res gestæ, they may be received.-Head v. Halford, 5 Rich. Eq., 128; Kittles v. Kittles, 4 Rich., 422; Renwick v. Renwick, 9 Rich., 50.

As they were introduced without objection, any consideration of their mere competency is precluded. The weight that was to attach

*257

*to them, as affecting the mind of the Judge, was a matter entirely for him, increasing or weakening, the one way or the other, the impression made on him by the whole of the Even competent, they testimony. when should be received with caution.

The appellants contend that, as matters of law, it is not alone sufficient to show an actual fraudulent intent, on the part of the grantor, to hinder, delay and defraud creditors, "but that the purchasers, the grantees, were parties to the fraud or had such a knowledge thereof as would make them equally participants therein or parties thereto," "Whether a conveyance be fraudulent or not is declared by the Statute to depend upon its being made" upon "good consideration, and bona fide." It must "be both."-Kerr on Fraud, 199. No matter how ade- curred.

tide, it wants one of the main incidents to validity. It would be going very far to say that although a deed is executed on full consideration, yet if there be a fraudulent design by the grantor, it will nevertheless be void, although the grantee may be innocent of any wrong intent, and in no way cognizant of any wrong motive.

It is not required that the mala fides of the transaction should be established by positive proof. The complicity of both parties may be inferred from the circumstances. Here the whole property of the father was conveyed to his children by separate deeds at the same time, pending suits by creditors. No complete and entire surrender of the property made—the children, or some of them, living with the grantor. These were among the facts from which the Judge might properly conclude that it was but a concocted scheme for the defeat of creditors.

The exception to the plea in analogy to the Statute of Limitations cannot defeat it. The Statute runs for four years from notice, or discovery, of the fraud, and the onus of shewing want of notice is not on the plaintiff. The defendant, in order to avail himself of the Statute, must show that the plaintiff had notice four years before the filing of the bill.—Shannon v. White, 6 Rich. Eq., 96 [60 Am. Dec. 115]; Godbold v. Lambert, 8 Rich. Eq., 155 [70 Am. Dec. 192]. The recording of the deeds is only notice of their execution and the contents.

In Godbold v. Lambert the Court said that the proposition that notice of a deed is notice of the fraud "cannot be sustained-there is no rationality about it." It is not necessary to consider whether any notice of the fraud by the Commissioner, the officer of the Court, to whom, in his official capacity, the *258

bond was payable, could *affect the parties interested in it for there is nothing in the

evidence to show any such notice. Even if it had been proved, it is not easy to perceive how it could have operated to defeat the rights of those for whose benefit

The motion is dismissed.

the bond was held.

MOSES, C. J., and WILLARD, A. J., con-

120

4 S. C. 258

BEALL v. LOWNDES.

(Columbia, Nov. Term, 1872.)

[Partnership €=34.]

Two several firms may, by their course of dealing with a third party, as by holding out the idea that they constitute but one firm, incur, as to him, a joint liability to the same extent as if they did in fact constitute but one partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. \$\sime 34.]

[Assignments for Benefit of Creditors \$\infty\$=199.] It is a well established principle of private international law that real estate is exclusively subject to the laws of the country where it is situated, and will not pass by an assignment under the bankrupt law of a foreign government.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 645; Dec. Dig. ⊚=199.]

[Assignments for Benefit of Creditors 199.] Where a deed of inspectorship, under the bankrupt law of England, contains an express saving of the rights of the creditors against any person or persons who may be jointly hear with the debtors for any of the debts, acceptance of the deed by a creditor will not discharge a party in South Carolina who is jointly liable for the debt.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 642; Dec. Dig. ♦ 199.]

[Assignments for Benefit of Creditors & 50.]

A trust deed for the benefit of creditors is not revokable at the will of the debtor and grantor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 180, 488–490; Dec. Dig. © 50.]

[Assignments for Benefit of Creditors & 44.]
A creditor for whose benefit a trust is created will not be held to have renounced the benefit without clear proof of an intention to do so.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 188; Dec. Dig. 😂 44.]

[Assignments for Benefit of Creditors 296.]

Mere delay in accepting the provisions of a trust deed for the benefit of creditors will not bar a creditor where the deed fixes no time for acceptance.

[Ed. Note.—Cited in Adler v. Cloud, 42 S. C. 278, 291, 20 S. E. 393.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 870; Dec. Dig. 296.]

Before Graham, J., at Charleston, August, 1874

These were two actions in the form of creditors' bills, one by William A. Beall and the other by Jeremiah Beall, plaintiffs, against Charles T. Lowndes and James Robb, defendants.

For a full understanding of the case it is sufficient to state that in the years 1866 and payable on the first day of January, 1873, 1867 there was a firm doing business in with coupons attached, the first to become

the city of Charleston, South Carolina, under the name of John Fraser & Co., and also a firm doing business in the city of Liverpool, England, under the name of Fraser, Trenholm & Co. The members of the first named firm were T. D. Wagner, W. L. Trenholm, C. K. Prioleau, B. F. Huger and F. Fanning; and those of the second were T. D. Wagner, L. T. Welsman, W. L. Trenholm, C. K. Prioleau and John R. Armstrong.

*259

*In 1867 the firm of Fraser, Trenholm & Co. went into bankruptcy in England, and on the 11th day of November of that year they executed a deed of inspectorship, under the bankrupt laws of that country. The only provisions of this deed, relating to points made in the case, are recited at length in the opinion of the Court. The deed was assented to by the plaintiffs in writing, their assent stating that "this assent is without prejudice to any liens or securities held by the undersigned, or to their rights and remedies against third parties."

On the 25th day of November, 1867, T. D. Wagner and W. L. Trenholm executed in Charleston, South Carolina, an instrument, in words and figures as follows:

"Memorandum of Agreement made and entered into this twenty-fifth day of November, Anno Domini one thousand eight hundred and sixty-seven, between Theodore D. Wagner and William L. Trenholm, in behalf of John Fraser & Co., and of Fraser, Trenholm & Co., and the several parties whose names are hereto signed, creditors of either or both of the said copartnerships.

"1. In consideration of the execution of these presents by Theodore D. Wagner and William L. Trenholm, it is agreed that all suits now pending against John Fraser & Co., and Fraser, Trenholm & Co., and instituted by parties, subscribers to this agreement, shall be stayed.

"2. Theodore D. Wagner and William L. Trenholm agree to execute their joint and several bonds for the aggregate sum of fifteen hundred thousand dollars (\$1,500,000) in favor of James Robb and Isaac Scott, of New York, and Charles T. Lowndes, of Charleston, as trustees, dated the first day of January, 1868; said bonds shall be issued of such denominations as the trustees may require. and in four separate series. First. Three hundred and seventy-five thousand dollars (\$375,000) payable on the first day of January, 1870. Second. Three hundred and seventy-five thousand dollars (\$375,000) payable on the first day of January, 1871. Third. Three hundred and seventy-five thousand dollars (\$375,000) payable on the first day of January, 1872. Fourth. Three hundred and seventy-five thousand dollars (\$375,000) payable on the first day of January, 1873,

the remainder on the first day of January in each year thereafter, at the rate of six per cent, per annum, and commencing on the first day of January, 1868.

*"Theodore D. Wagner and William L. Trenholm agree to secure the payment of the aforesaid bonds by the execution to the aforesaid trustees of a mortgage on all the real estate belonging to themselves, John Fraser & Co., Charles K. Prioleau, John B. Lafitte and E. Lafitte & Co., upon which real estate there shall be a relinquishment or renunciation of dower, and which shall be free from all liens, except such as had been created and were existing on the twentysecond day of June, 1867; and the aforesaid Theodore D. Wagner and William L. Trenholm may at any time during the existence of said mortgage, sell any of the real estate mortgaged, with the advice and consent of said trustees, and upon such conditions as they may prescribe. The proceeds of such sale or sales shall be paid over to the trustees, and by them distributed pro rata among the holders of the joint and several bonds of Theodore D. Wagner and William L. Trenholm, as herein described, or in payment of arrears of interest coupons if at any time there be any past due and unpaid.

"3. Theodore D. Wagner and William L. Trenholm agree to execute bonds for the aggregate sum of seven hundred and ten thousand dollars (\$710,000,) secured by a personal guarantee and endorsement, to be approved by the aforesaid trustees. Said bonds shall be issued in such denominations as the trustees may require, and in four separate series. First. One hundred and seventy-seven thousand five hundred dollars, (\$177,500,) payable on the first day of January, 1870. Second. One hundred and seventy-seven thousand five hundred dollars (\$177,500,) payable on the first day of January, 1871. Third. One hundred and seventy-seven thousand five hundred dollars (\$177,500,) payable on the first day of January, 1872. Fourth. One hundred and seventy-seven thousand five hundred dollars (\$177,500,) payable on the first day of January, 1873, with coupons attached, the first to become due on the first day of January, 1870, and the remainder on the first day of January in each year thereafter, at the rate of six per cent. per annum, commencing on the first day of January, 1868.

"4. The aforesaid bonds, in the aggregate, amounting to two millions two hundred and ten thousand dollars, (\$2,210,000,) shall be executed immediately after the signing of these presents, and delivered to the aforesaid trustees for pro rata distribution among the creditors of John Fraser & Co., Frazer, Trenholm & Co., and Lafittes & Le Count, in they shall be paid the amount of their claims

due on the first day of January, 1870, and settlement of their liabilities, as hereinafter provided.

*261

*"5. The liabilities of the aforesaid firms, represented by sterling bills, accepted by Fraser, Trenholm & Co., Liverpool, shall be computed at seven dollars to the pound sterling, in lieu of principal, interest, damages and exchange, and subscribers to this agreement agree to surrender the aforesaid bills to Fielden Brothers & Co., of Liverpool, on or after the signing of these presents, with power to said firm to collect and receive all dividends to be made thereon by the inspectors of the estate of Fraser, Trenholm & Co., and shall pay over said dividends, when collected, to the holders of the aforesaid bills, or their representatives, to the extent of eight shillings in the pound sterling in reduction of said bills, and shall further pay over to the aforesaid trustees any excess of said dividends when collected, over and above eight shillings, who shall pay said excess to Theodore D. Wagner and William L. Trenholm.

"6. Fielden Brothers & Co., of Liverpool, shall, on completion of the payment of eight shillings to the holders of acceptances of Fraser, Trenholm & Co., endorse the payment thereon and make a surrender of the acceptances aforesaid to the trustees named in this agreement, who shall, on the receipt thereof, immediately proceed to distribute pro rata among the holders of the aforesaid acceptances the bonds of Theodore D. Wagner and William L. Trenholm, as described in articles two and three.

"7. Holders of non-accepted bills drawn on Fraser, Trenholm & Co., subscribers to this agreement, agree to surrender said bills to the trustees named in this agreement, and accept in payment thereof bonds of Theodore D. Wagner and William L. Trenholm, at seven dollars to the pound sterling, in lieu of principal, interest, damages and exchange of the amount of said bills, or any balance due on non-accepted bills drawn by John Fraser & Co., known as the bills of A. J. Ingersoll & Co.

"8. Bills accepted by Fraser, Trenholm & Co., known as Ingersoll's bills, shall be entitled to receive payment in the bonds of Theodore D. Wagner and William L. Trenholm, for the balance due on said bills, after deductions are endorsed thereon for proceeds received for cotton surrendered by the inspectors of the estate of Fraser, Trenholm & Co., and sold for the benefit of said bills.

"9. Creditors of John Fraser & Co., and not holders of foreign bills of exchange, subscribers to this agreement, shall file with the trustees evidence of indebtedness of said firm, and on the final distribution of the bonds of

*262

Theodore D. Wagner and William L. *Trenholm, as described in articles two and three, bills of exchange.

"10. It is agreed, on the fulfillment of the conditions of this agreement, that the trustees shall surrender to Theodore D. Wagner and William L. Trenholm all bills of exchange drawn by John Fraser & Co., and Lafittes & LeCount, on Fraser, Trenholm & Co., and all evidence of indebtedness filed with them by the creditors of Fraser, Trenholm & Co., John Fraser & Co., and Lafittes & LeCount.

"11. It is further understood and agreed upon, that T. S. Metcalf, A. J. Ingersoll & Co., and Lafittes and LeCount, shall be bound to the creditors of John Fraser & Co., and Fraser, Trenholm & Co., by special guarantee on said bonds, in form to be approved by the aforesaid trustees, and to the amount respectively for which they are now severally bound on bills as drawers, endorsers or acceptors.

"12. Subscribers to this agreement, creditors of John Fraser & Co., and Lafittes & Le-Count, having incurred legal expenses in the prosecution of suits against the same, shall file with the trustees evidence of such expenses incurred and paid, for their approval, and the amount so approved shall become a charge on the common fund of dividend and bonds of Theodore D. Wagner and William L. Trenholm.

"13. Subscribers to this agreement understand and agree that the claims of the government of the United States, made in certain proceedings in the Courts of the United States, and in the Courts of Great Britain, that certain moneys are owing and due by Fraser, Trenholm & Co., and John Fraser & Co., shall be ascertained in accordance with the stipulations of an agreement dated the twenty-fifth day of September, 1867, signed at Washington City, by Caleb Cushing and Isaac F. Redfield, on behalf of the government of the United States, and James B. Campbell and A. G. Magrath, on behalf of John Fraser & Co., and Fraser, Trenholm & Co., a copy of which is hereto annexed, is to be recognized as a debt due by said firms, and to be paid out of the bonds of Theodore D. Wagner and William L. Trenholm, hereby created for the benefit of the creditors, and with such priority and preference by law as the government of the United States can en-

"14. And it is further agreed by the subscribers to this agreement, that Theodore D. *263

Wagner shall, on the signing of these *presents, immediately proceed to England to bring about a speedy adjustment in accordance with the agreement hereto annexed and herein referred to.

"15. The binding effect of this agreement

in the aforesaid bonds pro rata with the of these presents by all the creditors of John holders of accepted and non-accepted foreign Fraser & Co., Fraser, Trenholm & Co., and Lafittes and LeCount."

The bonds and mortgages provided for in the articles of the agreement, numbered 2, 3 and 4, were executed and delivered to the trustees therein named. Isaac Scott, one of the trustees, afterwards died, and these actions were brought against the two surviving trustees to establish the right of the plaintiffs as creditors of John Fraser & Co, to a share of the bonds.

On February 7th, 1872, the following order of reference was made:

"On motion of Buist & Buist, plaintiff's attorneys, and J. B. Campbell, of counsel, it is ordered that W. J. Gayer, Esq., be appointed Special Referee in these cases, with power to take testimony, summons and require the attendance of witnesses, and the production of books of account, papers and documents, necessary for the investigation hereby ordered.

"That the said Referee take an account of the debts of the late firm of John Fraser & Co., and of Fraser, Trenholm & Co., and Lafittes & LeCount, to whom due and owing, and the respective amounts thereof.

"That, for this purpose, he do cause to be published in the following gazettes, namely, in the Journal of Commerce of New York, and the Charleston Courier, and the Charleston Daily News, by weekly insertions, a notice, calling upon the creditors of John Fraser & Co., Fraser, Trenholm & Co., and Lafittes & LeCount, who may be minded to accept and become parties to the agreement of date 25th September, 1867, between Theodore D. Wagner and W. L. Trenholm, in behalf of John Fraser & Co., and of Fraser, Trenholm & Co., and the several creditors of either of said partnerships, and to receive the benefits, and give binding effect to the same, to appear before him at his office in Charleston, and after signifying their assent and signing said agreement, that they prove before him their alleged claims as creditors of either of said firms, before the first day of May, eighteen hundred and seventy-two.

"That as soon as possible thereafter the said Referee do make full report of the proceedings before him, stating the names of

claim*ing creditors and the amounts of their respective claims, and the proofs thereof, with his opinion thereon, respectively.

"That, for the purpose of this order, the said Charles T. Lowndes and James Robb do at once deposit with the said Referee the original agreement referred to.

"That the said Charles T. Lowndes and James Robb, in the meantime, and pending the reference and investigation hereinbefore provided, and until the further order of this Court, be restrained and enjoined from any further proceedings whatsoever under their shall be preceded by the assent and signing assumed trust, except the careful preservation of the trust property in their possession, upon the assumption (which John Fraser & without transferring or disposing of any of the bonds executed by the said Theodore D. Wagner and W. L. Trenholm, under the aforesaid agreement, as well those secured by mortgage as those secured by personal guaranty of George A. Trenholm and James T. Welsman.

'And that the said Charles T. Lowndes and James Robb do forthwith account fully and minutely, and set forth all their doings and actings under their assumed trust.

"Finally, that any of the parties in interest under the said agreement have leave to move for such further order or orders as may appear to be necessary for the complete execution of this order."

The rest of the case will be understood from the report of the Referee and the exceptions thereto, the decree of the Circuit Court, and the opinion of this Court.

The report of the Referee is as follows:

These causes were referred to me, with directions, among other things, to take an exact account of the debts of the firm of John Fraser & Company, and of Fraser, Trenholm & Company, and of Lafittes and LeCount, to whom due and owing, and the respective amounts thereof, and to report the proofs thereof, with my opinion thereon, respectively.

I report that I have proceeded to execute the order, and the first claims before me were those of the plaintiffs in the two suits, namely, William A. Beall and Jeremiah Beall. They were taken up and examined together. They are identical, arising out of the same transaction. No other disputed claim has yet been reached or examined. The investigation of these has been full and exhaustive. At its close, the counsel on each side having agreed and fixed a day for a hearing on the report

*265 before your Honor, concurred in *the wish that I would report specially upon these claims. It is impossible to close my general report at this time, and my acquiescence will save the delay which otherwise would be unavoidable.

I therefore respectfully report the proofs in full, as taken before me in writing, on the claims of the plaintiff, William A. Beall and Jeremiah Beall, which are appended hereto.

I further report briefly the opinions thereon which I have arrived at, upon full consideration of the testimony before me, as follows:

1st. I find these claims are for balances due on sales of cotton sold by Fraser, Trenholm & Company, on joint account of claimants and Thomas S. Metcalf, shipped to them by the latter, through John Fraser & Company.

2d. That Mr. Metcalf, in this joint account transaction, dealt with John Fraser & Company, and they dealt with him, as if and

Company acquiesced in) that John Fraser & Company, and Fraser, Trenholm & Company were substantially the same—the former being the parent house, the latter a branch of it, and both only parts of one general concern or partnership, and each liable for the engagements of the other; all the capitalists were partners in each.

3d. That both John Fraser & Company, and Fraser, Trenholm & Company, were fully advised by Mr. Metcalf, and each house fully understood, that the plaintiffs and claimants, Messrs. Beall, were in joint interest with him in the cotton for which they now claim to be paid their shares of the sales money.

4th. That from the beginning, and all through, John Fraser & Company, as well as Fraser, Trenholm & Company, were liable, and whatever was due on these claims was always a debt of each and both of said firms.

5th. That Fraser, Trenholm & Company have been discharged in bankruptcy of their liability for said debts, and that the claimants have consented to their discharge, but did not, thereby, consent to the discharge of John Fraser & Company; but their consent was upon the express condition, well understood by the parties and by John Fraser & Company, that they should continue liable for such debts of Fraser, Trenholm & Company for which they were already liable, in which these debts are included. And the release of Fraser, Trenholm & Company by claimants does not, therefore, release John Fraser & Company.

*6th. That the letter of John Fraser & Co., of January 15th, 1868, by which the balances due by them to each of the claimants are shown and acknowledged, though sufficient to establish their liability, unless controverted by more satisfactory evidence of error, inadvertence or mistake than any thing that has been produced or appeared before me, is not, in my opinion, the evidence of any new assumption, but of a well understood liability which to that time, and still later, had never been disputed or questioned.

7th. I therefore find and report that the plaintiffs, Messrs. Wm. A. Beall and Jeremiah Beall, are, as creditors of John Fraser & Company, entitled to prove for the amount of their claims, as set forth in the pleadings against defendants, Charles T. Lowndes and James Robb, trustees, under the memorandum of agreement made and entered into on the twenty-fifth day of November, 1867, by Theodore D. Wagner and William L. Trenholm, on behalf of John Fraser & Company, with their creditors.

8th. That the amount due to the plaintiff, William A. Beall, I find to be ninety-nine thousand six hundred and eighty-three dolJeremiah Beall, I find to be eighty-five thou- Metcalf, or W. A. Beall or Jeremiah Beall for sand and one hundred and seventy-three dol- the said cotton or the proceeds thereof. lars. These amounts are exclusive of interest, which is to be calculated on each amount from the eighteenth day of December, 1867.

9th. And I recommend that the defendants, Charles T. Lowndes and James Robb, transfer and deliver over to the said plaintiffs, in satisfaction of the said claims, and the interest due thereon, the proportionate share of the bonds of Theodore D. Wagner and William L. Trenholm, as well those secured by the mortgage of real estate transferred to them, the said trustees, as set forth in the pleadings, as those secured by personal guarantee and endorsement of James T. Welsman and George A. Trenholm, to which, as creditors of the said John Fraser & Company, they, the said William A. Beall and Jeremiah Beall, are of right entitled.

The defendants filed the following exceptions to the report:

1. Because the evidence in the case does not sustain the conclusion or opinion of the Referee, numbered 2 in his report, so far as that conclusion or opinion related to the house of John Fraser & Co. That no part of the evidence, except the statement of W. A. Beall, supports the conclusion or opinion that T. S. Metcalf dealt with John Fraser & Co., in relation to the cotton which is the sub-

*ject of this litigation, as if and upon the assumption that John Fraser & Co., and Fraser, Trenholm & Co., were substantially Nor is there any evidence that the same. John Fraser & Co. "acquiesced in" this socalled "assumption." But, on the contrary, all the testimony before the Referee established the fact that Fraser, Trenholm & Co., and John Fraser & Co., were separate and distinct commercial firms; and no testimony whatever was given to shew that these two firms were parts of one general concern or partnership, and each liable for the engagements of the other.

- 2. Because, also, in the same conclusion or opinion of the Referee, numbered 2 in his report, he states that the claims in these cases are for balances due on sales of cotton sold by Fraser, Trenholm & Co., on joint account of the plaintiffs and Thomas S. Metcalf, and shipped to them, (Fraser, Trenholm & Co.,) through John Fraser & Co., when the papers produced show that no part of the cotton was shipped through John Fraser & Co., but all of it by T. S. Metcalf direct to Fraser, Trenholm & Co.
- 3. Because, whether John Fraser & Co. ever were or not advised of the interest of T. S. Metcalf, W. A. Beall and Jeremiah Beall in the cotton shipped on their account by T. S. Metcalf to Fraser, Trenholm & Co.,

lars, and the amount due to the plaintiff, they were or could be made liable to T. S.

- 4. Because the Referee, in his conclusion or opinion, numbered four in his report, has stated that, from the beginning and all through, referring to the shipment of cotton to Fraser, Trenholm & Co. made by T. S. Metcalf on the joint account of himself and W. A. Beall and Jeremiah Beall, John Fraser & Co., as well as Fraser, Trenholm & Co., were liable, when such conclusion or opinion of the Referee is not sustained by any testimony before him.
- 5. Because the Referee, in the conclusion or opinion, numbered five in his report, should have reported that Fraser, Trenholm & Co. were discharged of the claim now made by the plaintiffs against John Fraser & Co., under the bankrupt laws of Great Britain; that such discharge freed the copartnership of Fraser, Trenholm & Co., and each member of the same, from any other or further liability for or because of the said claim; that no member of that firm admitted that, after such discharge, they, or either of them, should continue liable for the same; that John

*268

Fraser & Co. never in *any way were required or asked to be parties to any understanding connected with the assent of W. A. Beall or Jeremiah Beall to the discharge of Fraser, Trenholm & Co.; that if the firm of John Fraser & Co. has been liable to the plaintiffs for or because of the claim by them proved against Fraser, Trenholm & Co., the discharge of Fraser, Trenholm & Co. and the several partners of that firm would operate as the discharge of John Fraser & Co. That if such understanding had ever been made, it would have been void.

- 6. That the letter of John Fraser & Co., referred to in the conclusion or opinion numbered six in the report of the Referee, was proved to the Referee to have been written only for the purpose of communicating to the plaintiffs the statements and account, sent by Fraser, Trenholm & Co., to be forwarded to the plaintiffs, and that such statements and accounts were on their face statements or accounts of Fraser, Trenholm & Co., for which they were liable.
- 7. Because the Referee, in the conclusion or opinion numbered in his report six, at the close thereof, states that the liability of John Fraser & Co. for the claim made by the plaintiffs is a well understood liability of John Fraser & Co., which, at the time when their letter of the 15th January, 1868, was written to the plaintiffs, and till later, had never been disputed or questioned, when the evidence before him showed that no claim therefor was made until after the plaintiffs had become parties to the deed of inspecthey did not enter into any contract by which torship and discharged Fraser, Trenholm &

Co. from all liability for the claim now made. (Company, and the creditors of either or both

or opinion, numbered seven in his report, states that, for the amounts which he sets forth as respectively due the plaintiffs, the plaintiffs are entitled to prove against the defendants, under the memorandum of agreement made and entered into on the 25th November, 1867, when the evidence before the Referee showed that the plaintiffs had never become parties to that agreement and were not entitled to claim any benefit or advantage therefrom.

- 9. Because the Referee should have report-
- 1. That for the unpaid balance of the proceeds of cotton shipped by T. S. Metcalf on joint account of himself, W. A. Beall and Jeremiah Beall, to Fraser, Trenholm & Co., known as shipment No. 2, John Fraser & Co. were not liable, either as jointly with Fraser, Trenholm & Co., or in any other mode.

*269

- *2. That if John Fraser & Co. had been so liable to the plaintiffs, they were discharged therefrom by the operation of the bankrupt laws of Great Britain.
- 3. That if such discharge was alleged to be not final as to them, because of any understanding or agreement that it should not be so, the Referee should have reported that there was no evidence which connected John Fraser & Co. with any such understanding. Next, that no person was authorized to affect them by any consent to such understanding. Next, that such understanding, if proved, which it was not, was void.
- 4. That the memorandum of agreement of the 25th November, 1867, plainly expressed the manner in which creditors of John Fraser & Co. entitled to becomes parties thereto should make proof of their intent. That the plaintiffs in this case had not only never become parties to the same, but had, in contemplation of law, refused to become parties to the same; and, therefore, under such circumstances, these plaintiffs could have no claim against the defendants for any share or portion of the securities held by them in trust for those who are or were parties to that agreement.

The decree of His Honor the Circuit Judge is as follows:

The plaintiffs claim to be Graham, J. creditors of John Fraser & Company, and they bring suit to obtain their proportionate share of certain bonds of Theodore D. Wagner and William L. Trenholm, which are held by the defendants in trust "for pro rata distribution among the creditors of John Fraser & Company, Fraser, Trenholm & Company, and Lafittes & LeCount, in settlement of their liabilities," as provided by agreement "between Theodore D. Wagner and calf, in this joint account transaction, dealt William L. Trenholm, in behalf of John with John Fraser & Company, and they Fraser & Company, and Fraser, Trenholm & dealt with him, as if and upon the assumption

8. Because the Referee, in his conclusion of said partnerships," bearing date the twenty-fifth day of November, eighteen hundred and sixty-seven. The defendants resist this claim.

> The cases came on to a hearing on the report of W. J. Gayer, Esq., Special Referee, and exceptions thereto by the defendants.

> The Referee reports the proof taken before him in writing, and further reports, pursuant to the order of reference, the opinions he has arrived at thereon.

> I will take up these opinions, with the exceptions to each, in their order, and thus dispose of them separately:

*270

*The Referee says: "1st. I find these claims are for balances due on sales of cotton sold by Fraser, Trenholm & Company on joint account of claimants and Thomas S. Metcalf, shipped to them by the latter, through John Fraser & Company." The defendants except to this, and say: "The papers produced show that no part of the cotton was shipped through John Fraser & Company, but all of it by T. S. Metcalf, direct to Fraser, Trenholm and Company."

If the Referee is to be understood as meaning that the cottons were sent to Charleston and delivered into the actual possession of John Fraser & Company, and then put on shipboard, and the bills of lading taken by them, then he is mistaken, and the exception is well taken. But I do not so understand him. The letter of Mr. Metcalf of January 31st, 1866, the answer of John Fraser & Company of February 3d, 1866, and the subsequent correspondence, give a clear view of the transaction. John Fraser & Company advise Metcalf to ship the cottons himself, take the bills of lading to order, and that they will make the advances, and "hold the cotton subject to his order of sale." They would prefer, they say, "not to draw any bills themselves, but to send the bills of lading over to Fraser, Trenholm & Company, and let them send him (Metcalf) marginal credits." Their suggestion seems to have been adopted as to the manner of shipping the cotton from Savannah and other points, and the bills of lading appear to have been forwarded to John Fraser & Company, thus enabling them to "hold the cotton subject to Metcalf's order of sale." Their preference not to draw, themselves, for advances, was not adopted, and their bills were issued and sent to Metcalf in very large amounts. I understand the Referee to mean these transactions when he speaks of the cotton being shipped through John Fraser & Company, and not its manual handling and putting on shipboard. I agree with him, and the exception is overruled.

The Referee next says: "2d. That Mr. Met-

(which John Fraser & Company acquiesced | find that this conclusion is excepted to, but, in) that John Fraser & Company, and Fraser, Trenholm & Company, were substantially the same, the former being the parent house, and the latter a branch of it, and both only parts of one general concern or partnership, and each liable for the engagements of the other; all the capitalists were partners in *271

To this the defendants except, as follows: "1. Because the evidence in the case does not sustain the conclusion or opinion of the Referee, numbered 2 in his report, so far as that conclusion or opinion relates to the house of John Fraser & Company. That no part of the evidence, except the statement of W. A. Beall, supports the conclusion or opinion that T. S. Metcalf dealt with John Fraser & Company in relation to the cotton which is the subject of this litigation, 'as if, and upon the assumption that John Fraser & Company, and Fraser, Trenholm & Company were substantially the same.' Nor is there any evidence that John Fraser & Company 'acquiesced in' this so-called 'assumption.' But, on the contrary, all the testimony before the Referee established the fact that Fraser, Trenholm & Company, and John Fraser & Company were separate and distinct commercial firms. And no testimony whatever was given to show that these two firms were parts of one general concern or partnership, and each liable for the engagements of the other."

I think there is sufficient evidence besides W. A. Beall's statement to support the conclusion of the Referee, not only that Mr. Metcalf, but also the plaintiffs, through him, did deal with John Fraser & Company as if they and Fraser, Trenholm & Company were substantially the same, and that John Fraser & Company did acquiesce in, if not encourage, this assumption.

Their letter of February 3d, 1866, and the whole subsequent history of their dealings, culminating in charging themselves with the balances of December 18th, 1867, as per letter of January 15th, 1868, in my view, warrant the Referee's conclusion. He does not say, nor does the Court so understand him, that, as matter of law or of fact, these two firms were parts of one general concern or partnership, each liable for the engagements of the other. He only says that Mr. Metcalf dealt with John Fraser and Company as if this was so, and they acquiesced in this manner of dealing, and I think the testimony fully warrants this statement.

The Referee next finds: "3d. That both John Fraser & Company, and Fraser, Trenholm & Company, were fully advised by Mr. Metcalf, and each house fully understood, that the plaintiffs and claimants, Messrs. Beall, were in joint interest with him in the cotton for which they now claim to be paid their shares of the sales money." I do not of every kind, the correspondence, the con-

instead, the defendants say: "Whether John

Fraser & Co. were or were not *advised of the interest of T. S. Metcalf, W. A. Beall and Jeremiah Beall in the cotton shipped on their account by T. S. Metcalf to Fraser, Trenholm & Co., they did not enter into any contract by which they were or could be made liable to T. S. Metcalf, or W. A. Beall, or Jeremiah Beall, for the said cotton, or the proceeds thereof."

My recollection is that counsel for defendant admitted the correctness of this finding. In the pleadings, however, the defendants greatly rely upon the alleged fact that Mr. Metcalf did not discover to John Fraser & Co. the joint ownership of the plaintiffs, and John Fraser & Co., in their letter to W. A. Beall of June 24th, 1870, allege "entire ignorance of plaintiff's joint interest." "There was nothing," they say, "said of it in the invoices or letters received from Mr. Metcalf, and they believed that all of his shipments, amounting to forty-five thousand and thirtytwo bales (the six thousand three hundred and fourteen bales included) to be his own, except the single lot of eleven hundred and three bales, which the invoice expressed to be on account of Mr. Metcalf and yourself" (W. A. Beall); and they claim that, in consequence of this ignorance, they advanced to Mr. Metcalf, as if it was his own, and allege a loss thereby of some forty-four thousand pounds sterling. John Fraser & Co., and the defendants, relying upon them, were mistaken in all this, and the mistake was shown by the production of Mr. Metcalf's letters to them and their answers before and during and after the shipment.

The next finding is as follows:

"4th. That from the beginning, and all through, John Fraser & Co., as well as Fraser, Trenholm & Co., were liable, and whatever was due on these claims was always a debt of each and both of said firms."

To this the defendants say:

"Fourthly. Such conclusion or opinion of the Referee is not sustained by any testimony before him."

I do not agree with the defendants that the conclusion of the Referee is unsustained by "any testimony." On the contrary, the general current of testimony, and the defenses furnished by John Fraser & Co., to the defendants, and by them set up, namely, the alleged "entire ignorance" of the joint in-*273

terest of the plaintiffs, the *alleged over-payment to Mr. Metcalf in consequence, the claim of release to John Fraser & Co., by taking dividend and release of Fraser, Trenholm & Co. in bankruptcy, impress my mind as circumstances greatly in support of the Referee's conclusion. The whole testimony

duct of all the parties, the pleadings, the terms of the agreement of November 25th. 1867, and the statements of different witnesses, confirm the same impression, and I am constrained to the same conclusion as the Referee. Add to these the letter of January 15th. 1868, wherein John Fraser & Co. admit the balances due by them, and the claims of plaintiffs seem to be established. In my opinion, John Fraser & Co. have been and are clearly, liable to plaintiffs, as if they had drawn their bills for the same amount on Fraser, Trenholm & Co. and they were unpaid or unaccepted.

They were so advised by the English lawyers, counsel for the bankrupts, and also by their own counsel. They relied upon these opinions, which are now in evidence by the testimony of Mrs. Squarey, Mr. Hill and Messrs. Hull, Stone and Fletcher, the solicitors of Fraser, Trenholm & Co. have been and are clearly, liable to plaintiffs, as if they had drawn their bills for the same amount on Fraser, Trenholm & Co. and they were unpaid or unaccepted.

The fifth finding of the Referee is as follows:

"5th. That Fraser, Trenholm & Co. have been discharged in bankruptcy of their liability for said debts, and that the claimants have consented to their discharge, but did not thereby consent to the discharge of John Fraser & Co.; but their consent was upon the express condition, well understood by the parties and by John Fraser & Co., that they should continue liable for such debts of Fraser, Trenholm & Co. for which they were already liable, in which these debts are included. And the release of Fraser, Trenholm & Company by claimants does not, therefore, release John Fraser & Co."

To this the defendants make the following exceptions:

"Fifth. Because the Referee, in the conclusion or opinion numbered five in his report, should have reported that Fraser, Trenholm & Co. were discharged of the claim now made by the plaintiffs against John Fraser & Co., under the bankrupt laws of Great Britain: that such discharge freed the copartnership of Fraser, Trenholm & Co., and each member of the same, from any other or further liability for or because of said claim; that no member of that firm admitted that, after such discharge, they, or either of them, should continue liable for the same; that John Fraser & Co. never, in any way, were required or asked to be parties to any understanding connected with the assent of W. A. Beall or Jeremiah Beall to the discharge of Fraser, *274

Trenholm & Co.; that if the *firm of John Fraser & Co. had been liable to the plaintiffs for or because of the claim by them proved against Fraser, Trenholm & Co., the discharge of Fraser, Trenholm & Co., and the several partners of that firm, would operate as a discharge of John Fraser & Co.; that if such understanding had ever been made it would have been void."

The ground of defence here taken was exhaustively discussed in behalf of defendants. There seems to be no reasonable doubt that the plaintiffs, in becoming parties to the deed of inspectorship, proving in bankruptcy and taking dividends, did understand that they did not thereby release John Fraser & Co.

counsel for the bankrupts, and also by their own counsel. They relied upon these opinions, which are now in evidence by the testimony of Mrs. Squarey, Mr. Hill and Messrs. Hull, Stone and Fletcher, the solicitors of Fraser, Trenholm & Co. The latter, advising John Fraser & Co. as to the effect of plaintiffs' signing the deed of inspectorship, say it "has not in any way prejudiced their [plaintiffs'] right of proof against your [John Fraser & Co.'s] estate." And again, a year later, writing to Mr. Prioleau, they say: "It seems to us that the defense simply is that John Fraser & Co. never owed the money." If it were necessary for me to adjudge this point. I should not feel at liberty to disregard this testimony. But, in my view, the parties have settled that question for themselves. This is not a suit to make John Fraser & Co., or the parties personally liable for the debt upon which Fraser, Trenholm & Co. have paid a dividend and been discharged, but to obtain the pro rata share of a fund held in trust for persons coming within a particular description; and the question is, do the plaintiffs come within that description-are they creditors of John Fraser & Co., Fraser, Trenholm & Co., or Lafittes & LeCount, and, if so, can the trustees, considering the terms of their trust, raise the objection that taking a dividend from the estate of Fraser, Trenholm & Co. precludes the party from taking his proportionate share of the fund? I have already expressed my judgment that plaintiffs are creditors of John Fraser & Co., and the terms of the trust sufficiently answer the remainder of the question.

The agreement of November 25th, 1867, fourteen days after the date of the deed of inspectorship, but several months after the assent of plaintiffs to the "proposed" deed,

*275

contemplates through*out that parties having claims upon Fraser, Trenholm & Company, upon which John Fraser & Company are also liable, shall prove against the former estate and take their dividends. amount of the dividend is even estimated at eight shillings to the pound, and if it should exceed that rate the surplus is to be paid to Wagner and Trenholm, who put up the fund. The plain meaning of the agreement as to debts, on which both firms were liable, is, that the fund is to pay twelve shillings in the pound, and the estate of Fraser, Trenholm & Co. was expected to pay the remaining eight shillings, and if it paid more, then the surplus to be paid to Wagner and Trenholm. It seems to have turned out that there was no surplus, but a deficiency, and additional bonds were created to make good the eight shillings. How, then, can the trustees of this fund set up the pretence that taking a dividend from Fraser, Trenholm & Co. exFraser & Co., but from this fund created by clusion of opinion numbered 6, in his report, two individuals for the expressed purpose to be distributed among such persons and others?

The release of Fraser, Trenholm & Co. does not exclude the plaintiffs from their right to a ratable share of the bonds held in trust for them by defendants.

The legal effect of plaintiffs' accession to the deed of inspectorship and proof against the bankrupt estate in England, it was urged, is that the plaintiffs, notwithstanding the testimony of the English lawyers to the contrary, are excluded from proving also against John Fraser & Co. The authority of adjudicated cases in the English Courts was cited and relied upon. It does not appear to this Court necessary to decide any such questions in this case, because the questions here raised are not the same. It is not questioned that Wagner and Trenholm had a right to make the provision they have done for the payment of the debts of John Fraser & Co. which have already been in part paid by Fraser, Trenholm & Co., and this they have done. It is the duty of the trustees to execute the trust with which they are charged, and not their duty to seek to defeat it against parties coming within the description of those intended to be provided for by it. They have a right to make the defense suggested by the English lawyers of the bankrupt house, namely: "Simply, that John Fraser & Co. never owed the money." This they have done. In the judgment of this Court, they have failed to establish that defense, and their duty is accomplished. The question is one of fact and of testimony.

*276

*The sixth conclusion of the Referee is as follows:

"6th. That the letter of John Fraser & Co., of January 15th, 1868, by which the balances due by them, to each of the claimants, are shown and acknowledged, though sufficient to establish their liability, unless controverted by more satisfactory evidence of error, inadvertence or mistake, than anything that has been produced or appeared before me, is not, in my opinion, the evidence of any new assumption, but of a well understood liability, which, to that time and still later, had never been disputed or questioned." To this defendants except, and their objections are marked 6 and 7, as follows: "6. That the letter of John Fraser & Co., referred to in the conclusion or opinion numbered 6, in the report of the Referee, was proved to the Referee to have been written only for the purpose of communicating to the plaintiffs the statement and accounts sent by Fraser, Trenholm & Co., to be forwarded to the plaintiffs. And that such statements and accounts were, on their face, statements or accounts of Fraser, Trenholm & Co., for which they are liable.

clusion of opinion numbered 6, in his report, at the close thereof, stated that the liability of John Fraser & Co., (for the claim made by the plaintiffs) is a well understood liability of John Fraser & Co., which at the time when their letter of the fifteenth day of January, eighteen hundred and sixty-eight, was written to the plaintiffs, and till later, had never been disputed or questioned, when the evidence before him showed him that no claim therefor was made until after the plaintiffs had become parties to the deed of inspectorship, and discharged Fraser, Trenholm & Co. from all liability for the claim now made."

An effort was made to break the effect of the letter of which the Referee speaks. Mr. Fanning, the partner in John Fraser & Company, who wrote that letter, was examined, but he failed to say that it does not mean just what it purports by its language, namely: that balances shown by accounts of Fraser, Trenholm & Company were also balances due by John Fraser & Company. the facts were as stated by defendants' exception, that no actual formal demand was ever made by plaintiffs upon John Fraser & Company, till after they (plaintiffs) had become parties to the deed of inspectorship, I do not see that it would be inconsistent with the conclusion of the Referee that the liability "was well understood and had never been disputed or questioned." The plaintiffs cer-

*277

tainly *did, in Liverpool, before assenting to the proposed deed of inspectorship, let it be known what they then thought of the liability of John Fraser & Company. Mr. W. A. Beall testifies that "after his return from Liverpool, John Fraser & Company never denied his and his brother's claim against them for the balance. They only set up" (and that was in his last interview with Mr. Wagner) that the "signing of the deed of inspectorship in Liverpool released the firm of John Fraser & Company in Charleston." "I saw," he says, "Mr. Wagner in reference to these claims, after my return, two or three times, besides urging the house here to a settlement of these claims by letters." This testimony of Mr. Beall is, I think, fortified by circumstances, and, if true, is conclusive. John Fraser & Company were not released from this debt if they were never liable for it, and if, when urged to a settlement, they set up a "release," but did not deny and say "simply, they never owed the money," the conclusion is not an extravagant one that the "liability was well understood and not disputed or questioned."

f communicating to the plaintiffs the ent and accounts sent by Fraser, Tren-coo., to be forwarded to the plaintiffs, at such statements and accounts were, air face, statements or accounts of Trenholm & Co., for which they are 7. Because the Referee, in the con-

7 in his report, states that, for the amounts which he sets forth as respectively due the plaintiffs, the plaintiffs are entitled to prove against the defendants under the memorandum of agreement made and entered into on the 25th November, 1867, when the evidence before the Referee showed that the plaintiffs had never become parties to that agreement, and were not entitled to claim any benefit or advantage therefrom.

It is very clear that the plaintiffs cannot have the benefit of the agreement of November 25th, 1867, without becoming parties to The order of reference directs the Referee to call in the creditors of John Fraser & Company, Fraser, Trenholm & Company, and Lafittes & LeCount, "who may be minded to accept and become parties to the agreement of date November 25th, 1867," &c., &c. The plaintiffs have come in under this call, and the report is made thereupon. There is also this provision in the order, to wit: "That, for the purpose of this order, the said Charles T. Lowndes and James Robb do at once deposit with the said Referee the original agreement referred to." It does not appear that they have yet obeyed this order, and, while that obedience is delayed, it is too *278

*soon for the delinquents to complain that any creditor who has proved his claim, because "minded to become a party," has not yet done so. There is no limit of time fixed by the deed itself for the parties to come in, and the Trustees admit they have ample funds still undivided. The Court cannot think this objection seriously relied upon.

I am of opinion that the conclusions set forth by the said Referee are sustained by the evidence and the law applicable to the

It is, therefore, ordered and adjudged that the exceptions to the said report be overruled, and that the said report stand confirmed in all respects as the judgment of the Court.

It is further ordered that the defendants, Charles T. Lowndes and James Robb, do admit the plaintiffs, W. A. Beall and Jeremiah Beall, to become parties to the agreement of November 25th, 1867, on an equal footing with the holders of accepted and non-accepted foreign bills of exchange, and to be paid out of the bonds constituting their trust, in the same proportion, pro rata, namely: To the plaintiff, William A. Beall, or his attorney, bonds to the amount of ninety-nine thousand six hundred and eighty-three (\$99,-683) dollars, exclusive of interest; and to the plaintiff, Jeremiah Beall, or his attorney, to the amount of eighty-five thousand one hundred and seventy-three (\$85,173) dollars, exclusive of interest

It is further ordered that the plaintiffs, or either of them, have leave to apply for any further order which may be necessary to enable them to carry into full effect this decree. The defendants appealed on the grounds:

1. That there was no evidence in the case to establish any contract, understanding or agreement, by which John Fraser & Company became or were liable to the plaintiffs for the acts of Fraser. Trenholm & Company.

2. That the evidence in the case did establish the fact that Fraser, Trenholm & Company, and John Fraser & Company, although some of the partners in the one were also partners in the other firm, were distinct firms, each having one or more persons, not partners in the other, and neither bound for the acts of the other, unless by some express contract or agreement.

3. That the evidence in the case did establish the claim of the plaintiffs, as a claim against Fraser, Trenholm & Co., for which John Fraser & Co. were in no manner liable.

*279

*4. That if John Fraser & Co. were or had been liable for the claim made in the pleadings, the same had been discharged by the assent of the plaintiffs to the deed of inspectorship in England, under the Bankrupt Act of 1861, in that country.

5. That the claim of the plaintiffs made in this case against John Fraser & Co. was the same which had been made in England, under the Bankrupt Act of 1861, against the bankrupt estate of Fraser, Trenholm & Co., and that, for the claim so made against that bankrupt estate, the plaintiffs had received their dividends. That the plaintiffs, by their assent to the deed of inspectorship in England, under the English Bankrupt Act of 1861, and the receipt of dividends from the bankrupt estate of Fraser, Trenholm & Co., made their election to become the creditors of Fraser, Trenholm & Co., and discharged the said copartnership of Fraser, Trenholm & Co., and all the individuals composing the same, among whom were two or more persons partners of John Fraser & Co.; that the claims so made against Fraser, Trenholm & Co., discharged the said claims against all persons, except third parties, in which class of persons none could be regarded who were parties to the deed of inspectorship; that if John Fraser & Co. had ever been liable to the plaintiffs for the claim made by them against the bankrupt estate of Fraser, Trenholm & Co., the proof of such claim and the receiving dividends from the bankrupt estate of Fraser, Trenholm & Co., forever discharged all persons from the said claim who had been liable as partners of Fraser, Trenholm & Co., and that to make any other copartnership liable, in which were two or more of those who composed the copartnership of Fraser, Trenholm & Co., is in violation of the deed of inspectorship, and forbidden by the English Bankrupt Act of 1861.

6. That whatever understanding or agreement, if any, was had or made when the plaintiffs became parties to the Deed of In-

spectorship, was without the presence, assent or privity of John Fraser & Co.; that even if the same might be sufficient to affect the validity of the assent made and given to the deed of inspectorship, yet while that assent is unrevoked and under it the plaintiffs are in the possession of dividends received by them in consequence of such assent, the plaintiffs cannot at once take the benefit of such assent and renounce the obligations which it imposes on them by setting up some understanding or agreement by which the legal operation and effect of such assent is avoided, so far as John Fraser & Co. are concerned.

*280

*7. That when the claim of the plaintiffs against Fraser, Trenholm & Co. was discharged, by the assent to the deed of inspectorship and the acceptance of dividends from the bankrupt estate of Fraser, Trenholm & Co., and as such ceased to be a claim against John Fraser & Co., such claim was no longer a claim to be protected under the memorandum of agreement of the 25th November, 1867.

8. That the decree in the case accepts it as a fact that the claim now made by the plaintiffs is within the terms and the intent and meaning of the agreement of the 25th November, 1867, and of Theodore D. Wagner and William L. Trenholm, the parties by whom the said agreement was made, when both of these parties testified that they did not intend or desire by that agreement that the plaintiffs should be entitled to any benefit resulting therefrom; and although the intent and desire to exclude a party, if a creditor, may be a question which affects or not, as the case may be, the validity of the agreement, yet such intent and desire will not admit the party or parties intended to be excluded to claim that relation between them and the trustees named in the agreement that does exist between the trustees and the parties who are entitled to the benefit of the said defendant.

9. That the decree admits the plaintiffs to all the benefits of the said agreement when the plaintiffs testify that they had not intended to accept the same, and when it was in evidence that, subsequent to the filing of their complaint, they had instituted proceedings at law against John Fraser & Co. for the recovery of the claim now made in these proceedings against the trustees; and that such proceedings were and are the accepted evidence in law of a refusal to be parties to the said agreement.

B. F. Dunkin, Magrath & Lowndes, for appellants.

Buist & Buist, Campbell, T. Y. Simons, contra.

April 30, 1873. The opinion of the Court was delivered by

MOSES, C. J. Whether the firm of John Fraser & Company, or that of Fraser, Trenholm & Company, was responsible to the respondents by reason of any joint interest or ownership in the cotton referred to in the evidence as shipped by Metcalf, it is scarcely necessary now to consider.

Whatever doubts might have existed in regard to it have been removed by the admission of the appellants in their ninth ground

*281

*of appeal, and the recognition, on the part of both of the firms, of the ownership of the respondents in a certain amount of the cotton by the letter of Fraser, Trenholm & Company, of 21st December, 1867, to John Fraser & Company, and of the latter to W. A. Beall, of January 15, 1868. The actual amounts respectively due to the respondents for their several interests in the Metcalf shipment are therein stated. Whatever obligations were imposed on the one firm or the other, or on both, as to Metcalf, if he had been the sole owner and had pursued, in relation to it, the same course these respondents observed, must attach in their favor. Regarding it, then, as an established fact that the respondents had each an interest in the cotton amounting at least to the balance due, stated in the said letters, the material inquiry is whether they can claim the provisions of the agreement of 25th November, 1867, either as creditors of the firm of John Fraser & Company, or of Fraser, Trenholm & Company. Although the extent of the share which each of the respondents had in the cotton may not have been known to John Fraser & Company until about the 1st of January, 1868, still the evidence clearly shows that as early as the date of the first shipment it was brought to the notice of both the firms that a portion of it was on joint account with the Bealls, and the mode of distinguishing the cottons, as between the respective parties, made known.

If the respondents can bring themselves within the terms of the instrument by showing that a trust is created for their benefit, the execution of which they can require of these appellants, they are not to be deprived of the right to its enjoyment because the exact amount of their claim may not have been known, at the date of the agreement, to the parties who made it. If, before the trust fund is exhausted, they can show that they are entitled to a participation in it by fulfilling any of the conditions by virtue of which the trust is to attach, they have the right to enforce it.

It will relieve the case of some embarrassment and the Court of much unnecessary labor by declaring at once that if the claims of the respondents depend on any provisions in the agreement by which they are entitled to the relief they ask as creditors of Fraser, Trenholm & Co., they must fail. They are

not within the class of creditors provided for on account of liabilities represented by sterling bills accepted by Fraser, Trenholm & Co., nor are they holders of non-accepted bills drawn on Fraser, Trenholm & Co., referred to in the seventh clause. If they can-

*282

not sustain their right under the *ninth clause of the agreement as creditors of John Fraser & Co., they are precluded.

The agreement is by Theodore D. Wagner and William L. Trenholm, in behalf of John Fraser & Co., and of Fraser, Trenholm & Co., and the creditors of either or both of the said copartnerships. It cannot be said that they compose but one house, as the members of the two firms are not the same, and that incident so necessary to establish exact and complete identity between them is wanting. A partnership as to third persons may arise by operation of law. Two several firms may, by their course of dealing with a third person in the same transaction, incur a joint liability, in the same manner and to the same extent that two or more individuals may. In fact, though the firms may be separate, yet, if they both hold out that they are one, each is liable to answer for any obligation they incur to a party dealing with them under such circumstances. Should one do acts, no matter of what nature, to induce others to believe him a partner with another, he will be so held, and the same principle must apply where two firms, by their acts and representations, create a belief upon the faith and credit of which dealings are had with them. As was said by Parke, J., in Dickinson v. Valby, 10 B. & C., 128: "The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement."

So far from finding the conclusion of the Referee and the presiding Judge on this question of fact, as to the relation between these houses in the transaction, which is the subject of the complaint, manifestly against the evidence, a full examination of it leads us to the same result. Confining our enquiry alone to the letters between the parties, what do we find? In the first letter of Metcalf to John Fraser & Co., January 31, 1866, he says:

"Gents—How stands your firm, (Fraser, Trenholm & Co.,) at Liverpool?" to which John Fraser & Co. reply, on the 3d February following: "It gave us sincere pleasure to receive your letter of the 31st ult., proposing to ship your cotton to your old friends, Fraser, Trenholm & Co. * * * * We will tell you fully how we are situated, and let you determine for yourself, and for us too, whether we shall have the benefit of your patronage on this occasion. * * *

not within the class of creditors provided for on account of liabilities represented by sterling bills accepted by Fraser, Trenholm & *283

and we will make the advance you *name, and hold the cotton subject to your order of sale as suggested." Metcalf, on March 31, 1866, writes to John Fraser & Co.: "I enclose you my letter to your Liverpool house, which please forward;" to which they reply on 2d April, 1866: "The enclosure for our Liverpool house will be forwarded by the first mail." The said letter, so enclosed for Fraser, Trenholm & Co., of the same date, says: "I shall have the bills of lading filled up to order and sent you through your house in Charleston." The various letters offered in evidence, beginning at page 41 of the brief, lead unerringly to the conclusion that the transaction, so far as the owners of the cotton were concerned, was founded on the belief arising from the conduct of both the firms, that the dealing was with parties having some general and connecting interest in their commercial relations.

The claim of the respondents cannot be defeated by the operation and effect of the proceedings in England under the bankrupt law. However well established may be the principle contended for in the argument in regard to double proof against several trading firms where there are persons who are parties to them all, and its enforcement in England, it can have no application in the case before us. So far as the bonds for the \$1,500,000 provided by the agreement as a fund to meet the trust was to avail, it is not unreasonable at least to say that their value depended on the mortgage "of all the real estate of the said Wagner, W. L. Trenholm, John Fraser & Co., C. K. Prioleau, John B. Lafitte and E. Lafitte & Co.," which was given to secure their payment. The agreement was executed only fourteen days after the deed of inspectorship.

It is not necessary to enquire how far the proceedings in bankruptcy of a foreign Court will conclude another jurisdiction .-- Assignees of Topham v. Chapman et al., 1 Mill., 283 [12 Am. Dec. 627]; Robinson v. Crouder, Clough & Co., 4 McC., 519 [17 Am. Dec. 762]; Ogden v. Sanders, 12 Wheat., 211 [6 L. Ed. 606]. Could the proceedings in bankruptcy in England affect the interest of Wagner, W. L. Trenholm, Prioleau, in the real estate which they held in South Carolina? If so, how could it be "free from all liens except such as had been created and were existing on the 22d of June, 1867, provided by the agreement? "All the authorities in both countries, so far as they go, recognize the principle, in its fullest import, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate. So that we may here fully adopt the language of John Vœt: "De realibus quidam

*284

cum *plerorumque consen sus sit, id pluribus docere supervacuum fuerit;" indeed, so firmly is this principle established that in cases in bankruptcy, the real estate of the bankrupt situate in foreign countries is universally admitted not to pass under the assignment, although, as we have seen, there are great diversities of opinion as to movables."—Story Conflict of Laws, § 428.

There is nothing in the agreement to warrant an inference that any of the creditors of John Fraser & Co. were to be excluded from its benefits. It was an honest and earnest endeavor to provide, if possible, for all the demands which existed against the firm of John Fraser & Co., which had not gone into bankruptcy, in aid of the assets which may have been transferred in England by Fraser, Trenholm & Co., to provide an additional fund for their creditors of a certain class, which would leave a larger sum for those who could not be embraced within it. If, however, the words of the agreement, by the description of the parties who are to be entitled to its benefit, are to be accepted in their usually received significance, these respondents may well insist on being included among those provided for by the ninth clause. They are creditors of John Fraser & Co., whose whole real estate is pledged by the agreement to the payment of the various liabilities embraced in it.

The deed of inspectorship, and the assent of the respondents, in favor of Fraser, Trenholm & Co., cannot extend to John Fraser & Co., who are not parties to it. The effect of the deed, as to this firm, preserves the rights of its creditors in whose favor there is a joint liability with Fraser, Trenholm & Co., by the following provision, found on page 204 of the brief: "These presents shall not prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons who may be jointly liable with the said debtors for any of the said debts, or generally any person or persons other than the said debtors, or their respective heirs, executors or administrators; and, for the sake of conformity alone, the said debtors, or any of them, or their or any of their heirs, executors or administrators, may be joined in any actions, suits or other proceedings to be brought or instituted by any of the said creditors against such surety or sureties, or other person or persons." In this connection, the reservation in the assent of the respondents to the deed may well be held to refer to the firm of John Fraser & Co. as the third parties against whom their rights and remedies were *285

to be preserved. The mean*ing to be applied to a word in an instrument of this kind should not be of an over critical character. What Beall intended by the use of the term

"third parties" must be sought in the purposes which the deed of inspectorship proposed and the effect he supposed it was to have in relation to the debt which he claimed against both of the firms.

Who possibly can be comprehended within the words but the concern of John Fraser & Co.? With what other person or persons has any connection with the debt been intimated? That this was the designation he had in view may the more readily be accepted from the whole tenor of the evidence in regard to the declaration of assent.

None of the proceedings in bankruptcy are before us save the deed. Looking to this as the standard by which the rights and obligations of the party debtors to it are to be measured and regulated at the date of the agreement, they were not released from the liabilities of Fraser, Trenholm & Company, and, therefore, neither Wagner nor W. L. Trenholm can claim any discharge which would acquit them of the debt established in favor of the respondents.

By the terms of the deed (brief, p. 205,) "the said creditors do for themselves respectively, and their respective heirs, executors and administrators, covenant with the said debtors, and each and every of them, their and each and every of their executors and administrators, that if and when the said inspectors or inspector shall, by writing under their or his hands, certify that the winding up, realization and liquidation provided for by these presents has, as far as possible, been concluded, then, and in such case, and immediately upon such certificate being given, the said debtors and each, et ct., and their estates and effects, shall be thenceforth absolutely released and discharged from the said debts due from them to the said creditors respectively, and these presents shall thenceforth operate as a defeasance pleadable in bar," et ct. It has not been shown that any such certificate had been given, and from the short period which elapsed between the date of the deed and the agreement it was almost impossible that in the meantime a business of the magnitude of that which had been carried on by so extensive a concern could have been wound up, realized and liquidated.

It is contended no such relation as that of trustee and cestui que trust exists between the appellants and the respondents, and that *286

*the latter are not entitled to the benefit of the agreement, because it was not intended for them by those who made it, and their position has been inconsistent with its acceptance. The trust here cannot be considered a purely voluntary one; it was for the benefit of creditors, and however contradictory the decisions may be as to the power of revocation on the part of one who has made a voluntary settlement, if there was a tion is retained. The debts of the creditors provided for by the assignment here constitute a sufficient consideration.

The question is not between conflicting creditors. It is really, through the trustees, between the parties creating the trust, and creditors who claim that they are entitled by virtue of a certain provision in the agreement covering their debts. The fund is in Court ample to meet the demands of all the creditors who have appeared under the order of February 7, 1872, the effect of which is to marshal the trust securities, and wind up the trust by a final execution of it.

While the binding effect of the agreement was to be preceded by the assent and signing of all the creditors of John Fraser & Co., Fraser, Trenholm & Co., and Lafittes & Le-Count, no time was limited in which the one was to be given and the other done.

Creditors who were before the Court are supposed and held to have conformed to all the conditions and requirements of the agreement, to as full an extent as if they had expressed their assent in writing. "Declarations of the intention or understanding of a grantor, different from the intent apparent on the face of a deed, must be made at the time of executing it."-Louverly and Wife v. Arden et al., 1 S. C., 240. The bonds of Wagner and W. L. Trenholm were delivered according to the agreement, and a trust thereby devolved upon the appellants for the benefit of those who could bring themselves within its terms. Was the direction of Wagner and W. L. Trenholm necessary to authorize the trustees to deliver bonds to the respective creditors who claimed as cestuis que trust under the agreement? Was their interposition requisite for the transfer of the bonds? If so, by withholding their assent, they virtually could have defeated the trust. Does the agreement show that any control of the fund was to be reserved by Wagner and W. L. Trenholm? This doctrine of revocation, so questionable in voluntary settlements, cannot be applied to a trust founded on valuable consideration.

*287

*That a cestui que trust may renounce a provision in his behalf is not doubted. The advantage is intended for him, and he is at liberty to decide for himself as to its acceptance. Where it is not done by some positive act or declaration, the evidence to show a release of an intended benefit should be clear and conclusive as to the intention.

The mere delay in notice of acceptance, if not beyond the period limited by the instrument creating the trust, is not sufficient to divest the cestui que trust of his interest. The institution of suit on the demand, with the view of making George A. Trenholm a

consideration moving it, no power of revoca- a waiver of the right. A creditor having two sources of payment, by pursuing one of them, is not always held to have renounced or abandoned the other. The respondents would be bound by a much more rigid rule, if the question was raised between them and other creditors, or if there was a deficiency of assets to meet the debts of those who have come in under the order. But the fund is in court, ample for the satisfaction of all the creditors appearing and entitled to a distributive share of it, and the court can control its direction.—Shubrick v. Shubrick, 1 McC. Ch., 406. The course and conduct of the respondents may have been vascillating, evincing a want of determination as to the course they should pursue for the security of their debt, but we cannot say that it evinces a purpose to reject the trust and look to some other mode of payment.

The order dismissing the motion in both cases has been heretofore filed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *288

*VISANSKA v. BRADLEY.

(Columbia. April Term, 1873.)

[Landlord and Tenant @=248.]

A lien under the Act to secure advances for agricultural purposes, given by a tenant of rented land, has preference over a prior contract to pay the landlord, for the use of the land from the first makings of the crop, one-fourth of all that is made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1003-1008, 1010-1012, 1017; Dec. Dig. \$\infty\$248; Agriculture, Cent. Dig. § 35.]

[Landlord and Tenant \$258.]

The right of seizure under a lien to secure advances for agricultural purposes may be made elsewhere than on the land where the crop is

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1045; Dec. Dig. ← 258.]

[Judgment \Leftrightarrow 279.]

Where the trial is by the Court, the Code of Procedure requires that the decision should contain a statement of the facts found and the conclusions of law separately.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546–551; Dec. Dig. ⊗⇒279.]

Before Cooke, J., at Abbeville, February Term, 1873.

The appeal in this case was heard upon a brief, which is as follows:

"The issues in this action came on for trial before the Hon. T. H. Cooke, Judge of the Eighth Judicial Circuit of said State, at a Circuit Court, held at Abbeville Court member of the firm, cannot be construed as House, in and for the County of Abbeville,

on the 27th February, 1873. It was agreed that the matter should be submitted for the decision of the presiding Judge; and the plaintiff by his counsel opened the case.

"To maintain the issues on his part, the

plaintiff called as a witness:

"Samuel Link, who, being sworn, said: That he is an agent of the plaintiff; that he rented to Wm. Sprouse a parcel of land near Hopewell Church, in Abbeville County, of the plaintiff's. The contract of renting was made about the end of A. D. 1870, or beginning of A. D. 1871. Sprouse was in possession under this contract, which was made out in writing, but never signed. The contract was that plaintiff should have onefourth of all that was made. Sprouse was to pay plaintiff from the first makings of the crop. He made a crop of corn, cotton, &c., but did not give plaintiff according to contract-carried cotton to Mr. Parker's ginno part of it got by plaintiff. Witness, late in the fall season, went to Sprouse, who, after some trouble, gave him as part share due plaintiff, 1,100 lbs. seed cotton. Witness carried this to Thos. Thomson's gin. It was thrown in a pile with share cotton due by John Thomson to plaintiff. John Thomson's and Sprouse's share cotton was ginned together-there were two bales of it. When one bale was ginned and packed, and the second bale was ginned except about two baskets full of seed cotton, defendant came with Jesse Bradley to seize cotton under a

*289

lien which was *said to have been given by Sprouse. Witness thinks seizure was not made, but it was agreed to refer to Thos. Thomson, at the Court House, who had the best right to the bale of cotton, and a day was fixed. On the day fixed, witness carried the two bales to Abbeville Court House -did not see W. K. Bradley, according to appointment, but knew some of the Bradleys were at the village—waited in the street until he was tired, and wanted to go home, so he could get there before night-waited fully two hours after time appointed, and the defendant not appearing according to agreement, he did what Mr. Winstock advised him-he carried the cotton (two bales) to depot and unloaded it there, and went home.

"Moses Winstock, sworn for plaintiff (father-in-law of plaintiff): Went to Abbeville Court House on day fixed by Mr. Link—saw Mr. Link and the cotton—waited until long after the time fixed. Mr. Link being tired of waiting, advised him to carry cotton to depot—Mr. Link did so, and witness had cotton, when unloaded, shipped or directed to plaintiff in Columbia, and took agent's receipt therefor. Sheriff, after this, seized one bale under the defendant's lien, and took it into his possession and away from the depot. Has not the cotton receipts with him.

"The plaintiff closed.

"The defendant, by his counsel, then opened his case; and to maintain the issues on his part, called as a witness:

"Henry S. Cason, late Sheriff, who, being sworn, said: He seized as Sheriff a bale of cotton, under lien of defendant against Sprouse, at depot—had it in his possession in storage—with consent of parties, or their attorneys, there being a dispute about the cotton, he sold the cotton to save storage, danger from fire, &c.—sold for about—cents per pound, the then price of cotton. Was of the impression he paid the proceeds of sale to defendant—may not have done so—is not sure about it—books in office burnt, &c.

"Defendant, Bradley, sworn, says: About February, or in the early part of A. D. 1871, William Sprouse gave him a lien upon his entire crop, which was to be made that year on the land rented from plaintiff, near Hopewell Church. The lien was in amount for \$250 in gold. Witness furnished supplies to Sprouse. The agricultural lien was left with the Sheriff when the levy was made at the Court House, and is believed to have been burnt with the other papers in Sheriff's office. No part of lien paid. It was duly recorded. Witness went with Jesse Bradley to Thomas

*290

Thomson's *gin house to seize cotton under the lien—believes levy was made—afterwards placed lien in Sheriff's hands, and had one bale of cotton seized at Abbeville Court House in the depot. Has never received any money from Sheriff from sale of cotton, and the debt secured by the lien is still unpaid.

"The Court held that William Sprouse could give no lien which would affect the prior rights of the plaintiff to his share of the crop; that the lien could affect only such right as Sprouse had, and could not touch plaintiff's share.

"Decree for plaintiff as follows:

"Decree for the plaintiff for the sum of sixty dollars, with interest from 1st January, 1873, without costs. This decree to decide the right, and plaintiff has leave to recover money from the party having the same."

The defendant appealed, and now moved this Court to reverse the decree for the following reasons:

- 1. Because the presiding Judge erred in holding that the plaintiff, under his contract with Sprouse, acquired any such interest in the crop made by the latter, or in any portion of it, as would give him such right of property thereto as would exclude the defendant's lien.
- 2. Because it was error to suppose that at the time the lien was given to the defendant, the contract already made between Sprouse and the plaintiff had vested in the latter any title whatever to "the share" which he should be entitled at the end of the year to receive for the rent. Planting, cul-

essary to make such title; and before either was done the lien intervened.

3. Because, if there was actual delivery to the plaintiff of a portion of the crop, such portion, before delivery, was subject to the operation of the lien, which was paramount to all other claims, and preferred to all other liens, existing or otherwise, to the extent of the advance or advances made under such agricultural lien.

Perrin and Cothran, for appellant,

Thomson, contra, cited Bird v. Muhlenbrink, 1 Rich., 99; 3 Bouv. Inst., p. 63, § 2517. A lien is not, in strictness, either jus *291

in *re or jus ad rem, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged. -1 Story, Eq., § 506; Cross on Lien, 2. Possession is indispensable to complete the right. -Cross, 31, 36, 38, 42; 3 Bouv. Inst., p. 66, § 2521-2. There is no lien, properly speaking, under the Act, until seizure, and the right of seizure can be made only on the land for the cultivation of which the supplies have been furnished .- Arch. Land. & Ten., 153; 3 Kent Com., 482 and note; 3 Bouv. Inst., p. 41.

May 15, 1873. The opinion of the Court was delivered by

MOSES, C. J. The nature and extent of the lien out of which the claim of the appellant arises must be determined by the force of the Act creating it. If it changes the character and consequences of a lien as understood at common law, or as arising in equity from the application of principles peculiar to the administration of justice in that jurisdiction, the Court is bound to accord to it all the effect which the Legislature proposed by their enactment. The following is the provision as found on page 511 of the General Statutes, Section 55: "If any person or persons shall make any advance or advances, either in money or supplies, to any person or persons who are engaged, or are about to engage, in the cultivation of the soil, the person or persons so making such advance or advances shall be entitled to a lien on the crop which may be made during the year upon the land in the cultivation of which the advances so made have been expended, in preference of all other liens existing, or otherwise, to the extent of such advance or advances, provided an agreement in writing, &c." It was impossible to have used words giving a more exclusive right to the party making the advances. A lien on the crop by an agreement in writing, recorded according to the prescribed requisitions, was to have "a preference of all other liens existing, or otherwise, to the extent of such advance or advances." It is not denied that sions of Section 291 of the Code of Pro-

tivation, severance and delivery were all nec- all the conditions of the Statute were complied with, and the only question that is raised is as to its effect on the agreement with Visanska in regard to the rent of the land.

> According to the testimony of Link, "the contract was, that Visanska should have onefourth of all that was made. Sprouse was to pay V. from the first making of the crop."

> > *292

Did this agree*ment vest V. with any title to the first fourth of the crop? Was it any more than a promise to pay in "the first makings" of the crop instead of money? lien of the appellant bound the whole in preference to all other liens. It is not necessary to enquire how far the Act might fail in its operation as to a valid pre-existing lien having binding efficacy in the nature of a contract, for it is not perceived that V. held any lien on the share to which he sets up a right. Whatever may be the nature of his claim, it is, in no point of view, a lien. This is generally understood to be a right to retain property until some charge attaching to it is paid or discharged, but the Legislature by this Act, so far as it extends, has changed the common law incidents of a lien, and really constituted it a jus in re, or a jus ad rem.

The respondent had no title to any portion of the crop. He was neither a joint tenant or tenant in common with Sprouse .- Rogers v. Collier, 2 Bail., 581 [23 Am. Dec. 153]; State v. Gay, 1 Hill, 364.

It is objected "that the right of seizure under the lien can be exercised only on the land for the cultivation of which supplies have been provided." This would be giving a very narrow construction to the Act-destructive, to a great extent, of the benefit it intended for the person making the advances, and not supported by its terms.

Its design was to promote the agricultural interests of the State by encouraging the cultivation of lands, which would otherwise be unproductive for the want of supplies to support the labor which could be readily furnished. A construction should be given to it which would suppress the mischief and promote the remedy. Its language, however, shews that the seizure was to be allowed when the party "was about to sell or dispose of his crops, or in any other way is about to defeat the lien." So, to construe the Act as to hold that it loses its efficacy whenever the products of the crop are removed from the land which yielded them, would defeat its design, and offer an inducement to its evasion by the party who had enjoyed the benefit of the advances to the entire loss and prejudice of the holder of the lien.

It is considered a proper occasion to say, that in this as in various other instances where the trial is by the Court, the provicedure (General Statutes, 637,) are not conformed to. By its requirement upon the triate of the testator; that he allowed Rebecal of a question of fact, the decision must can Speake, the widow of the testator, to take

contain a statement of the facts found, *and the conclusion of law separately. Here there is neither. That the defendant claimed under a formal lien is not stated as a conclusion of fact, and on this his defense rested. The proof of such lien is not set forth, although its existence is shewn by the evidence, and the judgment of the Court on the law gives preference to the supposed claim of the plaintiff. An adherence to the course demanded by the Code would bring more distinctly to view the points on which we are to pass, and we trust hereafter that there will be no departure from the required mode.

The motion to set aside the judgment of the Circuit Judge is granted, and the case remanded to the Circuit Court for the County

of Abbeville.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 293

REEDER v. SPEAKE.

(Columbia. April Term, 1873.)

[Executors and Administrators \$\iffsize 473, 474.] Equity has jurisdiction of a bill by the creditor of an insolvent estate against the executor and devisee for an account of the assets, and to subject the land to the payment of the debt, and, in such case, there need be no judgment at law, and return of nulla bona on the execution, before filing the bill.

[Ed. Note.—Cited in Ariail v. Ariail, 29 S. C. 95, 7 S. E. 35; Brock v. Kirkpatrick, 60 S. C. 347, 349, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Executors and Administrators, Cent. Dig. § 2041; Dec. Dig. \$2473, 474.]

[Executors and Administrators \$\iffsigma 473, 474.] It is only where the creditor has plain and adequate remedy at law, and there is no suggestion of insolvency or of other debts, or other equitable ground of relief, that the Court will refuse to entertain the bill.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. ⊚⇒473, 474.]

Before Moses, J., at Newberry, Spring Term, 1871.

The original bill was filed, in this case, in 1868, by Mary Reeder against John L. Speake and Rebecca Speake. It was, in form, a creditor's bill, and alleged that, on the 21st day of May, 1860, George Speake, deceased, gave to plaintiff his sealed note for \$1,648, payable December 25th, 1861, and died shortly afterwards, leaving a last will and testament, a copy of which was exhibited with the bill; that the will was admitted to probate; that John L. Speake qualified

as executor and took possession of the estate of the testator; that he allowed Rebecca Speake, the widow of the testator, to take possession of a tract of land devised to her by the testator, and some personal property of the estate; that the executor has failed to pay the debts of testator as directed

**294*

by the will; that the *debt due to the plaintiff is unpaid, and that the executor has declared the insufficiency of the assets in his hands for the payment of the same.

The bill prayed that the defendant, John L. Speake, may be required to account for his administration of the estate; that any balance due by him be applied to the payment of the debts, and that the land devised to the defendant, Rebecca Speake, be applied to the same purpose.

The first clause of the will directed that the just debts of the testator be paid by his executor out of the first money that shall come into his hands; by the second clause he devised and bequeathed to his widow, for life, the tract of land mentioned in the bill, and some slaves and other personal estate; and by the last clause he appointed the defendant, John L. Speake, executor. It bore date May 26th, 1860.

The defendants, by their answers, admitted the allegations of the bill, and stated that the testator died in July, 1861; that his estate was amply sufficient for the payment of all his debts, which were very inconsiderable as compared with the value of the assets, but was now insufficient to pay the plaintiff's debt for which the testator was liable as surety, and the defendant, John L. Speake, stated that the plaintiff's debt was the only one that had not been paid.

In July, 1868, an order was made requiring the creditors of testator to establish their demands.

Mary Reeder died in 1868, and James J. Reeder, as her administrator, filed a bill of revivor, and the defendants, by their answer to the bill of revivor, submitted that the Court was without jurisdiction, on grounds which are stated in the opinion of this Court.

The Circuit Judge sustained the objection to the jurisdiction, and made a decree dismissing the bill.

The plaintiff appealed.

Baxter, for appellant.

Garlington & Suber, Caldwell, Fair, Pope and Pope, contra.

May 16, 1873. The opinion of the Court was delivered by

for \$1,648, payable December 25th, 1861, and died shortly afterwards, leaving a last will and testament, a copy of which was exhibited with the bill; that the will was admitted to probate; that John L. Speake qualified part of the respondents, calling in the credi-

*295

tors of the testator, George Speake. It *was not then supposed that the Court was without jurisdiction in the premises, because the plaintiff had full and adequate remedy at law. No such exception was submitted. The cause abated by the death of Mary Reeder, and it was not until a bill of revivor was filed by James J. Reeder, her administrator, and the said John L. Speake and Rebecca C. Speake were required to respond to it, that the plea was interposed. The inducements which let to its recourse are found in the answer of the respondents to the bill of revivor. It therefrom appears that a practice had sprung up in the Courts of law, since the filing of the answers to the original bill, "to render verdicts for only a fractional part of debts contracted previous to the late war, and the Judges of the Circuit Courts have so far recognized the justice of such course as to direct juries so to find." And the respondents submit, "that their testator was only a surety on the said note, and, therefore, as they conceive, entitled to the full benefit of at least the usual discount. Therefore these defendants say, by way of plea, that the demand of the complainant is unjust and unconscionable, and should be removed from this honorable Court to the Court of Common Pleas, there to be assessed according to its true value by a jury of the country." The avowal of the true reason for the objection to the hearing of the said cause by the Court of Equity, however creditable to the candor of the parties who make it, is not calculated to attract to their defense any more favor than that to which they are entitled by the strict enforcement of the principles applicable to their plea to the jurisdiction of the Court. They surely do not recommend themselves to any special grace, if it were ever competent for a Court to indulge in such dispensation, by claiming to be remitted to another tribunal, which, in the face of law and justice, would refuse to the creditor the one-half of his just and undisputed demand. This arbitrary and speculative mode of dealing with the rights of parties finds no sanction in law, and certainly none in morals.

That a creditor has no right to come into equity until he has exhausted his legal remedy against his debtor is true, as a general rule, but Courts of Equity, from their earliest institution, so far as we are informed by their history, have entertained proceedings on behalf of creditors claiming demands, not only against insolvent estates, through an account from their personal representatives, but where difficulties would attend the enforcement of judgments at law, or where a

multiplicity of suits would be prevented
*296

through *the interposition of a case in equity, where the rights of all parties, creditors and heirs, or devisees and legatees, would be settled and concluded. To require the creditor of a decedent to obtain return of nulla bona on an execution against the executor or administrator before he could call for an account in the Court of Equity and claim its interference against the descended or devised real estate would exact a barren form, productive of, and ending in, nothing but costs and expense. If the appellant had proceeded to judgment at law against the executor, and levied on the land of the testator, he would have thereby acquired no preference over any other creditor of his class. Mr. Story, in his work on Equity Jurisprudence, Section 546, sets forth the ordinary relief sought in Equity by creditors, "The more and in Section 547 he says: usual course, however, pursued in the cases of creditors is for one or more creditors to file a bill, (commonly called a creditor's bill,) by, and in behalf of him, or themselves, and all other creditors who shall come in under the decree, for an account of the assets and a due settlement of the estate." The jurisdiction proceeds upon the principle that "equality is equity." In the case where the relief has been refused, it is either where there is no suggestion that the estate is insolvent, nor averment of any other creditor save the particular plaintiff. Even if the bill could not be regarded as on behalf of creditors seeking an account of the executors, with a view of the payment of the debts of the testator, there are other principles involved in it which would entitle it to the consideration of a Court of Equity. Apart from the express trust which is impressed upon the executor by the direction of the will as to the payment of the debts, and which would render him amenable to that Court for its execution, the necessity of an account in favor of Rebecca C. Speake, if she should be forced to surrender the land. devised to her, for the payment of the debts of the testator, would be a good ground of equitable jurisdiction. A circuity and multiplicity of suits would thus be avoided, and all the questions affecting not only the creditors, but the devisees, could be adjudicated in one case by a form particularly adapted, by its mode of procedure, to their ready and prompt solution.

The motion is granted, the decree of the Circuit Judge set aside, and the case remanded to the Circuit Court for Newberry County.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *297

*SUMTER v. DESCHAMPS.

(Columbia. Nov. Term. 1872.)

[Weights and Measures = 1.]
The charter of the town of Sumter, providing that the certificate of the Public Weigher should, in case of dispute, be conclusive evidence of the weight of cotton and other articles sold weight, and that the public scales should be the standard to which all others in the town should conform, held that the Town Council could not, by ordinance, require all persons, under a penalty, to have their cotton brought to the town for sale weighed by the Public Weigher.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 1; Dec. Dig. & 1; Municipal Corporations, Cent. Dig. § 1360.]

Before Melton, J., at Sumter, January Term, 1872.

On September 28, 1871, the Town Council of the town of Sumter passed an Ordinance entitled "An Ordinance, under the 27th Section of the Act approved March 9, 1871, authorizing the Intendant and Wardens to appoint one or more Public Weighers," the 8th Section of which was as follows:

"That all persons bringing cotton, lint or seed, (packed or unpacked) to this market for sale, shall be required to have the same weighed by the Public Weigher before such sale is effected, and for every violation of this Section shall, upon conviction before the Town Council, be subject to a fine of not less than \$10 and not more than \$50 for each offense.'

W. F. Deschamps, a non-resident of the town, having violated the said Section, was fined by the Town Council in the sum of \$50. He refused to pay the fine, on the ground that the Town Council had no power under the charter of the town to pass the Ordinance. The town of Sumter then brought an action against him, before Trial Justice Charles M. Hurst, Esq., to recover the said fine. The Trial Justice gave judgment against him, and he appealed to the Circuit Court.

His Honor the Circuit Judge held that the charter of the town did not confer on the Council power to pass the Ordinance under which the fine was imposed, and he ordered judgment to be entered for defendant.

The town of Sumter appealed.

J. S. G. Richardson, for appellant:

1. The power to pass the Ordinance in question exists at the common law, and is not taken away by the charter.—Chamberlain of London's Case, 5 Co., 62; A. and A. on Corp., 83; 1 Bl. Com., 475-6.

*298

*2. The distinction is between Ordinances in restraint of trade and Ordinances to regulate trade. The former are void unless it appear that they are reasonable and beneficial to the public. The latter are always valid unless forbidden by the Constitution or

some statute law-in such case the question of expediency, or, in other words, whether they are reasonable and beneficial to the public, being for the Council and not for the Court.—See case above cited; Grant on Corp., 83, 84; Winnsborough v. Smart, 11 Rich., 551.

3. The Ordinance in question is clearly not in restraint, but merely in regulation of

4. There is not only nothing in the Constitution either of the United States or of the State, in the charter of the town, or in any general written law, which forbids the Ordinance in question, but the power to pass it is conferred by the charter.—See Act of 1866, § 11, 13 Stat., 454; Act of 1871, §§ 26, 27, 28, 30, 14 Stat., 629, 630. These Sections give the Council power to pass all such Ordinances as they may deem proper relative to the "markets and police" of the town, and the "quietude, peace, safety and good order of the inhabitants thereof, not inconsistent with the Constitution and laws of the State," and to establish public scales "for weighing cotton and other articles sold by weight," and to "appoint one or more public weighers." For the whole charter see Acts cited, and Act 1870, 14 Stat., 357. The Ordinance in question not being in violation of any positive written law, who but the Council have the right to determine whether it be not proper, or whether it is not expedient, or even necessary, in order to preserve the peace, safety and good order of the inhabitants.

5. Under an Act empowering the city of New York to appoint Weigh Masters, the Council passed an Ordinance requiring, under a penalty, all coal to be weighed by the Weigh Masters before sale. In an action to recover the penalty the Ordinance was held valid .- Stokes v. The Corporation of New York, 14 Wend., 87. In the Chamberlain of London's Case, the Ordinance required all persons having broad cloth for sale, to take it, under a penalty, to Blackwell Hall, to be viewed and searched. Ordinance held valid. In Winnsborough v. Smart, the Ordinance required all beef to be sold at the market. Ordinance held valid. In this last case it was said that the question of expediency is for the Council and not for the Court.

6. For other authorities bearing more or *299

less upon the case, see *A. & A. on Corp., 330: City Council v. Ahrens, 4 Strob., 256; City Council v. Pepper, 1 Rich., 356; City Council v. Benjamin, 2 Strob., 521; Kennedy v. Sowden, 1 McM., 323; Crosby v. Warren, 1 Rich.,

Moise, contra, contended that the Intendant and Wardens of the town of Sumter had no authority to pass and enforce the eighth Section of the Ordinance entitled "An Ordinance, under the twenty-seventh Section of the Act approved March 9th, 1871, authorizing the Intendant and Wardens to appoint one or more Public Weighers," ratified 28th September, 1871, (See Act of Incorporation for the town of Sumter, twenty-seventh and twenty-eighth Sections Acts of 1871, 14 Statutes, 631 and 632,) the true intent of the Legislature being to provide standard scales, or scales of reference, and no more; that such Ordinance was and is repugnant to law, to common right, restrictive of trade, contrary to public policy, unjust, unwise and oppressive.—A. & A. on Corp., 275, 276, 279, 280, 282.

May 23, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. This case involves the power of the Town Council of Sumter to pass the eighth Section of an Ordinance, ratified on the twenty-eighth day of September 1870, entitled "An Ordinance, under the twenty-seventh Section of the Act approved March the 9th, 1871, authorizing the Intendant and Wardens to appoint one or more Public Weighers," which Section is in the following words: "That all persons bringing cotton, lint or seed, (packed or unpacked) to this market for sale, shall be required to have the same weighed by the Public Weigher before such sale is effected, and for every violation of this Section shall, upon conviction before the Town Council, be subject to a fine of not less than \$10 and not more than \$50 for each offense." The right to pass it is claimed as incident to the corporation at common law, and not forbidden by the charter. This was last granted by the Act of 1871, which is found in the 14 Stat., 629. By the twentysixth Section of the said Act the Intendant and Wardens were authorized "to establish and keep up one or more public scales or scale houses, with proper scales and weights for weighing cotton and other articles sold by weight, by and at the expense of the said town." By the twenty-seventh Section they were authorized to appoint Public Weighers, "and when reference is had to any of the

public scales, on the same day *that the contract of sale is made, the certificate of the l'ublic Weigher shall be conclusive evidence of the weight of the cotton, or any other article sold by weight in any Court of Justice in which an action shall be pending, touching the weight of any such article, and the said Intendant and Wardens are authorized to assess a sum not exceeding ten cents on each bale of cotton, and a proportional sum on other articles weighed, to be paid by the seller, for the use of the said town."

By the "twenty-eighth Section, the public scales and weights so established shall be the standard to which all others in the said town shall conform, and if any person shall

in said town, weights and scales differing from the said standard, such person, on conviction in the Court of Sessions for Sumter County, shall be fined and imprisoned at the discretion of the Court." The right to pass the said Ordinance might have been exercised by the Council under its common law powers, or referred to the grant in the charter which authorizes the passage of all such Ordinances as they may deem proper in relation to the "police" of the town, and the "quietude, peace, safety and good order of the inhabitants thereof, not inconsistent with the Constitution and laws of the State," if the provision in the charter in regard to the establishment of "public scales or scale houses" had not designated the purpose for which they were to be used, in language of such a character as to forbid the idea of the preclusion of the sale of all articles sold by weight in the said town unless first weighed by the public scales. The object of their establishment is fixed and prescribed by the charter, and cannot, therefore, be so enlarged as to include the power now claimed by the Council. If they have the right to pass this Section, why may they not extend it so as to include every pound of sugar, coffee, tea, lard or any other article sold by weight in the town of Sumter? It cannot be contended that the Legislature proposed any such power, for its exercise would then operate as a restraint, instead of a regulation of trade. What is there in the charter to show that it must be confined to the article of cotton? A power fraught with such prejudicial consequences to the trade of the town should not depend for its existence on implication, unless it is plain and unavoidable.

The right conferred by the charter was to secure a true standard for the weight of all articles (usually sold by weight) where the parties, seller and buyer, could not thereon

*301

agree. It was to place *in the power of all who might require its use a regulating medium through which the true weight could be ascertained. They were intended to be scales of reference, and "the certificate of the public weigher was to be conclusive evidence of the weight of the article sold, in any Court of justice, &c."

They were to be the standard to which all others in the said town were to conform, and a party using any different from them was made liable to fine and imprisonment on conviction in the Court of Sessions. We cannot see that the corporation had the right to pass the said Section of the said Ordinance, and the motion to reverse the judgment of the Circuit Court is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

4 S. C. 301

SPRATT v. PIERSON.

(Columbia, April Term, 1873.)

[Subrogation &=31.]
A purchaser of real estate at a sale under The Sequestration Act of the Confederate Congress is not entitled, by subrogation or otherwise, to the benefit of a debt of the owner secured by a mortgage of the premises, which the Receiver who made the sale paid in order to give the purchaser an unencumbered title.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70–91; Dec. Dig. ⋘31.]

[Appeal and Error \$\sim 169.]

Where a plaintiff in equity acts under a decree in his favor, as if it were a mere order of reference reserving the equities, until the re-hearing of an appeal from a second decree dismissing the bill for want of equity, he will not be allowed at such re-hearing to except for the first time to such second decree because it is in conflict with the first.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1024, 1025; Dec. Dig. 169.1

Before Graham, J., at Charleston, January Term, 1872.

Bill in equity by L. W. Spratt, plaintiff, against John S. Pierson, Abraham G. Jennings, and others, defendants,

The case briefly stated was this:

On the 27th November, 1862, John W. Caldwell, Confederate States Receiver, offered for sale, under the Sequestration Act of the Confederate States, a lot and store on Hayne street in the city of Charleston, of which the defendants above named, who resided in New York, were owners, the terms of sale being one-third cash, and the balance in one and two years. The plaintiff and Edward Pierson, a brother of John S. Pierson, became the purchasers at \$10,500. The property was sub-*302

ject at the time to a mortgage given *by the owners to the Provident Institute for Savings, of Charleston, to secure the payment of a bond on which the sum of \$6,583.38 was then due and unpaid. Caldwell announced at the sale that he would pay the mortgage debt, and he did so. The plaintiff and Edward Pierson then complied with the terms of sale, paid \$3,500 in cash, and gave their bond and mortgage for the balance, and received from the Receiver a conveyance of the lot and store. At the end of one year they paid the bond in full, the plaintiff paying of the entire purchase money, principal and interest, \$8,-010, and Edward Pierson \$3,000. Edward Pierson occupied the property, and at the close of the war he surrendered the possession to the owners. He refused to join in this suit, and plaintiff sued alone, making him a party defendant.

The case was first heard by Carpenter, J., who, on the 1st May, 1869, made a decree as follows:

"On hearing the pleadings and evidence in this cause, and the argument of counsel, it is decreed and ordered that the said complainant be held entitled to be subrogated to the rights of the Provident Institution for Savings, in the city of Charleston, under the bond and mortgage of the defendants, John S. Pierson and Abraham Jennings, set forth in the pleadings, to the extent of the actual value of the funds paid by him towards the same," and he referred it to a Referee to take an account of the amount paid by the complainant and Edward Pierson, and the value thereof in the currency of the United States.

In April, 1870, the case came before His Honor Judge Carpenter on the report of the Referee, and exceptions thereto, and His Honor referred the case back to the Referee, with instructions to report the actual value of the \$6,583.38 in Confederate currency paid to the Provident Institution for Savings on 1st December, 1862, for the bond and mortgage of the defendants, John S. Pierson and Abraham G. Jennings, by John W. Caldwell, Confederate States Receiver, and the proportions of that value, with interest, to which the complainant and Edward Pierson were entitled "by reason of their contributions to the fund which was pledged by them for the repayment to the said John W. Caldwell, of the amount so advanced by him for their benefit.

The Referee reported that the value of the fund paid by the plaintiff, with interest thereon to the date of the report, May 9th, 1870, was \$2,425.22, and that the value of the fund paid by Edward Pierson, with interest to the same date, was \$908.28.

*The plaintiff excepted to the report on the grounds: (1) that gold, and no other standards of value, was adopted by the Referee; and (2) that the plaintiff was allowed for so much of his payment as went to the bond. and not for so much as went to the purchase.

In January, 1872, the case came before Judge Graham on the report and exceptions. His Honor reviewed the evidence, and coming to the conclusion therefrom that the bond and mortgage to the Provident Institute for Savings had not been paid by the plaintiff, nor with his money, and that they had been satisfied before he paid anything, he dismissed the bill for want of equity.

The plaintiff appealed on several grounds, setting forth supposed errors in the conclusions of the Circuit Judge upon questions of fact arising from the evidence.

Hanckel, for appellant. Phillips, Campbell, contra.

June 6, 1873. The opinion of the Court was delivered by

MOSES, C. J. After a re-argument of the the Congress of the Confederate States, by cause, and a careful consideration of the points made in behalf of the appellant, we do not see that they present any equitable ground upon which he is entitled to the relief he seeks by his bill. His claim is rested chiefly, if not entirely, on the principle of subrogation, through which he asks in regard to the bond and mortgage executed by the said John S. Pierson and Abraham G. Jennings, Jr., to the "Provident Institute for Savings in the city of Charleston," to stand in the place of the said corporation, and to set up the mortgage as a valid and binding incumbrance on the real estate referred to in the pleadings. If he cannot sustain the proposition which he thus submits, there is no ground upon which his bill can stand.

It is not to be denied that the doctrine of subrogation, however limited and restrained its application in the earlier cases in which it was accepted as a principle properly appertaining to the relation between principal and surety, has in more recent times been extended to cases where the nature and character of the transaction clearly brought it within the justice and equity of the doctrine, of which the Court had already taken cognizance between principal and surety. Therefore, where one, at the request of another, either expressed or implied, advances his *304

money on a debt *for the security of which some lien existed on his property, equity regards the debtor as a constructive trustee, holding it for the benefit of the new creditor, to the same extent and in the same manner in which it was originally bound. It is but the enforcement of a rule which finds its sanction in natural justice, and is, therefore, recognized as springing from the transaction, not properly as a part of the contract, but as a consequence resulting in an equity in favor of the party whose means contributed to the preservation of the property to the debtor, who should not be permitted to retain it, independent of all right on the part of the creditor to compel its devotion to the purpose contemplated at the inception of the lien.

The authorities, to which a reference is unnecessary, so treat the subject, and we cannot conceive how the plaintiff, under the facts and circumstances proved in the case, can ask that he shall be protected by any of the principles which regulate the doctrine on which he founds his claim.

By his own showing he was a party to an illegal proceeding, and it is difficult to perceive how an equity, whether of the character of a resulting or any other trust, can arise from a transaction unlawful on its face, against a party not only innocent of all complication, but one whose constitutional rights were intended to be affected and destroyed by it. It is scarcely necessary to adduce either argument or authority to show that any act of justice, and from its very nature never could

the mere operation of which alone the freehold of one citizen of the United States could be divested and transferred to another, would be unconstitutional and void, and therefore impotent to confer title. It may not, however, be out of place to fortify the general proposition thus announced, by quoting from the language of the opinion of the Supreme Court of the United States in the case of U. S. v. Keehler, 9 Wal., 86 [19 L. Ed. 574]: "It certainly cannot be admitted for a moment that a Statute of the Confederate States, or the order of its Postmaster General, could have any legal effect in making the payment to Clemens valid. The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an Act of its Congress, or an order of one of its departments, any right or property of the United States. Whatever weight may be given, under some circumstances, to its acts of force, on the ground of irresistible power, or whatever effect may

*305

be allowed in proper cases to the *legislation of the States while in insurrection, questions which we propose to decide only when they arise, the Acts of the Confederate Congress can have no force as law in divesting or transferring rights, or as authority for any act opposed to the just authority of the Federal Government."

The plaintiff avers that Caldwell, with his money and as his agent, paid the mortgage. and that he then became entitled to it. This aspect of his claim in no way strengthens it, or affords any right to set up the mortgage against Pierson and Jennings, the mortgagors. His voluntary payment could raise no assumpsit against them, for one cannot become the creditor of another unless by some agreement express or implied, or some subsequent recognition of an existing debt .-Chitty on Contracts, 592: Richardson ads. McCray, 1 Tread. Const. 472. In notes to the case of Dering v. Earl of Winchelsea, 1 W. & T., Leading Cases in Eq., 94, referring to the authorities which sustain the proposition, it is said "that it is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay, in order to protect his own interest, that a Court of Equity substitutes him in the place of the creditor as a matter of course without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor's rights without an agreement to that effect; payment by such a person absolutely extinguishes the debt and security." In Gadsden v. Brown & Wellsman, Speer's Eq., 41, Johnson, Ch., says: "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural

have been intended for the relief of those the property was knocked off, that the mortwho were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the fact will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money, or absolve him from his outract, would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty."

The testimony does not sustain the position of the plaintiff that Caldwell acted in the matter as his agent. The object of Caldwell was to confer a clear and unencumbered title on the purchaser. His declaration at the sale evinces it. The forbearance of the

*plaintiff to pay the cash portion of the purchase money until the lien of the mortgage was removed shews the inducement which urged Caldwell to its satisfaction. His purpose was to transfer by the sale an indefeasible title, and this he could not do until he paid the mortgage. The amount applied by Caldwell to its satisfaction was \$6,583.38, and yet the cash payment required on the sale, and which was afterwards paid, was only \$3,500. How, in this regard, can it be claimed that he acted as the agent of the purchaser? Griggs, the witness, who was the Secretary and Treasurer of the corporation which held the mortgage, states, in his testimony: "Understood him (Caldwell) to say that the store had been sold, and that he took up the bond to make titles." The plaintiff, in his evidence, says "he gave to the Receiver notice that he and Pierson would accept the title upon condition the bond should be taken up. To this the Receiver assented." Trescott, the recording officer, in his examination, says the satisfaction produced (in one of the books of his office) is signed by Griggs, Secretary and Treasurer of P. S. I. The paper of satisfaction was left by Mr. Griggs as a satisfaction of the mortgage. Of this he has no doubt." How, in the face of this proof, can it be said Caldwell, in paying the bond, acted as the agent of the plaintiff, and for his benefit? In one view, in the contemplation of the parties, the Act did enure to his benefit, because, having no doubt that the sale by the Receiver would transfer all the legal rights of the defendants, A. G. Jennings and John S. Pierson, in the premises, the satisfaction of the mortgage removed a lien from the property, which would have affected it, even if the sale had been valid. Caldwell's purpose was not to sell the mere equity of redemption, and this must have been well understood by the purchasers, gage would be satisfied? Conceiving that the title to the buyer through the sequestration under the proceeding in the Confederate Court, as whose officer he officiated, would be good and valid, except as to existing encumbrances, his object was to remove the lien which the mortgage created, and thus permit his conveyance to operate as an absolute transfer of the titles of the original owners.

As against them, he was a mere naked trespasser, and the plaintiff who aided in the transaction stood in the same relation. If no rights could be conferred on the purchaser by reason of the trespass to which they were parties, to apply the doctrine of *307

subroga*tion to any condition which could arise under the transaction, would entirely subvert all the considerations of natural justice to which it owes its origin. Even as between the surety and principal, if the circumstances show that the payment made by the former was with intention to extinguish the lien, which the creditor had as a security, it will be held an extinguishment of it.—See notes to case already quoted, p. 95.

The counsel for the plaintiff in his argument submits as authority from the same case, and the notes appendant to it, that "it is to be presumed that the party by whom the payment was made meant to make it in the way to operate most beneficially, and consequently to keep the debt alive, unless there is enough to show the existence of a contrary intention." Now can there be a doubt of the intention here, when the plaintiff in his evidence admits "that he gave to the Receiver notice that he and Pierson, (Edward), would accept the title upon condition the bond should be taken up?" It is requiring too much of the Court to infer from the testimony that the plaintiff purchased any legal or equitable claim to the bond and mortgage. They were the impediments in the way of the title which he sought to acquire in the property, and before he complied with the conditions of the sale he required that they should be removed. He supposed he was purchasing whatever estate and title the Confederate government could sell, freed and discharged from the mortgage. had a covenant for title, and it has failed, he must resort to his vendor, and it is his own fault if such recourse would not only be unavailing but impossible, for with his eyes open he was content to accept a conveyance through the proceedings of an assumed tribunal which was unconstitutional, and could therefore impress no validity on its acts.

Nor can the plaintiff derive any right from the delivery of the mortgage to him, in 1866, by Griggs, the officer of the "P. I. for Savings."

He distinctly avers, in his testimony, "that after the war it was in his possession still, else why did he declare at the sale, before as the Secretary and Treasurer of the comof it; refused to give him an assignment of it, because he did not know what was on the bond, but delivered the mortgage to Mr. Spratt, knowing that he had been the purchaser, or one of the purchasers, of the store, and that the bond had been paid to make him title. Did not intend it as an assignment. but only as a delivery of the paper to Mr. *308

Spratt, as *the party witness thought entitled to it for whatever use he might make of it." It is clear that no assignment was intended, but even if it had been, it could have conveyed no interest, for the bond had been satisfied nearly four years before the delivery of the mortgage to the plaintiff.

Whatever might have been the opinion of the Court on the effect of the order of Judge Carpenter, of May 1, 1869, if it had been brought to its notice at the proper time, it is now too late for the plaintiff to set it up as a judgment in his favor, rendering the subsequent decree of Judge Graham, dismissing the bill, void and inoperative. On the hearing of the second report of the Referee, Judge Graham, in the language of the brief, "entered into a consideration of the equity of the bill." To this the plaintiff, so far from excepting, did not even make it one of the grounds of his appeal. The case was heard by this Court, and it was not until a re-argument was had that the plaintiff, in his reargument, made the exception. It comes too late, if for no other reason, that it operates as a surprise on the defendants, who, by the course of the plaintiff, has thus lost the opportunity of appealing from the said order of Judge Carpenter. We do not mean to be understood as saying that the appellant, in this Court, must be restricted to the grounds which may be contained in his notice, but where, on a hearing by one Circuit Judge, all the parties entering into the cause as if the equities remained open for his decision, and no exception taken to such course because it is in conflict with the conclusions of the Circuit Judge who presided at a previous Term and heard the case, this Court, with such objection not noted until it had ordered a re-argument, must regard, as the parties did, the whole case open before the Judge who last heard it.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *309

*EARLE v. STOKES.

(Columbia. April Term, 1873.)

[Payment = 14.] Neither the Ordinance of September, 1865, nor the Act "to determine the value of contracts curred.

pany. Mr. Spratt applied for an assignment | made in Confederate States' notes or their equivalent," can be applied to a contract un-less it be shown that such contract was made with reference to Confederate currency or its equivalent.

[Ed. Note.—For other cases, see Cent. Dig. § 93; Dec. Dig. ⇐⇒14.]

Before Orr, J., at Chambers, Greenville, May 16, 1872.

Action by R. H. Earle, plaintiff and appellant, against Edward F. Stokes, defendant,

The case is stated in the opinion of the Court.

The plaintiff appealed.

Earle & Blythe, for appellant. Stokes, contra.

June 6, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. On the 3d day of June. 1861, the respondent executed a promissory note for the sum of three hundred and ninety-six dollars and eighty-eight cents to Gower, Cox, Markley & Co., payable one day after

In December of the same year, the said note was assigned to appellant by Gower, Cox, Markley & Co. Action was commenced on the 29th day of December, 1871, for the recovery of the amount of the said note and interest thereon, by service of summons and complaint on respondent. Respondent answered and appellant moved to strike out the answer as frivolous.

On the 15th day of May, 1872, the case was heard by the Judge at Chambers. The answer of the respondent was stricken out as frivolous, and the appellant authorized to enter up judgment for three hundred and fifty dollars and fifty cents, together with costs. From this order an appeal is taken to this Court to set it aside, that judgment may be entered for the whole amount due on the said note.

This Court has held in several cases that neither the Ordinance of the Convention of 1865, nor the Act of the General Assembly entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent," is applicable, or can be applied to any contract, unless it first be *310

shown that such contract *was made with reference to such currency or its equivalent. -Neely v. McFadden, 2 S. C., 169; Harmon v. Wallace, Ib., 208; Earle v. Harrison, Ib., 432; Detheridge v. Earle, 3 S. C., 396.

In this case, it was not claimed or attempted to be shown that the note in question was made with reference to Confederate States notes or their equivalent.

The order must be set aside, and the case remanded for a new trial.

MOSES, C. J., and WILLARD, A. J., con-

4 S. C. 310

DETHERIDGE v. EARLE.

(Columbia, April Term, 1873.)

[Dismissal and Nonsuit 5 60.]

A defendant cannot avail himself of plaintiff's failure to proceed to trial on the call of the case and démand a non-suit unless he himself has given notice of trial as required by Section 277 of the Code of Procedure.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 150; Dec. Dig. ← 60.]

Before Orr, J., at Greenville, September Term, 1872.

The case on the first appeal is reported in 3 S. C., 396, and the whole case as now made is stated in the judgment of the Court.

Stokes, for appellant, Earle & Blythe, contra.

June 6, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. This case was heard by this Court at the April Term, 1872, and sent to the Circuit Court for a new trial.

On the call of the docket of that Court, the plaintiff being called and not answering, the following order in the cause was made by the presiding Judge: "The plaintiff and plaintiff's counsel having been called on this the last day of the attendance of the jurors, and upon a peremptory call of the docket, on motion of Earle and Blythe, the defendant's attorneys, it is ordered that the plaintiff do pay the costs of this action, except the costs *311

of appeal, on or by *fifteenth day of October, prox., and in default thereof that he be nonsuited." The order presupposes that the plaintiff was in default. This is not shown by anything in the brief.

It does not appear that notice of trial had ever been given by the defendant as required by the 277th Section of the Code of Procedure, page 633 of new edition of General Statutes. He could take no advantage either of the unwillingness or the inability of the plaintiff to proceed to trial, because he was not in a position to avail himself of the benefit to which he might have been entitled, if he had shown that he ever gave notice that he would require a trial.

The motion is granted, and the case remanded to the Circuit Court for the County of Greenville.

MOSES, C. J., and WILLARD, A. J., concurred.

4 S. C. 311

AUDITOR v. TREASURER.

(Columbia. April Term, 1873.)

[States @== 145.] The principle decided in the case of the State Ex Rel. Shiver v. Comptroller General

(ante p. 185), that the Act of March 2d, 1872, so far as it authorized the issue of scrip known as the Revenue Bond Scrip, is unconstitutional and void, reaffirmed.

[Ed. Note,—Cited in Bank v. Railroad Company, 5 S. C. 158, 22 Am. Rep. 12.

For other cases, see States, Cent. Dig. § 141; Dec. Dig. 5145.

[Injunction & 74, 114.]

An action lies at the suit of the State Auditor in his official capacity against the State Treasurer and County Treasurers to enjoin them from receiving in payment of taxes unconstitutional and worthless scrip. So, also, he may maintain the action in his individual and private right as a citizen of the State.

[Ed. Note.—Cited in Sanders v. County Com'rs, 7 S. C. 363.

For other cases, see Injunction, Cent. Dig. §§ 142, 208; Dec. Dig. 574, 114.]

Before Melton, J., at Columbia, November, 1872.

This was an action in the name of the State by Edwin F. Gary, as State Auditor, relator, against Niles G. Parker, as State Treasurer, and others, as County Treasurers, defendants, for injunction. By an order of the Circuit Court, John P. Southern and others, scrip holders, were allowed to intervene as defendants.

The points decided in the case will be fully understood from the opinion of the Court.

His Honor the Circuit Judge granted the injunction, and the defendants appealed.

Rion, Magrath, for appellants. Pope & Haskell, contra.

*312

*June 9, 1873. The opinion of the Court was delivered by

MOSES, C. J. In the case of the State Ex Rel. R. C. Shiver, et al., v. S. L. Hoge, (ante p. 185) as Comptroller General, this Court held that the Act of March 2d, 1872, referred to in the pleadings here, so far as it attempted to authorize the issue of the obligations designated as revenue bond scrip, was in conflict with so much of the tenth Section of first Article of the Constitution of the United States as declares that "no State shall emit bills of credit," and therefore void. There, the plaintiffs sought by mandamus to require the Comptroller General to levy, or cause to be levied, a tax of three mills on the dollar for the redemption of the said scrip. Here, the plaintiff, by his complaint, prays an injunction against the State Treasurer and the several County Treasurers to enjoin:

1. The State Treasurer from issuing and putting in circulation the said revenue bond

2. To enjoin the State Treasurer and the County Treasurers from receiving the same for past due taxes.

3. That they be enjoined from paying out the said revenue bond scrip.

the same for taxes hereafter to be collected in payment of taxes of that which would have under the levy for the year 1872, or at any other time

The case before us involves the point made and decided on the petition for the mandamus, as to the prohibitory effect of the Constitution of the United States on the said scrip. Our opinion and judgment there are adopted as concluding so much of this case as presents the same question. A single other proposition remains to be considered, and this is raised by the answer of the defendants, Southern, R. C. Shiver and others, who, at the hearing on Circuit, on November the 9th, 1872, were admitted by order of the Court, on their own petition, as parties defendant. They object to the relief claimed, on the ground "that no right of action subsists in the plaintiff to pray the injunction sought for." The complaint of the plaintiff is to be regarded in a two-fold aspect: 1st. As to the receipt of the said scrip for past due taxes: and, 2d, for taxes to be thereafter collected under the levy for 1872, or at any other time. The Auditor is an officer of the State, connected with its fiscal operations. The taxes, after the rate is prescribed by the Legislature, are to be levied by him. They

are to meet appropriations *made, and this anticipates their payment in money, or in the substitutes for it which the Legislature may have previously directed. The power to order the levy must involve the right not only of enforcing it according to the intention of the Act, by virtue of which it is exercised, and, therefore, of preventing its execution by the Treasurers in a mode calculated to subvert the purposes which the Legislature contemplated by its enactment. The Legislature holds but one regular annual session, and if during its recess no officer of the government could intervene to secure the reception of the taxes in the medium alone which the Legislature had directed, its whole object might be defeated by the unlawful course of the State Treasurer or the County Treasurers, in receiving as payment that which the Legislature had not authorized, and which would be entirely unavailing to meet the current expenses of the year. The disastrous consequences which would follow such a course can be prevented by the intervention of some State officer, whose duties closely connect him with its fiscal concerns, claiming, in his relation on behalf of the State, the interference of the judiciary department. To say

4. That they be enjoined from receiving nothing of the acceptance by the Treasurer in fact no value, because its existence could not be recognized as constitutional, it was at least questionable, under the third Section of the Act of 2d March, 1872, whether the scrip was receivable in payment of taxes past due or arising from the sales of land for delinquent taxes. The Auditor, therefore, may well be recognized as the proper officer, in the name of the State, not to question its act, but to prevent its execution in a manner never contemplated by it, and tending to the great wrong and injury of the whole people. If the Auditor had only sought by his complaint to enjoin the Treasurer from accepting the scrip in payment of past taxes, the Court would, nevertheless, have the right to pass upon the constitutional character of the whole enactment, so far as it related to the scrip.

There is another view which may be taken of the objection thus urged. A public officer having the charge or care of the property or money of the State, as to its proper preservation and disposition, occupies, in regard to it, the relation of a trustee. He must hold it alone in strict devotion to the purposes of the agency which his office confers. The State, as a cestui que trust, may enforce the trust and save the subject of it from conversion to an object not within its scope. A private citizen and tax payer has *314

such an equity as *will authorize him, on behalf of himself and all others who will be prejudiced by the proposed wrongful act of the officer, in respect either to the money or the property, to resort to judicial proceedings for its prevention. Even if the plaintiff in his official capacity as Auditor, could not sustain his complaint against the State Treasurer and the County Treasurers to the extent of the entire relief which he seeks under it, the Court may still entertain his application, looking to his rights as a member of the community in the trust of which the principal defendants are trustees, holding the money of the State on conditions and for purposes subject only to the constitutional contract of the Legislature. His absolute and personal rights in the premises cannot be lost because he asks for their protection in an official in place of an individual relation.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 314

FRASER v. FISHBURNE.

(Columbia. April Term, 1873.)

[Trusts \$\sim 206.]

Equity has jurisdiction to authorize the Trustees of a married woman to borrow money, for the purposes of the trust, on a mortgage of the trust property, although no such power be conferred by the instrument creating the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 283–292; Dec. Dig. ≈ 206.]

[Trusts = 206.]

Such jurisdiction may be exercised under a petition of the trustees, the husband and wife admitting the facts and joining in the prayer.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 283-292; Dec. Dig. &=206.]

[Principal and Surety =15.]
Where a decree in Equity was made authorizing the trustees of a married woman to borrow money for the purposes of the trust by giving a mortgage of the trust property to segiving a mortgage of the trust property to secure the payment of a bond of the husband, and the holder of the bond and mortgage gave time to the husband by special contract: *Held*, That the trust estate was the principal debtor, and that such giving of time did not discharge the mortgage thereon.

[Ed. Note.-For other cases, see Principal and Surety, Cent. Dig. § 34; Dec. Dig. \$15.]

Before Green, J., at Georgetown, June Term, 1872.

This case will be fully understood from the decree of His Honor the Circuit Judge, which is as follows:

Green, J. Robert Fishburne and James Ravenel, trustees under the marriage settle-*315

ment of B. Clay Fishburne and Jane *Rose Fishburne, his wife, filed their petition in the Court of Equity on the 8th day of April, 1867, so much of which as is necessary to be stated in this opinion is as follows:

"That the disastrous termination of the late war has greatly impaired the value of the estate conveyed. That the plantation called Enfield, in the said indenture, is the only property of the trust estate that at present can be made available to make a crop and produce an income; that in consequence of scarcity of money, your petitioners are unable to raise the means of carrying on the planting operations of the plantation, without giving a lien on the same by mortgage or otherwise. Your petitioners further show, that a large portion of the land on the said Enfield plantation has been placed in readiness for planting, and a sufficiency of labor employed to give a reasonable promise of a good coming crop, if the means can be raised and provided for feeding the said laborers, and paying the other current expenses of the plantation; and that if the means be not raised, all the work, labor and preparation already done, will be thrown away, and no crop can be made, thus depriving their cestui January, A. D. 1868. On the same day, to

que trusts of the means of subsistence. Your petitioners further show, that the said B. Clay Fishburne, and Jane Rose, his wife, have made application to your petitioners to raise a sum sufficient to enable them to carry on the planting operations of the plantation, by giving a mortgage of the said Enfield plantation, as the only means by which they could make a crop, and secure to themselves a subsistence and living, for they have no issue. In view of these facts, the said B. Clay Fishburne, and Jane Rose, his wife, have applied to your petitioners to mortgage the said plantation, for the purpose of raising the sum required, for the purposes above set forth. But your petitioners are instructed that they have no authority under and by virtue of the said indenture of marriage settlement so to do, and can only legally create a lien on said trust estate by authority, which may be given them by this honorable Court. Your petitioners, therefore, pray that they be authorized to borrow a sum not exceeding seven thousand dollars, to be expended by them exclusively for the purposes of making a crop on Enfield plantation, and that for that purpose they be authorized and empowered to mortgage Enfield plantation, to secure the payment of the said sum of seven thousand dollars, or so much as may be borrowed for the purposes aforesaid,"

*316

*Under the signature of the trustees is the following:

"The undersigned certify to the correctness of the facts set forth in the above petition, and respectfully join in the prayer thereof. B. Clay Fishburne,

"Jane Rose Barnwell."

The petition was referred by the Chancellor to the Commissioner of the Court, to examine into and report upon the same. The Commissioner filed his report on the 9th of April, 1867, recommending that the prayer of the petitioners be granted. On the 13th of April the Chancellor made the following order:

"On hearing the report of the Commissioner in this case, on motion of R. Dozier, solicitor for the petitioners, it is ordered that the same be confirmed, and that the petitioners, Robert Fishburne and James Ravenel, trustees, be authorized to execute and deliver a mortgage of Enfield plantation, as a security for the bond of Dr. B. Clay Fishburne, for a sum not exceeding seven thousand collars, the money so raised to be applied exclusively to the object and purposes set forth in the petition."

On the 3d day of June, 1867, B. C. Fishburne executed his bond to Cart, Kopff & Jervey, conditioned for the payment of the sum of six thousand eight hundred dollars. without interest, on or before the 31st day of

wit, on the 3d day of June, 1867, the trustees | paid the bond out of his own funds, would aforesaid executed a mortgage deed of the Enfield plantation to secure the payment of the said bond. B. C. Fishburne paid on the bond the sum of twenty-five hundred dollars on the 31st January, 1868. On the 20th of August, 1868, B. C. Fishburne and Joseph Risley entered into an agreement, whereby Risley stipulated to pay for Fishburne the sum of forty-three hundred dollars, the balance then due upon the bond, provided he would cause the bond and mortgage to be assigned to him (Joseph Risley) for the full sum of sixty-eight hundred dollars; and he also stipulated to give Fishburne an indulgence of two years in which to pay the said sum of sixty-eight hundred dollars, the stay or indulgence to be endorsed on the said bond at the time of the assignment. On the 15th day of December, Cart, Kopff & Jervey duly assigned the said bond and mortgage to the said Joseph Risley; the assignment contained a stipulation, for indulgence, in accordance with the agreement above referred to, and it was admitted at the hearing that this

was done *with the knowledge and consent of the trustees. Joseph Risley assigned to E. Baum, and he assigned to Robert E. Fraser, who has filed his complaint in this Court for a foreclosure of the said mortgage debt.

*317

B. C. Fishburne departed this life in November, 1870; an answer was filed by Mrs. Jane Fishburne, who resists a decree for foreclosure upon the following grounds: 1st. Because the Chancellor had no authority to make the order of date the 13th April, 1867the Court having no power to give authority to the trustees beyond what they derived from the deed of settlement. 2d. Because if the Court had jurisdiction, the proper parties were not properly before the Court. 3d. Because the trust estate was the surety for the personal debt of B. C. Fishburne, and the extension of time given by the creditor released the surety. At the death of B. C. Fishburne, Mrs. Jane Rose Fishburne, by the terms of the marriage settlement, became entitled to the property, discharged from all or any uses or trusts whatsoever. I am satisfied that the proceedings in this case were such as were usual and proper to attain the object of the trustees; that all the parties in interest were properly before the Court, and that the Chancellor had ample power to grant the order dated 13th April, 1867.

In order properly to determine whether the debt created by the bond, executed by Fishburne, was his personal debt, or a debt against the trust estate, the bond and mortgage must be considered in the light of the proceedings which preceded them, and of which they were the result; all constitute one transaction. The money was to be expended by Fishburne, under the order of the Court, for the benefit of the trust estate. Suppose Fishburne had or incumbrance, or its devotion by way of

he not have been entitled to reimbursement out of the trust estate? Fishburne could receive no benefit except through the trust estate. The measure of his rights after as before the expenditure of the money, is to be found in the deed of settlement. It may be said that if the rents and profits of the Enfield plantation were increased his share would be enhanced; but the same may be said of Mrs. Fishburne, and had there been other life tenants, the same might be said of them. I conclude that the debt created by the bond of B. C. Fishburne was the debt of the trust estate, and therefore the relation of principal and surety never did exist between Fishburne and that estate. There is, there-*318

fore, no room for the *application of the rule that indulgence extended to the principal will discharge the surety. The amount of twenty-five hundred dollars should be credited on the bond on the 31st January, 1868, leaving a balance, according to the statement furnished me, of five thousand six hundred and fifteen dollars and twenty cents, on the 13th day of June, 1872; for this balance I think the plaintiff is entitled to a judgment of foreclosure.

And it was so ordered and decreed.

The defendant appealed on the grounds: First. That the Court had not jurisdiction under the proceedings to grant the order of the 13th April, 1867: 1st. Not in exercise of the decretal power, for there was no case against this defendant, and she was not made a party; 2d, Not in exercise of the administrative power, for she was not of natural incapacity, and this was not an order for the maintenance of her person or the preservation of her estate.

Second. But, that if so, and the mortgage were valid, therefore it was collateral to the debt of the husband, and was satisfied by the fund paid by himself and David Risley to that debt, or was discharged by the extension of time and other changes in the debt, made in the attempted assignment of the bond and mortgage.

Spratt, for appellant. Dozier, contra.

June 9, 1873. The opinion of the Court was delivered by

MOSES, C. J. It has been long held in this State, contrary to the doctrine which prevails in England, that a married woman has no control or power over her separate estate beyond that conferred by the instrument creating it. The Court of Equity has, therefore, interposed to promote the benefits designed by the trust, and make it subservient to the real purpose for which it was intended, by either allowing a sale of the property, or its charge tion from loss or decay. While it has not them to carry on the planting operations of withheld the aid of its jurisdiction to permit the cestui que trust so to deal with the estate, unless forbidden by the deed or will under which it arises, as to make it a source of profit, instead of one of loss, it never pro-*319

ceeds without first *ascertaining by testimony that the proposed act will tend to the interest of the parties who are the objects of the trust. In Magwood and Patterson v. Johnston, 1 Hill Ch., 236, Chancellor Harper says: "How far have our Courts departed from the English doctrines? Thus far, that the wife should not, by her own act merely, charge her separate estate. The Court will look into the necessity and propriety of the charge. If she is under the necessity of supporting herself and family on the credit of the separate estate, she may do so, as in England. But the Court, before making her estate liable, will look into the circumstances of the husband, and be satisfied that the necessity existed, and that the goods furnished or money advanced was proper in her circumstances."

In Dunn v. Dunn, 1 S. C., 354, this Court used the following language: "It is settled law in this State that without the aid of a Court of Equity a married woman cannot dispose of or charge her separate estate except in the execution of powers conferred by the instrument conferring such estate."

That the Court of Equity in this State has exercised over trusts in favor of married women the same control that they can themselves exercise in regard to them in England, cannot be doubted or disputed, with this limitation, that this Court will only extend its approval where the proposed change or act is to enure to the interest of the beneficiaries.

It is objected that if the Court had the power which is claimed for it, no rights of Mrs. Fishburne in the premises were affected by the order, because the proceeding was by petition, a process under which no judgment could be rendered that could bind the separate estate of a feme covert. The form resorted to was the one in general practice where no adversary rights were asserted against the settled property of the married woman. The petition was not only by the trustees in whom the legal title vested, but virtually also by Mrs. Fishburne and her husband, who not only certify to the truth of the facts set forth in it, but "respectfully join in the prayer thereof." The petition to which they were parties avers that they had made application to the trustees, the co-peti- concurred.

security for means necessary for its preserva- | tioners "to raise a sum sufficient to enable the said plantation by giving a mortgage of the said Enfield plantation." The legal title to the property has vested in Mrs. Fishburne, freed and discharged from all trusts. She has enjoyed the benefit of the advance made at her own request under a judgment of the

*320

Court *which stands unreversed. Can she assail it in the mode she now proposes? It is valid and binding because the Court which ordered it had jurisdiction over the parties and the property in the case in which it was rendered, and it cannot be vacated in this collateral way.

We cannot sustain the proposition of the appellants, which seeks to treat Dr. Fishburne as the principal in the debt, and the trust estate only as the surety, and thence claims to discharge the latter from all liability on the mortgage by reason of the extension of indulgence by the creditor, the holder of it.

In no possible view can such a relation be inferred from the transaction, looking to all of it as a whole.

The petition, so far from regarding the plantation as a surety for the bond of Dr. Fishburne, on which the means of carrying on the planting operations were to be raised, shows that the application was to permit the trustees "to mortgage the said plantation for the purpose of raising the sum required for the purposes set forth."

The bond given was that of Dr. Fishburne, but the name of any other obligor would as well have answered the purpose in view; in fact, the proper parties to have executed the bond were the trustees who held the legal title to the estate which was to be mortgaged. Equity looks not to the form, but to the substance and essence of the transaction. very mortgage which secures the debt avers that it was incurred for the benefit of the trust estate. We see nothing which can in any way convert the wife into a surety for the husband; the debt, though nominally his. was not so in fact. The real debtor (so to speak) was the trust estate, and it must respond to the obligation it has incurred.

The motion is dismissed, and the case remanded to the Circuit Court for Georgetown County, that the further order, now necessary by the lapse of time, may be had for the proper enforcement of the judgment.

WRIGHT, A. J., and WILLARD, A. J.,

4 S. C. *321

*DONALD v. LIFE INSURANCE COM-PANY.

(Columbia. April Term, 1873.)

[Insurance \$\sim 365.]

A. held a policy of insurance on his own life which expired on the 5th March, 1871, but which, by its terms, was renewable within thirty days at "the entire option of the company." On April 3d, 1871, A., who was the local agent of the company, wrote a letter to the General Agent enclosing therein the amount of the premium. A. was unwell when he wrote—became quite sick the next day, and became gradually worse until the 7th, when he died. The letter informed the General Agent that the money was sent to pay the renewal premium on A.'s policy, and on the day it was written, was enclosed in a package to be sent by express, A. being the agent of the Express Company. On April 5th, A. gave the package to his wife and instructed her to send it the next day, but it was not sent until the 10th April, reaching the General Agent the same day. The Company refused to accept the premium, and this action was brought by the widow and children of A. against the Company to recover the amount of the policy: Held, That the policy was void for non-payment of the premium according to its terms, and consequently that the plaintiffs had no cause of action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 932; Dec. Dig. \$\sime 365.]

[*Insurance €* 349.]

The conditions of a policy of insurance as to payments of annual premiums must be strictly complied with by the insured, or his policy will be void.

[Ed. Note.—Cited in Perkins v, Philadelphia Life Ins. Co., 93 S. C. 92, 76 S. E. 29.

For other cases, see Insurance, Cent. Dig. §§ 891, 895–902, 913; Dec. Dig. €⇒349.]

Before Orr, J., at Anderson, Fall Term, 1872.

The case is stated in the following brief, prepared by counsel for the Supreme Court:

This was an action brought by Ella Donald, Anna A. Donald, and others, the widow and infant children of the late Col. David L. Donald, against the Piedmont and Arlington Life Insurance Company, on a policy insurance for the sum of five thousand dollars on the life of the said David L. Donald.

It appeared from the testimony adduced on the trial that the deceased, on or about the 5th of March, 1869, took out a policy for the sum of five thousand dollars in the said company for life, and that the annual premium was paid thereon for the year ending March 5th, 1870. It also appears by the terms of the policy that after the day named for the renewal, thirty days of grace are allowed within which the annual premiums may be paid. The day specified in the policy being the fifth day of March of each and every year during the continuance of the said policy, the days of grace extended this time to the fourth day of April of each and every year as aforesaid.

The question was as to whether the pay-

ment had been made, and the policy renewed for the year within which Col. Donald died. The affirmative of this proposition was maintained by the plaintiffs, and denied by the defendants, and the facts upon which the result of the issue depended were substantially these:

*322

*Col. David L. Donald, the deceased, was the agent of the Greenville and Columbia Railroad Company, at Williamston, where he resided. He was also agent of the Express Company, and of the Life Insurance Company of defendants. On Monday evening the 3d of April, 1871, he was sick, suffering from cold and hoarseness. On Tuesday morning, the 4th April, he was too unwell to get up to breakfast, and did not leave the house: during the day he was still sick, but walked out to his store near the railroad depot in the evening. The cars were behind time and he returned to his house about night, before their arrival. He was then very sick, and went immediately to bed, handing his wife at the same time the portfolio in which he carried his express matter, and saying to her that the contents must be sent off the next morning. The portfolio was locked up in his trunk and never removed or opened until after his death. He became worse rapidly, and was so ill on Tuesday morning that his directions about the express matter were forgotten. He continued to grow worse until the evening of Friday, the 7th of April, when he died.

On Monday morning, the 10th April, the portfolio containing the express matter was opened and found to contain three packagesone for the Railroad Company and two express packages sealed in the printed envelopes of the Express Company; one was directed to the "Working Christian," Columbia, and the other to Dr. Isaac Branch, at Abbeville, S. C., the defendant's General Agent. The package was carried on that day, 10th April, 1871, by Messrs. Lark & Herrick, to Dr. Branch, at Abbeville, who received it, and broke the seal in their presence. It contained within a letter, also directed to Dr. Branch, bearing date April 3, 1871, and contained one hundred dollars in money, which, as was stated in the letter, was to pay the renewal premium on his, David L. Donald's policy of life insurance. Dr. Branch having received the letter and money, undertook to submit the same, with a statement of the case, to the Home Office of defendants, in the city of Richmond, Virginia, giving at the same time to Messrs. Lark & Herrick a paper in the nature of an accountable receipt for the same. The defendants declined to accept the money as a renewal of the policy, and it was returned to Messrs. Lark & Herrick, and by the latter handed over to Mrs. Donald, the first named plaintiff in this action.

It was also proven on the trial that Col.

pany, was authorized to receive renewal pre- that time.

*323

*miums on the policies of others at any time he could get them, and that it was the habit of the company in that community to receive such premiums after the expiration of the time mentioned in the policies, as also of the days of grace, (without question.) The plaintiffs having closed their case, the defendants moved the Court that the plaintiffs be nonsuited upon grounds hereinafter stated. presiding Judge overruled the motion.

The case was submitted to the jury who found for the plaintiffs.

The defendants appealed on the ground, inter alia, that the policy was void because of the failure to pay the annual premium which became due on the 5th March, 1871.

Perrin & Cothran for appellants:

1. It is a fundamental principle in Life Insurance that the death of the assured, and not the cause of death only, must have happened during the continuance of the risk.-Lockyer v. Offley, 1 T. R., 254.

2. By the terms of the contract in this case the annual premiums were to be paid in cash every twelve months after the 5th day of March, 1870, or within thirty days thereafter, within the lifetime of the assured, the payments being annual.

The policy expired on the 5th March, 1871, the day named in the policy, and the risk extended beyond that time only "at the entire option of the company." The days of grace expired on the 4th of April, the assured died on the 7th. If the assured had died on the 3d of April, and the amount of the annual premium had been tendered on that day, the company would not have been bound to accept it; a fortiori then as to the tender made by Lark & Herrick on the 10th.

The following cases dispose of the offer of payment made by them to Dr. Branch.—Tarleton v. Staniforth, 5 T. R., 695; Wait v. Blunt, 12 East., 183; Simpson v. The Accid. Insurance Company, 89 E. C. L., 287.

1. The whole frame of the policy shows that every premium was to be paid in the lifetime of the assured. And such is the law. See Simpson v. Accid. Insurance Company, cited above.

2. No payment having been made or tendered within the days of grace, or within the lifetime of the assured, to the company or its authorized agent, does the fact of intention, as manifested by the assured, constitute payment in law?

*324

*(a) This is a contract relating to personal property, and must be strictly construed. The doctrine of cy pres does not apply.-Story's Eq. Jur., §§ 291-1169, et seq.

(b) The premium was due on the 5th of March. It is not pretended that there was bearing of principles."-2 Sumner, 367.

Donald, as agent of this Life Insurance Com- an effort, or even an intention, of payment at

(c) A part of the contract was that no receipt for payment bound the company, unless signed by the President or Secretary or Actuary of the company. No such receipt has been exhibited; no such receipt was given.

(d) The assured, who is claimed to have been an agent of the company, must have known this officially as well as by the terms

of his policy.

(e) The assured, as agent, could not have given a binding renewal receipt to a third person, under his own hand, much less have renewed his own policy by payment to him-

(f) After 5th March the continuance of the risk and the acceptance of the premium, if tendered, were at "the entire option of the company."

(g) No opportunity was afforded for the

exercise of any such option.

(h) "If the party meant to drop the insurance and meets with a serious accident within twenty-one days after the year of insurance, (the days of grace in that case), he may, according to your argument, tender the premium, which he never intended to pay, and so make the company liable."-By C. J. Cockburn, to Plaintiff's Counsel, in Simpson v. Accidental D. Ins. Co., (supra.)

(i) "Is not this the true construction? If the insured chooses to renew the policy, he may do so by paying the premium within twenty-one days (of grace in that case,) provided the Directors do not exercise the option given them of terminating the risk by refusing to receive the money."—Ib.

1. The terms of the contract of insurance. having been adopted by the parties, are not varied or controlled by the proof offered for that purpose by the plaintiffs as to usage of other companies, the instructions from agents in Columbia, &c .- Ruse v. The Mut. L. Ins. Co., 23 N. Y., 516; Reviewing S. C., 26 Barbour, 556.

2. The principle, as established by innumerable decisions, may be stated thus:

"Evidence of usage, though sometimes ad-

*325

missible to add to or *explain, is never so to vary or to contradict, either expressly or by implication, the terms of a written instrument."—1 Smith's Lead. Cas., 413.

3. The practice is pernicious—subversive of the established principles of the law-inexpedient, impolitic and unwise, and is condemned by the ablest Judges.

In Sonnell v. The Col. Ins. Co., Judge Story says: "I am among those Judges who think usage among merchants should be sparingly adopted as rules of Court by Courts of Justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full

The acts, on the part of the assured, which are claimed as evidence of his intention to pay, and to be, in fact, tantamount to payment, fall, in point of time, partly within and partly subsequent to the days of grace allowed by the policy.

Grace is defined to be "that which a person is not entitled to by law, but something extended to him as a favor." The term "days of grace," so far as it has received judicial interpretation, is limited in its application to bills or notes. The usual term of three days, in the beginning and for a long time, was not demandable by the acceptor or drawer, as of right, but now, under the establishment of the custom of merchants, and the sanction of repeated judicial decisions, is so demandable.—6 Watts and Serg., 179.

In the case cited, 89 E. C. L., (supra,) twenty-one days of grace were allowed; in the case before the Court thirty days were allowed—both as concessions to the assured and for their convenience—in both cases with certain restrictions and requirements, which formed part and parcel of the concessions. In neither case was it the growth of custom. In both it was matter of contract and agreement, and as such must be construed.

Reed & Brown, contra:

1st. It is insisted the renewal premium was paid, or tendered to be paid, or disposed of in such way as to render it equivalent to payment. That, under the circumstances, the question of payment was one depending on the facts, which, having been found by the jury, the result is conclusive.—Townsend v. Henry, 9 Rich., 318; Fried v. Royal Insurance Company of Liverpool, 47 Barb., 127; 2 Wait's Dig., 887; Abrahams & Son v. Kelly & Barrett, 2 S. C., 235.

*326

*2nd. But if payment was neither made or tendered, it was prevented by Providential interference, and the cestui que trusts are not to suffer from the hand of Providence laid on their trustee, the assured. "The act of God makes injury to no man."—2 Black's Com., page 122; Broom Leg. Max., 113, 114; Welts v. Connecticut Mutual Life Insurance Company, 46 Barb., 412; 2 Wait's Dig., 887; Baldwin v. N. Y. Life Insurance and Trust Company, 3 Bosw., 530; 2 Wait, 887.

3rd. Payment, or tender of payment, within the time mentioned in the policy, was expressly waived by the acts of appellants, and they have, therefore, nothing to complain of.—Buckhee v. U. S. Insurance Annuity and Trust Company, 2 Clinton Dig., 1756, No. 10; 18 Barb., 541; Ruse v. Mutual Benefit Life Insurance Company, 2 Clinton, 1757, No. 13; 26 Barb., 556.

June 21, 1873. The opinion of the Court was delivered by

MOSES, C. J. The testimony in the cause presented no issue of fact for the solution of

The acts, on the part of the assured, which | which the conclusion of the jury was necestre claimed as evidence of his intention to sary.

The facts may be conceded as established by the evidence adduced on the part of the respondents, and if they do not constitute a sufficient cause of action against the appellants they were entitled to a non-suit. The determination of the case depended on the construction of the policy and of its conditions, which was the contract between the parties, and this was for the Court and not for the jury.

Before entering on what really appears to us the merits of this contention, it may be satisfactory to refer to the position submitted on the argument in behalf of the respondents, which claims the existence of the policy at the death of the assured, by reason of the alleged payment, of the premium in his lifetime. There is a distinction between a tender and actual payment itself. The former may sometimes so operate as to place the party making it in a position in which he may be entitled to the full benefit of some condition which was to avail, if within a certain time he made payment of the stipulated sum fixed by the agreement, but it cannot amount to full and complete satisfaction. Here the point relied on was, not that payment of the required premium had been made, but the intention of the assured, by enclosing the money in a package, its direction to the General Agent of the Company, and its pres-

*327

enta*tion after his death by Herrick and Lake, amounted to a compliance with the stipulations on the performance of which the interest in the policy was preserved to the respondents. This raised a question of law. The facts from which the legal conclusion was to be drawn, were not contested and presented as a proposition purely for the judgment of the Court.

To give, however, to the respondents the full benefit of the acts through which they contend the policy was saved to them, for the purpose of the argument, we will consider what would have been their effect if the assured had been living, and claimed that his policy was still of force by virtue of the transactions which the respondents aver, he being dead, secure to them the benefit of the covenant. "The conditions annexed to a personal contract, like a policy of insurance, must be performed according to the terms used, and the apparent intent of the parties, and are not satisfied by a performance cy pres."-3 Steph., N. P., 2072. Every warranty in the policy is a condition precedent. and the assured must aver and prove performance of it. It is held that a liberal construction must be given to such an instrucment in seeking for the true intention of the parties, but if the terms leave no dougt of this, it must be enforced according to the ir plain meaning.

show so much of its conditions as is necessary for a proper understanding and decision of the case. "The company, in consideration of the first annual payment on the policy, continues the same in force from the 5th day of March, 1869, to the 5th day of March, 1870, and in consideration of the payment of the like sum in cash every twelve months as hereafter stated, and of the annual premium of eighty-six dollars and seventy-five cents, to be paid on or before the day day of

in every year, during the continuance of this policy, (or within thirty days thereafter, within the lifetime of the assured, when the payments are annual,) do assure the life of David Lewis Donald, &c.;" "and it is also understood and agreed in case the said party contracting for this assurance shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.'

The notice endorsed on the policy, which is

*328

made part of the con*tract, declares that "the premium is payable at the commencement of this risk in one or more payments as within expressed. If the assured desires to alter the mode of payments, application must be made to the company in writing for permission, which the company will grant at its discretion. The premiums are always due on the several days stipulated in the policy, and all risk to the company commences at the time of the actual payment of the first premium, without regard to the date of the policy, (unless otherwise stipulated in the policy), and continues until the day named in the policy for the payment of the next premium, at 12 o'clock noon, and no longer, except that thirty days' grace are allowed, as within provided, where payments are annual, but no days of grace on less than annual premium."

"No premium will be received by the company continuing any risk after the day named in the policy for the payment of such premium, unless the insured is in perfect health, and the risk continued at the entire option of the company, and no payment of premium is binding on the company, unless the same is acknowledged by a printed receipt, signed by the President, or Secretary, or Actuary of the company. Agents are not authorized to bind the company by the issue of policies or permits, nor give receipts for the renewal of premiums; neither are they authorized to waive forfeiture, or make, alter or discharge contracts."

The policy expired on the 5th of March, 1871, and the risk could be extended beyond that time only "at the entire option of the

The following extracts from the policy company." The days of grace terminated on the 4th of April following-the assured died on the 7th. The appellants well contend "that if he had died on the 3rd of that month, and the amount of premium had been tendered on that day, the company would not have been bound to accept it." The liability of the company depended on the death of the assured during the continuance of the risk. This ended on the 5th March, 1871, and the extension within the time fixed as days of grace was subject entirely to the will of the company.

> The principles decided in Simpson et al., Executors, v. The Accidental Death Insurance Company, 88 E. C. L., 257, apply to the case here, and the facts are analogous. The premium there was payable on 22d January in each year, and by one of the conditions endorsed on the policy "the premium was to be paid within 21 days from the day on which

*329

the same should first accrue or be*come due -and that, provided the same should be from time to time paid within such space of 21 days, the policy should not be void, notwithstanding the happening before the expiration of such space of 21 days of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition, it was provided "that if the premium should be unpaid for 21 days next after it should become due, the policy should be absolutely void." And it was further (fourthly) provided, "that in every case in which a new premium should become payable, the Directors should be at liberty to terminate the risk by refusing to accept such premium."

A. paid the premiums to the year 1855. On 22d January, 1856, one of the premiums, payable as in the policy mentioned, became due. February 1, 1856, he died from an accident which happened to him on January 27th preceding. It was held that there was nothing in the conditions to enable his executors to pay the premium after his death, and that if they had tendered it within the twenty-one days the company would not have been bound to accept it; that the policy was, by reason of the non-payment of the premium within the terms of the policy and conditions, absolutely void, and that the company were not estopped from denying the payment; that neither the plaintiffs (executors) nor the assured (had he been living) would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days, the fourth condition giving the Directors the option of refusing to continue it or not, at their pleasure. The principles which governed this decision had been applied in Tarleton, et al., v. Stanforth, et al., 5 T. R., 695, to a case of insurance against

loss by fire, and in Want and Gaskoin v. Blunt, et al., 12 East., 183, to one arising out of a policy of life insurance. The reasoning in the cases leave nothing for further elucidation, and are conclusive on the points made here in behalf of the respondents.

Nor can the verdict be sustained upon the presumption that the deceased was a recognized agent of the company, authorized to receive payment of premiums for others, and, therefore, to be held invested with the same right, as to himself, the exercise of which continued his policy. In the first place, the evidence contradicts the inference that he had paid the premium by charging it in his account with the company, for he proposed to send it to the General Agent, not in satis-*330

faction of *money with which he was so charged, but "to pay premium," adding, "if amount is not sufficient, will arrange it when we meet," and the endorsement on the policy (made part of the contract) expressly forbids agents from giving "receipts for the renewal of premiums," and declares that "no payment or premium is binding on the company unless the same is acknowledged by a printed receipt, signed by the President or Secretary, or Actuary of the company." As agent, therefore, he could not have given a binding renewal receipt to a third person, under his own hand, much less have renewed his own policy by a payment to himself.

However reluctant, we are obliged to say that we see no cause of action on the part of the respondents, and the motion for the nonsuit refused by the presiding Judge must prevail, and it is so accordingly ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 330

GUIGNARD v. KINSLER.

(Columbia. April Term, 1873.)

[Ferries 17.] By Act of the Legislature, passed in December, 1865, a charter for a ferry, with right of way thereto over the land of another, was granted to K., for the term of five years, and in September, 1868, the charter was renewed for the term of fourteen years: Held, That the repeated of the charter carried with it the right renewal of the charter carried with it the right of way for the extended term of fourteen years.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 41; Dec. Dig. ≎ 17.]

[Eminent Domain 🖘 3.]

Neither Section 23 of Article I of the Constitution of 1868 nor the Act of September, 1868, to declare the manner by which rights of way may be acquired, apply to a case where the right of way existed at the adoption of the Constitution Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 13; Dec. Dig. € 3.]

Before Carpenter, J., at Richland, February Term, 1873.

Action by J. S. Guignard and J. G. Guignard, plaintiffs, against William Kinsler, Edward Kinsler and Henry O. Kinsler, defendants, for an injunction to restrain the defendants from using a right of way over the plaintiffs' land.

The facts alleged in the complaint, and admitted by the answer, were as follows:

In December, 1865, J. S. Guignard, father of the plaintiffs, was the owner for life, with remainder to the plaintiffs in fee, of a farm

*331

*in Lexington County, west of the Congaree River, and bounded on the east by that river, called Still Hopes. On the 21st day of December, 1865, the Legislature passed an Act, which is recited in the opinion of the Court, by which they granted to the defendants a charter for a ferry over the Congaree River, for a term of five years, with a right of way thereto through the said farm. The ferry was established by the defendants, and they used, during the said period of five years, part of said farm as a landing place and way to their ferry. The father of the plaintiffs died on the 18th February, 1868, and on the 15th day of September, 1868, the Legislature passed another Act, whereby the defendants' charter was extended for the term of fourteen years. The defendants continued to use the landing place and way over the farm after the said term of five years had expired, and thereupon this action was brought.

The judgment of His Honor the Circuit Judge is as follows:

Carpenter, J. This cause was submitted on the complaint and answer, and was argued by counsel for the plaintiffs and defendants, on an application for a permanent injunction. About the facts there is no dispute. plaintiffs are the owners in fee of the farm "Still Hopes," and the pine lands attached thereto, having acquired title thereto as the heirs-at-law of their father, the late James Sanders Guignard, Jr., and the said plaintiffs are now in possession of the said farm and lands, and have been since the death of their father. On the 21st day of December, A. D. 1865, the General Assembly passed an Act entitled "An Act to establish certain roads, bridges and ferries." By the 7th Section, Acts 1861-1866, p. 353, it was provided, "that a ferry across the Congaree River, at the city of Columbia, is hereby established and vested in William Kinsler, Edward Kinsler and H. O. Kinsler, their heirs and assigns, for the term of five years, with the same rates of toll allowed to James S. Guignard, at his ferry, and they shall be permitted to have the right of way through the land of the said James S. Guignard, on the western bank of the river." Under this Act, the defendants ran their ferry and passed over the lands of the plaintiffs, and have continued to do so until the present time. By an Act of the General Assembly, approved September 15th, 1868, it was provided "that the charter heretofore granted to William Kinsler, Edward Kinsler and H. O. Kinsler, to estab-

*332

*lish a ferry over the Congaree River, near the city of Columbia, be, and the same is hereby, extended for the terms of fourteen years from the expiration of their said charter." On the 26th day of September, A. D. 1868, the General Assembly enacted that the road leading from the said ferry, (Kinslers',) on the western side of the Congaree River, to the State Road, be, and the same is hereby declared to be, a public highway. The facts above stated are all that have any bearing upon the case. Whatever may have been the rights of the defendants, under their charter of 1865, I am of the opinion that the Act of the 18th of September, 1868, conferred no authority upon them to use the lands of the plaintiffs for the purpose of their ferry after the expiration of their original charter, nor did the Act of the 26th day of September, 1868, for the reason that the Acts of the General Assembly, so far as they attempt to confer such rights upon the defendants, are in conflict with the Constitution of the State of South Carolina, and are therefore null and void. By the Declaration of Rights, Article 8, private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner, or a just compensation therefor. This provision is clear, unequivocal, and mandatory. The Legislature have no power to pass any law infringing upon this wise prohibition, and hence the attempt to give to the defendants the use of the plaintiffs' lands for fourteen years is simply void. The defendants have no right to use or occupy the lands in question, and a perpetual injunction must be granted. It is, therefore, ordered and adjudged that the defendants and their agents and servants, be enjoined and restrained from the further use and occupation of the lands of the plaintiffs described in the pleadings, or any part of said lands in connection with their ferry, or in any other manner or for any other purpose whatsoever. Let copies of this opinion be served upon the defendants.

The defendants appealed on the ground, inter alia, that the way over plaintiffs' land having been established by the Act of 1865, and being, therefore, an existing public way when the Constitution of 1868 was adopted, neither Section 23 of Art. I of that Constitution nor the Act of September, 1868, to declare the manner by which rights of way shall be acquired, has any application to the case.

Pope & Haskell, for appellants:

*333

*I. The State has the right to the use of the waters within her limits, and the sole right to establish ferries.—Stark v. McGowan, 1 N. & McC., 387, 392, 394.

In 1865, by the right of eminent domain, the State had the right to take private property for public uses, and to establish landings and avenues as appurtenant to the ferry.—Stark v. McGowan, (supra); Gourdin v. Davis, 1 Bail, 471: Evans' Road Law, p. 10, § 8.

II. In 1865, the Legislature could not take private property for the private use of another, and the Legislature could establish no

other than a public way.

Private ways can be only acquired: 1, by grant; 2, by necessity; 3, by prescription.—Vide Evans' Road Law, 65, 66 and 68; 3 Kent Com., 419; Turnbull y. Rivers, 3 McC., 131; Beekman v. Saratoga Railroad, 3 Page 45; Matter of Albany St., 11 Wend., 149; also 5 Page, 137; 19 Wend., 659; 4 Hill, 140.

The Legislature cannot lay out or grant a private way through the land of another. A private way lies in contract.—Evans' R. Law, 68, § 17; Lawton v. Rivers, 2 McC., 445; Com's v. Singleton, 2 N. & McC., 526; Capers v. Wilson, 3 McC., 170.

The Legislature could, in the very nature of things, grant only a public way.

Let us apply several tests:

1. Test. Ways in gross and ways appurtenant, considered.

When private, how acquired and lost.

The difference, when appurtenant to a ferry, considered and illustrated.—Evans' Road Law, p. 70; Woolrych on Ways, 2 Vol., Law Library.

2. Test. The ferry and avenues were established, not for the benefit of the Kinslers, but for the benefit of the public.

Who had the right to use and travel the road established by the Act of 1865? All citizens. It was thus public.

In the case of Prince v. Wilbern, this is one of the tests.—1 Rich., 58.

3. Test. If, under the Act of 1865, the way had been obstructed, would not an indictment lie? Yes. If so; why? Would it lie for the obstruction of a private way? Surely not; and why?

The rule can be found in the following authorities: Woolrych on Ways, 2 Vol. Law L., pp. 53 and 54; Young v. Com. of Roads, 2 N. & McC., 537; McKenzie v. Chovin, 1 McM., 222; Com's v. Taylor, 2 Bay., 282, 290.

*334

*When, therefore, the Legislature "took" the way through Guignard's land in 1865:

1. It was as an appurtenance to a ferry.

2. As such, it was taken for the use of the ferry.

3. It then became ex vi termini a public way.

4. Test. The ways taken in such cases are declared public, and are expressly recognized by the Act of 1824.—Vide 9 Stat., 544; Evans' R. Law, p. 43, § 50.

These tests show that the ways were public; and what was the precise character of these public ways is not important.

- 1. They might become highways, because they lead from a highway to a highway, and to a market town, and are used by the public generally.
- 2. They might be what are called, in some of the Acts of the Legislature, (singularly,) "private paths," as contradistinguished from "highways," yet still are public roads, and pass under the name of "thoroughfares."—Vide Evans' Road Law, 6 and 7.

It is not important which the Legislature created by the Act of 1865.

They are all public ways, and not private ways.

III. Neither the ferry nor the ways ceased at the end of five years.

The "term" ended, to be sure, but the franchise still continued in the State as sovereign, and could be re-granted to any one else.

Once established as a public way, how could the State lose her right and authority over the same?

In two ways only: 1. By a discontinuing Act. 2. By non-user for twenty years, (perhaps.)—Evans' R. Law, 44.

Neither has occurred in this case. No discontinuing Act; no non-user.

In 1865, two rights: 1. The right to "take."
2. The right to "compensate." One as effectual as the other, and either would fix both the rights of the State and the character of the way.

If the owner had been compensated for the way in 1865, where would this case be?

And if the "taking" was as effectual as the "compensating," is not the principle the same?

If every new lease of a term is a "re-taking" of the franchise, then every franchise in the State that has been vested in the State

*335

*for the last one hundred years, upon a new lease now, will have to make compensation for the right of way.

Why not?

It is not a question of time, it is a question of right—and the time has expired again and again. The right—if it be a right—matures in a day, as well as it does in a hundred years.

IV. But the Legislature of 1868 did not "take" private property for public use at all.

That Legislature found it already public property, to wit, a public way leading to a public ferry, together making the franchise.

This was, then, a franchise in the State (before the Constitution of 1868) which nothing could disturb.

But the Constitution of 1868, itself, puts the matter at rest.—Vide Art. VI, § 2.

The Legislature of 1868 found these ways already taken and dedicated to the public use, and accepted by the public.

What more? This is Carver's Case, 5 Strob., 218, citing The King v. Inh. of Leake.

V. Then, by the Act of 1868, p. 74, (the new lease,) the Legislature simply extends the term of the lease out of the general franchise (already in the State) to fourteen years.

There is no new "taking." There is no new franchise created in conflict with the Constitution of 1868.

These terms are granted, because the State cannot undertake to keep the ferry herself.

Occasionally the State has granted a perpetual franchise of a ferry, which, for the want of a better name, is sometimes called the fee, but not very accurately, perhaps,

Where, then, is the ground for a perpetual injunction at all?

VI. But more: Have not the ways, in contemplation of the Legislature, been actually and fully compensated for by the two grants to the two ferries, giving mutual ways, as will appear by the Acts.

Finally: If the lease of fourteen years, in 1868, had been a "taking" of private property for public use, (which it clearly was not.) there was really no trespass, but a case for compensation under the general Act on that subject.—Vide Act 1868, 89.

Tradewell, contra:

*336

*The subject-matter of this action is the use and occupation of lands, about the ownership of the fee in which there is no dispute. The lands are the admitted property of the Guignards, the respondents, and against their consent, since December A. D. 1865, to a certain extent have been used and appropriated by the Kinslers, the appellants, for the convenience of their ferry, for their own pecuniary benefit, without compensation.

The right of the Kinslers thus to use and appropriate for their own benefit the lands of the Guignards being denied, the question to be discussed is: On what foundation does the right claimed rest?

It is contended that the right asserted and exercised has been conferred by the public authority in the solemn form of Acts of the General Assembly, and the following Acts are referred to as bearing directly on the question, to wit: The 7th Section of the Act of 1865, entitled "An Act to establish certain roads, bridges and ferries," 13 Stat., 352, 353; the Act of the 18th day of September, A. D. 1868, special session, 14 Stat., 74; the Act of the 26th day of September, A. D. 1868, special session, 14 Stat., 118; the Act of March, A. D. 1869, 14 Stat. 214; the Act of the 22d day of September, A. D. 1868, special session, 14 Stat., 59.

The attention of the Court is called to the O. Kinsler shall not be permitted to land as follows: "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: Provided, however, That laws may be made securing to persons or corporations, and for works of internal improvements, the rights to establish depots, stations, turn outs, &c.; but a just compensation shall, in all cases, be first made to the owner.'

See the 19th Section of the 4th Article of the Constitution, which directs the election by the qualified voters of each County of three persons, as a Board of County Commissioners, and defines their jurisdiction; and also the Act of September, 1868, special session, 14 Stat., 128, passed in pursuance of the said 19th Section of the 4th Article of the Constitution.

June 16, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The great object that should be kept in view in determining a question of legal construction should be to *337

satisfy *the equities of the case and effect substantial justice so far as that can be attained through the rules and principles of law. By an Act of the General Assembly, approved December, 1865, two ferries were established across the Congaree River, one "at the site of the old Columbia Ferry," and "vested in James S. Guignard, his heirs and assigns, for the term of five years." After the rates of toll are fixed by this Act it says: "And the said James Guignard shall be allowed the right of way to his ferry through the lands of the estate of John O. Kinsler, on the eastern bank of the river where the road now passes: Provided, That the said James S. Guignard shall be required to keep and use a substantial rope for crossing his flats at the place where his present main rope is now located: And provided, also, That only one toll shall be exacted for crossing said ferry and recrossing within twenty-four hours."

Another ferry across the Congaree River was established by the same Act of the General Assembly and "vested in William Kinsler, Edward Kinsler and Henry O. Kinsler, their heirs and assigns, for the term of five years, with the same rates of toll allowed to James S. Guignard at his ferry; and they shall be permitted to have the right of way to their ferry through the lands of the said James S. Guignard, on the western bank of the river: Provided, however, That the said William Kinsler, Edward Kinsler and Henry

23d Section of the Declaration of Rights, their flats within less than one hundred feet part of the Constitution, Article I, which is of the main rope now used by the said James S. Guignard as at present located: And provided, further, That only one toll shall be exacted for crossing said ferry and recrossing within twenty-four hours."

> Here were two ferries, established by the same Act of the General Assembly, one vested in the appellants and the orner in the respondents, each, by the Act of the General Assembly, having the right of way over the other's lands. Hence, it might be very properly inferred that there was a mutual understanding between the said parties that such should be the case. It is conceded by the respondents that the General Assembly, in 1865, had the right to take private property for public use. That it had that right is fully recognized by the following cases: McGowan v. Stark, 1 N. & McC., p. 387 [9 Am. Dec. 712]; Gourdine v. Davis, 1 Bail., 471. The right of way was established through the land of the respondents, as well as that of the appellants, and that right having been once established by the General Assembly, and acquired, must

*338

remain as essential to the *ferries as long as the General Assembly shall continue them or either of them. If the doctrine contended for by respondents should prevail, then. at the expiration of the time for which the ferry was chartered, the right of way must be acquired and recognized every time the ferry shall be rechartered or the charter extended.

By an Act of the General Assembly, approved September 18, 1868, the appellants' charter was extended for the term of fourteen years from the expiration of the first charter. The appellants having enjoyed the right of way from December, 1865, having acquired that right previous to the adoption of the Constitution of 1868, neither the Constitution of 1868 nor the Act of the General Assembly of September, 1868, entitled "an Act to declare the manner by which the lands, or the right of way over the lands, of persons or corporations may be taken for the construction and use of railways and other works of internal improvements." can be applied to this case, as Section 23 of Article I of the Constitution of 1868, and the Act of Assembly made in pursuance of said Section, only apply to persons or corporations desiring the right of way where it has not already been obtained and such person or corporation not in possession,

The injunction must be dissolved and the judgment of the Court below reversed.

MOSES, C. J., and WILLARD, A. J., concurred.

4 S. C. 338

MANUFACTURING CO. v. PRICE.

(Columbia, April Term, 1873.)

[Mortgages = 277.]

A. conveyed lands to B., but, by mistake, part of the tract intended to be conveyed was omitted from the conveyance, and B. mortgaged the whole tract to A. to secure the purchase money. B. afterwards obtained a decree against A, for a conveyance to B., by the Commissioner in Equity, of the omitted part, but the convey-ance was made by the Commissioner in Equity, not to B., but to C., who claimed as assignee of B., and C. conveyed to D.: *Held*, That, as against D., the part conveyed to him was charged with the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 726, 727; Dec. Dig. ⇐⇒277.]

[Mortgages \$\infty 497.]

One who holds by title derived from the mortgagor subsequent to the mortgage, is not concluded by a decree for foreclosure to which he was not a party.

[Ed. Note.—Cited in DeSaussure v. Bollman, 7 S. C. 339: Greenwood Loan & Guarantee Ass'n v. Childs, 67 S. C. 254, 45 S. E. 167.

For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. \$\sim 497.]

[Mortgages \$\sin\$587.]

[A proceeding in foreclosure instituted against a mortgagor alone cannot overreach or affect the title of a vendee of the mortgagor, vesting intermediate the delivery of the mortgage and the commencement of the action to foreclose it.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1688; Dec. Dig. \$\simes 587.]

Before Vernon, J., at Spartanburg, Spring Term. 1870.

This was an action of trespass to try title by the South Carolina Manufacturing Company, plaintiff, against J. Perry Price, de-*339

fen*dant. The case is stated in a report made, by consent of counsel, as follows:

"Upon the trial of this case it appeared that one Abijah Phelps, in July, 1848, conveyed to one Esau Price a tract of land "whereon the said A. Phelps now lives, including the plantation and mill on Thickety Creek," "containing 464 acres, more or less," and at the same time Price, in order to secure the purchase money, executed a mortgage of the same to the grantor, describing it as "all that tract of land whereon the said A. Phelps now lives, lying on main Thickety Creek, in the State and District aforesaid, bounded by lands of F. Guthrie, James Richards, and others, containing 464 acres, more or less." In the deed the land was described by metes and bounds, while in the mortgage the description is as above stated. Some time after the execution of the conveyance, it was discovered that 100 acres, which was intended to be included in the deed, had been left out by mistake, and that 100 in an opposite direction had been included. Price, under the execution in favor of Smith;

Some time in the year 1855 Esau Price filed a bill in the Court of Equity, against Phelps, to have the mistake corrected, and to perfect his title to the 100 acres in question. Upon the hearing of the case, in June 1855, the Court directed its Commissioner-Phelps having left the country-to convey the 100 acres to Price. It further appeared that the present plaintiffs held a judgment against Price for some \$396, to satisfy which a ca. sa. was issued in October, 1855, and Price arrested. Being so arrested, Price applied for the benefit of the Prison Bounds Act, and in his schedule, among other things, was "366 acres of land, the Mill Tract-100 acres of same land left off-the deed from Phelps to defendant." On the 12th of November, 1855, Price assigned all his estate and effects mentioned in schedule to S. Bobo. Upon Mr. Bobo exhibiting to the Commissioner the said assignment, that officer, on the 22d of December, 1857, conveyed to him the 100 acres which he was directed by the decree of the Court of Equity to convey to Esau Price, and on the 13th of February, 1858, Mr. Bobo conveyed the same to the plaintiffs. Upon this title the plaintiffs brought an action of trespass to try title, against the defendant. J. Perry Price, which was tried at Fall Term, 1859, and a verdict rendered for plaintiffs; the defendant appealed, and the Appeal Court, 186, decided that the Commissioner had no right to convey to Bobo, when

*340

the decree directed him *to convey to Esau Price, and set aside the verdict. After this decision of the Appeal Court Mr. Bobo filed a petition in the Court of Equity, and procured an order to have the title for the said 100 acres made to him, and on the 22d day of August, 1861, the Commissioner made him day of , 1861. title, and on the he conveyed to plaintiffs. This constituted plaintiff's title in the present case. On the 14th day of April, 1856, Moses Webber, a surety upon the bail bond of A. Phelps, who had run away from the country, having been compelled to pay, in 1855, a large sum of money, to wit, the sum of \$494.24, to Willis Smith. a judgment creditor of Phelps, by reason of Phelps' failure to satisfy the conditions of his bond, filed a bill in equity against Willis Smith, Benjamin Price and Esau Price, to have the mortgage given by Esau Price to Phelps foreclosed, and claiming to be subrogated to the rights of the mortgagee, the mortgage, as well as the notes for the purchase money, having been assigned to Willis Smith under an attachment taken out by him against A. Phelps, and judgment already obtained upon said notes in favor of Smith. The said bill set forth, further, the fact that the said 464 acres of land had been twice sold by the Sheriff as the property of Esau that at the first sale, in December, 1855, Ben-| Court of Equity to be conveyed to Esau jamin Price became the purchaser, but refused to comply with the terms "on account of the mortgage to Phelps, and that at the second sale, on first Monday in January, 1856, it was bid off by some parties who transferred their bid to Benjamin Price, who paid the purchase money, which was applied to older executions than Smith's but junior to the mortgage." In his answer, as defendant in this bill, Esau Price sets up no claim for himself or for Mr. Bobo, one of the counsel, who files his answer, to the 100 acres which had been previously ordered by a decree of the Court to be conveyed to Esau Price, but states therein, "that the Mill Tract of land was sold to his co-defendant, Ben. Price, and that he bid it off for a sum less than its value: that he had, in fact, purchased the same land from your respondent, at the sum of eighteen hundred dollars, and refused to pay for it, on account of these claims;" meaning, as he proved on this trial, the failure to cover this one hundred acres by the Phelps deed, and upon hearing this case, the Court of Equity made the following decree, to wit:

"'On hearing the pleadings, arguments and evidence, and no objection being made thereto, it is ordered, on motion of Dawkins, *341

*solicitor for plaintiff that the defendant, Benjamin Price, pay to the plaintiff the sum of four hundred and thirty-one dollars and eighty-one cents, with interest from the 5th day of November, 1855, on or before the sixth day of December next, and on his failure to do so, that the mortgage mentioned in the pleadings be foreclosed, and the tract of land containing 464 acres, more or less, and known as the Mill Tract, being first described in the mortgage, and now owned and possessed by the said Benjamin Price, be sold by the Commissioner on the first Monday in January next thereafter, for cash, and after paying off the demands of the plaintiff, that the surplus, if any, be paid to the defendant, Benjamin Price-the plaintiff and the defendant, Benjamin Price, each to pay one-half of the whole costs of the case.

Job Johnston."

June 7th, 1856.

"Under this decree the land was sold on the first Monday in January, 1857, and was bid off by Benjamin Price, for the sum of \$700.00, who received title from T. O. P. Vernon, Commissioner, on the 5th day of Benjamin Price afterwards same month. conveyed to the defendant, J. Perry Price. Upon the various proceedings in equity, and this title, the defendant relied. The questions presented by this case, are:

"1st. Whether the 100 acres left out of the deed from Phelps to Esau Price, by mistake, and previous to the proceedings for a foreclosure of the mortgage ordered by the

Price, were sold and conveyed to Benjamin Price, under whom defendant claims title under the decree of foreclosure made by Chancellor Johnston.

"2d. Whether notice of want of title in Esau Price, and the alleged fact that leaving out the 100 acres, the remainder of the land, was sufficient to satisfy the mortgage, does not limit the defendant to the 364 acres, covered by the terms of the deed from Phelps to Esau Price.

"The Court instructed the jury that the order of the Court of Equity, for the conveyance of the 100 acres left out by mistake in the original deed from Phelps to Esau Price, enured to the benefit of the mortgagee, and those claiming under him, and that the plaintiffs were concluded by the proceedings in equity, in which Moses Webber was complainant and Esau Price, and others, defend-

*342

ants, *from disputing the title of defendant, derived from the sale made under the decree in said case. Under these instructions the jury found for the defendant."

The plaintiffs appealed and moved this Court for a new trial, the 2d and 3d grounds of appeal being as follows:

- 2. Because the presiding Judge erred in charging the jury that the 100 acres not embraced in the Phelps deed, by mistake, enured to the benefit of the mortgagee, notwithstanding there was enough land left and embraced in the mortgage to pay the balance due upon it.
- 3. Because the presiding Judge erred in charging that the plaintiffs were concluded by the decree in the Webber case from disputing the title of defendant.

[For subsequent opinion, see 6 S. C. 278.]

Bobo & Carlisle, for appellant:

Esau Price purchased of Phelps in July, 1848, taking a deed, leaving out of the purchase 100 acres by mistake. Some time thereafter Esau Price bargained the land to Ben Price for \$1,800, and then proceeded in the Court of Equity to perfect his title, and at June Term, 1855, the Court ordered the Commissioner to convey the 100 acres to Esau Price, who assigned to S. Bobo, 12th November, 1855. In December, 1855, the Sheriff levied upon Esau Price's land under Smith's execution, and Ben Price became the purchaser. At June Term, 1856, the Court of Equity ordered the mortgage to be foreclosed, containing 464 acres, more or less, known as the Mill Tract, now owned and possessed by the said B. Price. In January, 1857, the land was sold under this order and parchased by Ben Price at \$700, but to satisfy a debt of \$494.24 to Webber as surety to Phelps, to whose interest he claimed to be subrogated.

We admit that the whole land was bound

for the purchase money, and if it were neces- | refused to pay for it on that account, and vet sary that the whole tract should be sold to pay the purchase money, it was in Phelps' power to have it sold. But we say it was not, in fact, sold, nor was it necessary that it should be. It was not, in fact, sold; the Court ordered the land to be sold which at the time was owned and possessed by Ben. Price. It will be remembered that Ben Price had, in December, 1855, purchased at Sheriff's sale the Mill Tract. Esau Price had no levyable title, (indeed he had no title what-

ever) to this land at that time, for, in *November preceding he had assigned his right to a deed for it to S. Bobo, which deed was after vards made to him by order of the Court. What land, then, did Ben Price own and possess at that time? The answer is plain, that it was so much as the Sheriff had sold under his levy, and no more. This is confirmed from the amount it was bid off at (\$700) when the purchaser had himself a short time before purchased the whole tract at \$1,800, and refused to perfect the purchase because he knew that Esau had no title to this 100 acres. We therefore say that this 100 acres not only was not sold either by the Sheriff or Commissioner in Equity, but that Ben Price, the purchaser, knew it. Price, therefore, purchased at both sales with a full knowledge of all the facts. A party purchasing with a full knowledge of the legal or equitable title of another will not be to protect himself against claims, but his title will be postponed to theirs.-1 Story Eq., 383. The question of title to this 100 acres was at the time settled in the Court of Equity, and a case was pending in that Court to perfect the title in S. Bobo. All persons are presumed to know what is going on in the Courts, and therefore actual notice is not necessary, (1 Story Eq., 393 and note 2,) though in this case Ben Price had actual notice.

Again the mortgagee had abundance of means to secure the purchase money in the 364 acres, and when a party has a lien on two funds or estates to secure a debt, and another has a junior lien on one of them, he is bound to seek satisfaction on the unincumbered estate in the first instance.-1 Story Eq., 588-9, and notes.

The question whether the mortgage covered more land than the deed is one that should have been submitted to the jury. On the former trial it was submitted to a jury, who found a verdict for the plaintiff. There is no doubt but that both were intended to cover the same land, and it would be passing strange if Price would give Phelps a mortgage of Phelps' own land—he had no right to mortgage it, nor had the Sheriff any right to sell it as Esau Price's land. Ben Price, under whom defendant holds in all of his purchases, knew that Esau Price had no title,

he is allowed to purchase and speculate on Esau Price and his creditors, by first holding out that Esau has no title and then get it for a song.

Evans & Bomar, contra:

*344

*The defendant relies upon the following propositions and authorities:

- 1. That the mortgage, v its terms, covered the whole 464 acres which the deed was intended to convey, and need d no correction. 1 Rich., 139.
- 2. That the decree in equity, made June Term, 1855, ordering the Commissioner to make title to Esau Price for the 100 acres left out of the deed from Phelps, enured to the benefit of the mortgagee, and had the effect of investing Price with the title to said 100 acres, at date of the deed, the Court simply doing for the parties to the deed what they intended to do, and thought had been done when it was executed.-Thompson v. Peake, 7 Rich., 353; Wiley, Banks & Co. v. Lawson, 7 Rich., 152.
- 3. That the fact of the mortgage having been recorded before the assignment to Bobo, and that the tract of 464 acres covered by it was twice sold soon after said assignment by the Sheriff as the property of Esau Price, without objection or notice from said Price or Bobo of their claim to the 100 acres, gave to Benjamin Price, who bought the equity of redemption, and complied with the terms of the last sale, a good title to the said 464 acres, as against Esau Price or any one claiming under him.—Haily v. Curry, 3 Strob., 100; Cox v. Buck, 3 Strob., 367.
- 4. That the proceedings by bill in equity for foreclosure of said mortgage, having been afterwards instituted, bringing into Court the said Esau Price, and all other parties who had any interest, or supposed interest, in the mortgaged premises as defendants, and of which proceedings the said Bobo, as counsel and assignee of Esau Price, had the fullest knowledge, and a decree having been made on the 7th of June, 1856, by consent of defendants, for the sale of the mortgaged premises, the plaintiffs are estopped from disputing the title of the defendant in the present action, who derives his title from said sale.—Bail. Eq., 284; Henderson v. Kenner, 1 Rich., 478; 4 Kent, 6th Ed., 98; Kerr on Fraud and Mistake, 95, 127.

June 19, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The action was trespass to try titles. The only questions presented by the record arise upon two propositions of law submitted to the jury. The matters set forth in the 1st, 4th, 5th and 6th grounds of appeal do not appear to have been the subject *345

of *any proposition submitted to the jury. nor of any request to charge, and consequently they cannot be considered at the present time. The 2d and 3d grounds of appeal will be considered as embracing exceptions duly taken

The 2d ground is based upon an instruction to the jury "that the order of the Court of Equity for the conveyance of the 100 acres, left out by mistake, in the original deed from Phelps to Esau Price, enured to the benefit of the mortgagee, and those claiming under him." E. Price purchased from Phelps and gave back a mortgage for the purchase money. Phelps' deed, by mistake, omitted part of the land intended to be conveyed, but the land was described in Price's Subsequently the mistake was corrected by proceedings in equity, which resulted in a decree directing the Commissioner to convey to E. Price. That conveyance was never actually made, but, in consequence of the intervention of a creditor of Price, the land was actually conveyed by the Commissioner to S. Bobo, the assignee of E. Price, and by him conveyed to the plaintiffs.

Had the Commissioner conveyed to Price, as the decree in its original form directed, Price would have been in the same position, as it regards the mortgagee, as if he had acquired the land by deed from Phelps subsequent to the execution of the mortgage, with recitals in the deed showing that it was intended as a correction of a mistake in the original deed. He would, in that case, have held the land subject to the mortgage, under the estoppel, resulting from his attempt to embrace it within the lands mortgaged. The plaintiffs' title rests upon the legal rights of Price's creditor, which cannot exceed those of Price himself, and accordingly the lands in the hands of the plaintiffs were charged with the mortgage precisely as they would have been had they passed into the actual possession of Price. The proposition charged as above stated does not differ substantially from that just presented, and is free from error.

The third ground of appeal presents the instruction "that the plaintiffs were concluded by the proceedings in equity in which Webber was complainant, and E. Price and other defendants, from disputing the title of defendant derived from the sale under the decree in that case." This charge is to be understood as holding that the proceedings in equity so bound the plaintiffs that they could not aver against it. In this respect it is erroneous. The decree referred to could not directly bind the plaintiffs, because

neither *they nor their grantors were made neither *they nor their grantors were made in the Circuit where the mortgaged premises parties to it. To whatever extent they may are situated, a motion in the cause, to set aside

have been bound by the mortgage, their rights could not be directly concluded by the proceedings to foreclose the mortgage unless they were parties to it, or unless their title, or that of their immediate grantor, was derived subsequently to the decree from one bound by it. This was not the case, for the assignment to S. Bobo, under which the rights of the plaintiffs, as against E. Price, are to be tested, was anterior to the filing of the bill by Webber. It was, therefore, necessary that S. Bobo should have been made a party to the bill in order to give the decree direct binding effect upon the plaintiffs.

As the case stands before us, we are compelled to infer that the verdict for the defendant stood wholly on the proposition embraced in this exception. To hold that the plaintiffs were directly bound by the proceedings in foreclosure was to conclude them from disputing it as stated by the Court, and would entitle the defendant to his verdict, irrespective of any other question in the case. The question of title, so far as it related to the facts, was, in effect, withdrawn from the jury by the instruction of the Court.

A new trial must be granted.

MOSES, C. J., and WRIGHT, A. J., concurred.

·4 S. C. *347

*THOMAS v. RAYMOND.

(Columbia. April Term, 1873.)

[Mortgages \$\sim 496.]

I nder a bill in equity for foreclosure an order of reference to ascertain the amount of the mortgage debt was made in July, 1866, by Chancellor J. An appeal was taken, and, in December, 1867, the order was affirmed by the Court of Errors. In January, 1868, a final order for sale of the mortgaged premises was made by Chancellor C., and in May, 1868, the Gen-eral commanding the military district made a eral commanding the military district made a special military order, which—reciting that Chancellor J. had made an order in the case for sale of certain premises in violation, &c.—set aside, vacated, and annulled said order: Held. That the military order applied to the order made by Chancellor J. alone, and that the order for sale made by Chancellor C. remained with the order deviation. unaffected by it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1457; Dec. Dig. \$\infty\$ 496.]

[Army and Navy 3.]
A Court of Equity has no jurisdiction to correct, on the ground of mistake, the order of a military commandant exercising supreme authority.

[Ed. Note.—Cited in Shand v. Gage, 9 S. C. 190

For other cases, see Army and Navy, Cent. Dig. § 6; Dec. Dig. \$3.]

[Mortgages \$\infty 496.]

Where an action for foreclosure is pending

161

a decree therein, can be made only in the Circuit where the action is pending.

[Ed. Note,—Cited in Bank of Manning v. Mellett, 44 S. C. 386, 22 S. E. 444.

For other cases, see Mortgages, Cent. Dig. §§ 1457–1468; Dec. Dig. ⇐⇒496.]

[This case is also cited in Warren v. Raymond, 17 S. C. 185, as to facts.]

Before Orr, J., at Greenville, September, 1872.

This was a bill in equity for foreclosure, filed by William M. Thomas, plaintiff, against Mary Raymond, defendant.

The following statement of facts and dates, in addition to those stated in the opinion of this Court, seems to include everything necessary to a full understanding of the points decided by the Court. The military order, No. 10, mentioned in the special military order dated May 23d, 1868, recited in the opinion of this Court, was issued on April 10th, 1867, after the order of reference of Chancellor Johnson, and before the final order for sale of Chancellor Carroll, both of which are copied in the opinion of the Court. The decree of the Court of Errors affirming the order of Chancellor Johnson was made in December, 1867.—See Thomas v. Raymond, [15 Rich., 84]. On December 4th, 1868, the mortgaged premises were sold by the Commissioner, under the decree of Chancellor Car-The sale did not realize a sum sufficient to satisfy the mortgage debt, and for the balance a writ of fi. fa. was issued. This writ was sent to Charleston (which is in the First Judicial Circuit of the State-Greenville being in the Eighth,) to be enforced, and thereupon the petition for an injunction or to set aside the decrees mentioned in the opinion of this Court was filed in Charleston by the defendant. Neither the contents of the petition, nor the proceedings under it before Judge Carpenter, Judge of the First Judicial Circuit, are stated in the papers furnished the Reporter.

*348

*The case came before His Honor Judge Orr, on the report of the Commissioner on sales. His Honor confirmed the report, and ordered that the purchaser have the writ of assistance to obtain the possession of the premises; that the injunction granted by Judge Carpenter be dissolved, and that the plaintiff have judgment for the balance of the debt after deducting the proceeds to the sale.

Both parties appealed. The plaintiff's grounds of appeal it is unnecessary to state. The defendant's are substantially as follows:

- 1. That the decree for sale of the mort-gaged premises was annulled by the military order of May 23d, 1868.
- 2. That the rights of the parties were finally determined by the order made by Judge Carpenter.

Earle & Blythe, for plaintiff. Campbell & Seabrook, Birnie, contra.

June 19, 1873. The opinion of the Court was delivered by

WILLARD, A. J. Both parties, plaintiff and defendant, are appellants. There are many intricacies presented by the case, arising from the informality of the proceedings of both parties in the Court below. It will not be necessary to solve all the questions arising out of these informalities. As they do not affect the real questions at issue between the parties, and as they sprung out of peculiar and exceptional complications between the military government of 1867 and the civil authorities, and out of the constitutional changes of the Judiciary of the State made in 1868, their solution will be without general interest.

In July, 1866, Chancellor Johnson made a decretal order in equity, upon a bill to foreclose a mortgage, filed by W. M. Thomas, as mortgagee, against Mary Raymond, as mortgagor, with a view to ascertaining the amount due on the sealed note, dated August 25, 1863, secured by the mortgage. The order runs as follows: "Ordered and decreed, that it be referred to the Commissioner to ascertain the amount due on the sealed note, reduced to two thousand five hundred dollars, and that all payments of interest in Confederate money be reduced in the same proportion, and that the parties be at liberty, at the foot of this decree, to take such orders as may be necessary to carry the same into

*349

execution by foreclosing *the mortgage or otherwise." The effect of this decree was to reduce the nominal amount of the sealed note to conform to some idea of the relative value of Confederate currency and legal money in the mind of the Chancellor, but not disclosed by his decree. From this decree the plaintiff appealed to the Court of Appeals. The appeal was dismissed by the Court of Errors, to which Court it was referred, and the order appealed from affirmed. It does not appear that at this stage of the case the defendant, Mary Raymond, objected to the decree, but, on the contrary, it may be assumed that she demanded and obtained its affirmance by the appellate Court. Subsequent to the affirmance of this decretal order, the amount due upon the mortgage was ascertained by a report of the Commissioner, confirmed by a decree of Chancellor Carroll. The decree of Chancellor Carroll was final and complete, as a decree of foreclosure, and bears date January 22d, 1868. It adjudges the amount due on the note and mortgage, orders the sale of the mortgaged premises, declares that such sale shall bar the equity of redemption, directs the mode of distributing the proceeds of the sale, and awards execution for any deficiency that may exist on the contracts of parties is inapplicable, for such sale.

It does not appear that any appeal was taken from this decree, or any steps taken to vacate or modify it. This decree is, in form, a final decree, and must be regarded as final, as to the rights of the parties, unless it is made to appear that it became nugatory under the subsequent orders of the military commandant for the time being. This is the important question in the case, decisive of all the matters presented by the present appeals.

It is alleged that the decree of Ch. Carroll became nugatory and void under the order of the military commandant, dated May 23d, 1868, which declares as follows: "It appearing to the satisfaction of the General commanding that a decree or decretal order has been made in equity by the Hon. William D. Johnson, one of the Chancellors of the State of South Carolina, in the case of William M. Thomas v. Mary Raymond, whereby the sale of certain premises was ordered in violation of the provisions of Paragraph 1, General Orders, No. 164, (1867,) modifying General Orders, No. 10, (1867,) it is hereby ordered that said decree or decretal order be set aside, vacated and annulled, and that all proceedings in said suit be staid until further orders."

Unless the decree of Ch. Carroll can be found included within the terms of this order, it will not be necessary to consider the *350

*delicate and intricate questions growing out of the relations between the military and civil authorities of the State at that time.

Ch. Carroll's decree is not to be found in the express terms of description contained in the order. Can we, then, put it there upon principles of construction?

Ch. Johnson's decree substantially answers the description of that which the order was intended to operate upon.

Although that decree did not, in terms, order a sale of the mortgaged property, yet the concluding clause may be regarded as looking to the sale of the mortgaged premises, for that was the only mode of proceeding upon the decree, under the state of the case, so that no case of misdescription is presented. In order to draw the decree of Ch. Carroll within the terms of the order, it is necessary, either that this Court should undertake to correct the order, on the idea of a mistake, or that it be made to appear that the nullity of the decree of Ch. Johnson would, of its own force, render void that of Ch. Carroll.

We know of no precedent or principle of law or equity that would enable us to correct, on the principles of a mistake, the orders of a military commandant exercising supreme authority. The principle on which the Courts of Equity correct mistakes in proceedings before Judge Orr. The objec-

it proceeds upon the idea that, under some circumstances, the Court is the authorized exponent of the mind of the contracting parties: but such a relation the Court cannot sustain to a military commandant clothed with supreme authority; he is the only exponent of his own mind. The correction of a mistake in the contracts of individuals proceeds on the general or particular equity of the transaction, The military order in question cannot be regarded as in the nature of remedial process between parties litigant, for it sets forth, as the ground moving it, a wrong to military authority as such, namely, disobedience of a military order, and it does not profess to operate as a means of redressing the wrongs or enforcing the rights of the parties affected by its provisions. It must be regarded as purely penal or punitive in its nature. Such a proceeding cannot originate an equity capable of recognition and enforcement in Courts of Equity, as the basis of either a correction or reformation of the order. Nor does it appear that the parties themselves, in their mutual dealings, have acted upon the order, by way of conforming their relative rights to it, so as to make it, virtually, the law of their case by *351

mutual contract *or consent. It can have no other force before us than such as was originally imparted to it by the authority of the military commandant, and, as such, it cannot be regarded as acting directly on the decree of Ch. Carroll. Did it, then, act indirectly, reaching that decree through its direct action on that of Ch. Johnson?

At the time this military order was made the parties were already bound by Chancellor Carroll's final decree, pronounced while Chancellor Johnson's decretal order was in full force, standing as affirmed by the Court of Errors. What has occurred since to destroy this binding force? Had the final decree been made after the military order had assumed to nullify the decree of Chancellor Johnson, a question might have arisen on an appeal from the final decree, or on other proceedings in the Courts, or before the military authority, looking to its vacation as a nullity, whether it could be sustained independent of the validity of Chancellor Johnson's decretal order. No such question is presented in the present case. It does not appear that any proceedings were taken to annul the final decree, and, therefore, the parties are precluded from saying that the final decree is not conformable to and has not adequate support from the antecedent proceedings in the case. The validity of Chancellor Johnson's order is now in no sense the test of the validity of the final decree. The parties are bound by it on the forensic principle of acquiescence.

No objection was taken to the form of the

tions urged against his order go to the merits. The first ground of appeal is not well taken, for the reasons already shown.

The second ground of appeal takes the position that the rights of the parties had, previously to the order of Judge Orr, been finally adjudicated in the proceedings before the Circuit Court of the First Circuit. The order of the Circuit Court of the First Circuit cannot be regarded in any other light than as a stay of proceedings on the execution. 'This was the whole scope of the order of May 14th, 1869, and the memorandum on the record, of the nature of the final decision on the motion does not indicate that its character underwent any change. It is true that the words "perpetual injunction," employed in the order made, would seem to indicate an intention beyond that of a mere stay of proceedings pendente lite, but those words must be construed by the nature of the proceeding and its relation to the general proceedings in the cause.

*352

*It cannot be regarded as a new and independent suit, having for its object a perpetual injunction, for in that case it should have been commenced by bill and not by petition. It must be assumed, on the contrary, to be a collateral application or motion in the original cause. That it was intended as such is apparent from the prayer of the petition, which seeks both to set aside the original decrees and to reinstate the original suit. Such an application could be properly made only in the original cause, and is not the proper subject of a new bill. The original cause was pending in the eighth Circuit where the mortgaged premises were situated, and in that Circuit alone a motion to set aside the decrees could properly be made. At most, the Circuit Judge of the First Circuit should have confined his interference with the case to a temporary stay of proceedings, to enable the party to make his motion in the Eighth Circuit. The purport of the action of that Court, as far as that action appears on the record before us, is in conformity with this view. It nowhere appears that the Court made any order declaring the decrees or other proceedings void.

The question of the validity of the decrees not having been conclusively adjudicated, the matter came properly before Judge Orr, and he was warranted in making the order appealed from.

The appeals must be dismissed, the order of Judge Orr affirmed, and the cause must be remanded to the Circuit Court for further proceedings,

MOSES, C. J., and WRIGHT, A. J., concurred.

[Affirmed, Raymond v. Thomas, 91 U. S. 712, 23 L. Ed. 434.]

4 S. C. *353

*WALLER V. CRESSWELL

(Columbia. April Term, 1873.)

[Guardian and Ward =144.]

Has the Probate Court jurisdiction to compel a guardian to account for the estate of his ward where the proceedings are commenced by the latter after arriving at age? Quare.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 477-481, 488; Dec. Dig. \$\simeq 144.]

[Appeal and Error \$\sim 185.]

In such a case, where no objection for the want of jurisdiction was interposed by the guardian, the Supreme Court did not feel bound to interpose it, of its own motion, on the hearing of an appeal by the ward to that Court.

[Ed. Note.—Cited in Davenport v. Caldwell, 10 S. C. 348; Railroad Com'rs v. R. Co., 22 S. C. 232.

For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. ©=185.]

[Guardian and Ward \$\sim 53.]

A guardian appointed in this State who received during the war, from an administrator in Alabama, Confederate currency on account of his ward's share of his father's estate in that State, is liable to account only for the value of the currency received in lawful money.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 232-241; Dec. Dig. 53]

[Guardian and Ward \$\sim 53.]

An investment by a guardian of his ward's Confederate currency in Confederate bonds, bearing interest, was no breach of trust.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 239; Dec. Dig. 🗫 53.]

[Guardian and Ward \$\sim 53.]

If a guardian is liable for investing his ward's Confederate currency in Confederate bonds, he is only liable for the value, in lawful money, of the currency invested.

[Ed. Note.—Cited in Koon v. Munro, 11 S. C. 153; Crane, Boylston & Co. v. Moses, 13 S. C. 582.

For other cases, see Guardian and Ward, Cent. Dig. § 239; Dec. Dig. ⋒⇒53.]

Before Orr, J., at Abbeville, October Term, 1870.

The proceedings in this case were commenced by a petition for account, filed on the 8th day of June, 1869, in the Court of Probate of Abbeville County, by Cadmus G. Waller, petitioner, against James Cresswell, C. W. Sproull and William N. Blake, defendants.

In May, 1862, Cresswell was appointed by the Court of Equity for Abbeville District, guardian of the petitioner, and gave bond, Sproull and Blake being his sureties.

The father of the petitioner was, in his lifetime, a citizen of South Carolina. He died in August, 1859, leaving a considerable estate in Alabama, which his administrators in that State sold the same year. The sales were on credit, and bonds with sureties taken for the purchase money.

from the administrators in Alabama, on account of his ward's share of the estate, several sums in Confederate currency, amounting in the aggregate to \$4,851.68, and invested \$2,000 thereof in seven per cent. notes of the Confederate States. On the 28th day of February, 1864, he received from the same administrators another sum of \$4,304, also in Confederate currency, and on March 28th of the same year he invested \$3,000 in a four per cent, certificate of the Confederate States.

The Judge of Probate decided that Cresswell acted in good faith, as well in receiving the Confederate currency as in making the investment for his ward. He accordingly allowed him credit for the sums invested, and after allowing further credits for payments

*354

and *commissions, found a balance due by him, on 1st January, 1864, of \$588.49, which, reduced to its value in national currency, amounted to \$42.34, for which sum, with interest from 1st January, 1864, he gave a decree against defendants.

The petitioner appealed to the Circuit Court on grounds substantially the same as those hereinafter mentioned as taken on his appeal to this Court, except that by one ground he complained of the allowance of the investment of \$3,000.

By order of the Circuit Court certain questions were submitted as issues to a jury, who found, in reply thereto, that the estate of the petitioner was not called in by the defendant, Cresswell, and that the investments were made in good faith, and with the funds of the ward.

His Honor the presiding Judge sustained the decree of the Probate Court, except as to the investment of \$3,000. That investment he held to be unlawful, and he gave a decree for the petitioner for \$260.87, the value, in lawful money, of the \$3,000 with interest thereon from the 28th March, 1864, and also for the sum decreed by the Probate Court, and for costs.

The petitioner appealed to this Court on the grounds:

- 1. Because the estate of the appellant, consisting of good and safe securities, bearing interest at the rate of eight per centum per annum in lawful and sound currency in the State of Alabama, having been unnecessarily called in by his guardian, James Cresswell, one of the respondents, and received by him in the unlawful and depreciated Treasury notes of the Confederate States, was a breach of trust, and the said James Cresswell should have been charged in sound and lawful currency with the sum of money so received by him for his ward, the appellant.
- 2. Because the investment of two thousand dollars, alleged to have been made by the said

In the years 1862-3 Cresswell received lant, in seven per cent. bonds of the Confederate States, was a breach of trust, and should have been disallowed in stating the account of the said James Cresswell, as guardian of the appellant.

3. Because, if it were not a breach of trust for the respondent, James Cresswell, to receive his ward's estate in the depreciated Treasury notes of the Confederate States, yet the receipt on the 26th of February, 1864. of four thousand three hundred and four dollars, or other sums, only one month be-*355

fore the Act of Congress of the *Confederate States requiring the Treasury notes of that government, on the first of April, 1864, to be funded in four per cent. bonds, or to be reduced in value one-third, was to go into operation, was a breach of trust by the said guardian, and should have been so held, and the guardian charged with that sum in lawful and good money.

4. Because the investment of three thousand dollars by the guardian, on the 28th of March, 1864, having been dissallowed, the guardian should have been charged with that sum in lawful and sound money, instead of being charged with the value in sound and good money of three thousand dollars of Confederate Treasury notes.

5. Because the amount expended by the guardian in the depreciated currency of the Confederate States was allowed in his accounts, without any abatement or reduction.

It appeared by the pleadings and the evidence that the petitioner was of full age when the petition was filed, but no objection to the jurisdiction of the Probate Court was made by the defendants on that ground at any stage of the proceedings.

Burt, for appellant.

Perrin & Cothran, contra.

The Court ordered the following question to be argued: "Can a ward who has attained the age of twenty-one years maintain, in the Probate Court, an action against his guardian for an account of his guardianship?" And after hearing argument upon this question and the other points involved in the case,

The opinion of the Court was delivered by

MOSES, C. J. We do not propose in this case to give any construction to the words, in the twentieth Section of the fourth Article of the State Constitution, "in business appertaining to minors," which might, on the one hand, limit the jurisdiction of the said Probate Court to matters cognizable by it only while the party is under age, or, on the other, to extend it to rights and obligations arising during his minority, and sought to be enforced in his favor after he had attained his majority. Although the proceeding here was commenced by the appel-James Cresswell for his ward, the appel- lant when he was sui juris, no exception was made to it on that ground, either in the made before it. The final judgment of the
*356 Circuit or Supreme Court is substituted as

Probate *Court where it originated, the Circuit Court, to which it was taken on appeal, nor in this Court, where it thence came. The objection, for the first time, was intimated by the Court here, and the counsel for the respondents, so far from availing himself of any advantage to be derived from it, did not desire its interposition. While we have no hesitation in saying that where there appears to be a clear want of jurisdiction, the Court is not prevented from so declaring, because the exception has not been made by the party against whom its exercise is to operate, but where it is doubtful, and the exception is not submitted until a long protracted litigation is about drawing to a close, the Court, as was said in Wilson, et al., v. Cheshire, 1 McC. Ch., 242, "will not be astute to discover such an objection at the very moment when the rights of the parties are about to be fully determined on and put at rest forever." To the same effect said Chancellor Kent, in Underhill v. Van Cortland, 2 Johns. Ch., 369, referring to the opinion of the Court of Errors, in Ludlow v. Simond, 2 Caine's Cases in Error, 40, 56.

When a Court takes cognizance of cases in which the very nature of its organization prevents it from entertaining the issues made between the parties, and its means of administration prevent an enforcement of any judgment it may therein pronounce, the objection to its jurisdiction may be made at any time; but where, having jurisdiction over the general subject, limited only by some qualification, as, possibly, here, the age of the party complaining, in the language of Chancellor Harper in Miller v. Furse, Bail. Eq., 191, "there can be no hardship in requiring the objection to be made, in the first instance, before the delay and expense of preparing the case for trial."

There is another consideration which should influence the Court to entertain the appeal in the case before it, without regard to its intimation as to the want of jurisdiction by the Probate Court. The motion here is to modify and reform the judgment of the Circuit Court, which, it is conceded, (notwithstanding what may have been the concurrent authority of the Probate Court.) had original jurisdiction over the parties and the subject-matter. The sixty-fifth Section of the Code, Gen. Stat., p. 557, provides, "that the final decision and judgment in cases appealed shall be certified to the Probate Court by the Circuit Court, or Supreme Court, as the case may be, and the same proceedings shall be had in the Probate Court as though such decision had been made in such Court." It *357

only *remains for it to carry out such final judgment without any further action, determining in any way any question already

made before it. The final judgment of the Circuit or Supreme Court is substituted as that of the Probate Court, and must be accordingly enforced.

In the case before us the guardian cannot be treated as a trustee who has caused loss to his cestui que trust, by calling in, without adequate reason, good and safe obligations, and accepting for their payment a depreciated currency. The jury, by their verdict on the issues submitted, has found that the estate of the appellant was not called in by the respondent, his guardian, and therefore the Confederate Treasury notes are only to be considered as received by him as a payment on account of the interest of the ward, as a distributee of his deceased father.

The administrators of the father represented his estate. They held their letters under the authority and by virtue of the laws of Alabama, and the respondent, as guardian, had no direct control or supervision over it. The bonds which were taken on the sale were not secured by any mortgage of real estate, and the administrators accepted Confederate money for their payment. The cases, therefore, in which we have held that a trustee is responsible, if he received such currency when the debt was secured by a lien of that character, have no application. Nor does the doctrine which this Court has maintained, making him responsible if he exchanges a security for one which is inferior in value, or invests in direct opposition to the terms of the trust, affect the case of the guardian here. He was bound either to receive the portion of the ward's estate tendered him as the only prevailing circulating medium of the country, or, by declining, leave the administrators to be pursued by the ward in the Courts of the State in which they resided. His appointment as guardian in this State conferred on him no right to bring the administrators to account for the interest of the appellant in the estate which they represented. He had no alternative; he was without remedy by which to make the obligors of the bonds liable. They had satisfied them by payment to the administrators in a medium which, by their consent, had discharged them. No evidence was offered as to the character of the administration bond, or the solvency of the principal and his sureties. They were all in another jurisdiction. Under these circumstances, is the guardian to be held accountable for receiving from the *358

ad*ministrators, all being citizens of the same de facto government, the currency which they had accepted in discharge of the bonds, and which was the only one prevailing, both in Alabama and this State? It had some value; it not only afforded the means by which the ordinary articles necessary for support could be acquired, but it was a medium by which commodities could be exchanged, and even

property bought, although at highly augment- ian to account for the currency which, in ed prices. A civil war was raging, fierce and devastating, when and how terminating human foresight could with no approach to certainty determine. Even if successful to the Confederacy which was waging it, years of deprivation, toil and industry must probably have been endured to repair the broken fortunes of its people. Can we, then, say that the "act in question was an incautious and imprudent one?"

The receipt of the money at the time referred to in the third ground of appeal depends upon the same principle and views which have been expressed in regard to the acceptance of Confederate Treasury notes from the administrators of the estate of the father. If it was not a breach of trust on the part of the guardian to receive such notes on account of the share of the ward in the hands of the administrators, can it be made so because he received this particular sum when he had the opportunity of investing it in an interest-bearing bond of the same Government which had issued the non-bearing interest notes? And this applies, too, to so much of the appeal as seeks to hold the guardian liable because of his investment in such securities. Was loss more likely to follow from the conversion of the notes into bonds of the Government which had issued both? If not, the act of the guardian did not reduce the funds of the ward to a worse condition than they were in when he held them in the shape of Confederate Treasury notes. The good faith of the guardian is established by the finding of the jury, and as the transaction was in no way calculated to diminish the value of the funds of the ward in his hands, it does not constitute, in itself, such a breach of trust as should render him liable for the loss.

The fourth ground of appeal insists that the Circuit Court, holding the investment of the \$3,000 by a deposit with the agent of the Treasury of the Confederate States inoperative, should have disallowed it entirely, instead of allowing it to stand as a charge against the ward to the extent of its value in national currency. This strikes us as a misconception of the principle in Head et al. v. *359

Tal*ley, Administrator, (Sup. Ct. U. S., 3 American L. Times, 155 [Fed. Cas. No. 6,-293]), which is brought into requisition to sustain it. There the Court decided "that while it is true that the investment of trust funds in a loan sanctioned by the proper Confederate Courts was not an imprudent act, it must be held to be an investment of such a nature that it cannot, under any circumstances, be regarded by a Court of the United States as excusing an account." To give to the authority its fullest scope, no more can be asked than to require the guardthe language of Chief Justice Chase, who delivered the opinion of the Court, "was an actual advance of money to the Confederacy itself-there was an investment of trust funds entirely voluntary on the part of the administrator in a loan to the Confederacy, to aid in its efforts to dismember the Union and overthrow the National Government." guardian cannot be responsible for more than he so advanced, for the extent of his aid, through the act, must be measured by the value of the consideration for which he acquired the bond. If the investment is void in itself, all that the party, for whose use it was intended, can claim, is the amount which the guardian paid for it, and this is the sum which must be refunded. To give him the whole amount of the bond in national currency would, in fact, make the trustee liable for the receipt of the Confederate Treasury notes, against the opinion of the Court that he committed no breach of trust in accepting them.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *360

*PICKENS v. DWIGHT.

(Columbia. April Term, 1873.)

[Equity \in 396.]
In April, 1863, a Master in Equity received payment, in Confederate currency, of a bond, secured by mortgage of real estate, which, in June, 1861, he had taken under a decree of the Court, and which he held for the use of a party to the cause in which it was taken: *Held*, That the Master was not liable as for a breach of

[Ed. Note.—Cited in Blackwell v. Tucker, 7 S. C. 400; State v. Moseley, 10 S. C. 5; Koon v. Munro, 11 S. C. 154.

For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ⊗⇒396.]

The conclusion reached by the Court in Mc-Pherson v. Lynah and Gray, 14 Rich. Eq., 121, approved, but not the reasoning of the Court.

[Equity \$\sim 396.]

The measure of a Master's liability for the funds of suitors in his custody is not that of a technical trustee. He is the financial agent of the Court, and the extent of his liability must be determined by the practice and course of the Court in similar cases.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ≎⇒396.]

Before Graham, J., at Charleston, June Term, 1872.

This was a bill in equity, filed in September, 1866, by Thomas J. Pickens and wife against Isaac M. Dwight, James Tupper and others, and revived in 1869 against the executors of Mr. Tupper, who had died in the

meantime. The facts of the case are stated fore, not now before the Court, nor has the in the decree of the Circuit Judge, which is as follows:

Graham, J. The facts in this case are fully set forth in the pleadings, from which it appears that the defendant, Isaac M. Dwight, in September, 1858, contracted to purchase a plantation in St. Paul's Parish, Colleton District, to an undivided moiety, of which the plaintiffs, Pickens and wife, were entitled, and the defendants, Mrs. Perry and her sons, J. Allen Miles and Jeremiah Miles, to the other moiety, for the sum of \$5,000, and made a partial payment on account, and entered into possession; but finding legal difficulties in making sufficient titles, he filed a bill in the Court of Equity for Charleston District against the plaintiffs and their cotenants of the land to enforce the agreement and perfect the title. The bill was filed on the 31st of October, 1860, and, all parties having answered, a decree was made in the cause on the 22d day of May, 1861, directing Mr. Tupper, then one of the Masters of the Court, to convey the said plantation to Mr. Dwight, in fee simple, in accordance with the contract, allowing him credit for the amounts already paid by him on account, upon his executing his bonds for the balance of the purchase money. The decree further directed that, after payment of taxes and the costs of suit, one-half of the residue of the proceeds of sale, including therein \$1,000 already paid to him by Mr. Dwight, should be paid to Thomas R. Waring, trustee of Mrs. Perry, and to her two sons, J. Allen and J. *361

J. Miles, to be equally *divided between them, and the other moiety, including \$500 already paid by Mr. Dwight to Thomas J. Pickens, should be paid to John M. Pickens, to be held by him upon the uses and trusts set forth in the answer of Mrs. Pickens, provided he should first enter into bonds to said Master, with approved sureties in double the amount paid to him, for the faithful discharge of his duties as trustee.

On the 4th June, 1861, Mr. Dwight, at the request of the parties, and for their accommodation, paid \$500 more of the purchase money in cash, and executed to the Master four (4) bonds, secured by a mortgage of the plantation, conveyed to him, for the balance of the purchase money, \$3,000. Three of these bonds were for \$500 each, and were assigned by the Master to T. R. Waring, trustee of Mrs. Perry and the two Miles,' respectively, on the 7th of February, 1862.

It was admitted at the hearing that, subsequently to the filing of the original bill in this case, these three bonds were for the proceeds of sale of the same plantation which was sold in 1867 under foreclosure of a second mortgage given by Mr. Dwight to Street. The original assignees of these bonds, parties defendant to the original bill, were, there- to receive, the obligee and the mortgagee;

purchaser at said sale, under foreclosure of the said mortgage, been made a party to this suit. The plaintiffs, Pickens and wife, were not made parties to the proceedings for foreclosure of the second mortgage, because the original mortgage of Dwight to the Master had been satisfied, as to their interest therein, under the circumstances now to be stated:

John M. Pickens never qualified as trustee of his mother, Mrs. Pickens, by giving security to the Master, and never applied to the Master for an assignment of the fourth bond of Dwight to the Master for \$1,500, being Mrs. Pickens' share of the purchase money; and the said bond, therefore, remained in the hands of the Master, the obligee, unassigned, until the 29th April, 1863. At that date, the bond being past due, Mr. Dwight paid to the Master, Mr. Tupper, \$1,-710.51, being the amount of principal and interest then due on said bond, in Confederate States Treasury notes, and the bond was delivered up to him, and a satisfaction pro tanto entered on the mortgage by the Master. Of this payment it appears the complainants had no notice until after the 26th of April, 1866, the date of Mr. Dwight's letter to Thomas J. Pickens. The sum of \$1,710.51,

*362

so received by *the Master, was deposited by him in the Bank of the State of South Carolina to the credit of the case of Dwight v. Pickens, as required of him by law; and was, subsequently, invested by said Master in \$1,555 Confederate States 8 per cent. bonds, which he held as assets of the same cause, subject to the order of the Court.

The original bill in this case was filed on the 6th of September, 1866, to cancel the receipt and satisfaction of Master Tupper, and to set up the original bond and mortgage. and to foreclose the same; and failing in that, then to make Mr. Tupper personally liable for the amount thereof.

After all the defendants to the original bill had answered Mr. Tupper died, and this bill was filed on the 14th July, 1869, to revive the suit against his executors. The executors of Tupper not having filed an answer to the bill of revivor, and having since, as they alleged, fully administered his estate, which was not sufficient to pay his specialty debts, an order was made at the hearing, with consent of plaintiff's attorney, allowing them now to answer the bill of revivor, exhibiting their administration of the estate of their testator, accompanied by certified copies of the inventories and appraisement, and the executor's account.

So far as the bill seeks to set up the bond and mortgage against the obligor and mortgagor, Isaac M. Dwight, it is clear that it cannot be sustained, for they were satisfied by the person having the legal title and right

and unless there was fraud or collusion between him and the obligor, they must be held to have been paid. This precise point was decided by the present Supreme Court, in the case of Mayer v. Mordecai, 1 S. C., 383 [7 Am. Rep. 26], and the case of Creighton v. Pringle [3 S. C. 77] Supreme Court, November Term, 1870.

So far as the bill seeks to make the estate of the deceased Master liable for receiving payment in Confederate currency of a bond past due, given to him for the purchase money, and remaining in his hands under order of the Court, it is identical with the case of McPherson v. Linah and Gray, decided in 1866, and reported 14 Rich, Eq., 121. only points of difference between this case and that are as to time, and are in favor of the defendants in this case. In McPherson v. Lynah and Gray, the bond was given in 1860, and the payment to the Master was on 30th January, 1864, while in this case the bond, although given in payment of a contract of purchase made in 1858 was not exe-

*363

cuted until the 4th of June, *1861, and on that day \$500 more in cash than the contract called for was paid by Dwight, at the request of the parties in interest, though in what currency does not appear. The payment to the Master was on the 29th April, 1863, Confederate currency then having a far greater purchasing value than it had on 30th January, 1864.

If, then, the case of McPherson v. Lynah and Gray, is law, it is conclusive of this case, and the relief sought against the executors of the late Master must be refused.

It was contended by the plaintiff's counsel that the decision in McPherson v. Lynah and Gray has been virtually overruled by the decisions of the present Supreme Court, in the cases of Mayer v. Mordecai, and Creighton v. Pringle, already referred to, and in the case of Fitzsimons v. Fitzsimons, 1 S. C., 400. But the two first cases were rested by the Court, upon the construction of the instruments creating the trusts, and the trustees were held liable as for breach of trust in receiving payment of bonds held by them as trustees, in Confederate currency, such receipt not being within the scope of their powers, because not in compliance with the requisitions of the settlements, which were necessary conditions to the legal exercise of the power, in the one case "upon consultation" with the cestui que trust, and in the other upon her "written consent." In the case of Fitzsimons v. Fitzsimons, an administrator cum testamento annexo was held to have committed a devastavit in calling in a bond well secured by real estate left by his testator, and receiving payment in Confederate currency, when the money was not needed for the purposes of administration, because it

ableness of his conduct in disturbing an investment acknowledged to be good. In the case of Nance v. Nance, 1 S. C., 209, the distinction is pointed out as to the liability of trustees who "exceed the limits of their discretion," and their liability "for errors of judgment in cases where they have a right to the exercise of a discretion," and recognizes the rule which relieves them from liability for losses where they have acted in good faith, and with ordinary care and prudence, provided they have acted within the limits of their discretion.

In the case of McPherson v. Lynah and Gray, the Court held that the receipt by the Master was, under the circumstances, a fair and legitimate exercise of his discretion, and that, too, "within the line of his duty." In that case, too, the Court laid stress upon the fact that the parties interested could have

*364

prevented the receipt of *the money; in this case plaintiffs, who were the parties entitled to the bond, could, at any time, have taken it out of the hands of the Master, by procuring the qualification of their trustee, or the appointment of another. Their failure to take any steps to this end may, perhaps, be partly explained by the fact shown by the pleadings that the plaintiff, T. J. Pickens, had already received \$500 of the purchase money which he was ordered to pay over to the trustees, when qualified.

All the authorities cited by plaintiff's attorney, in argument, were upon the liability of express trustees, while the case of Mc-Pherson v. Lynah and Gray is the only case which has been decided by our Court as to the responsibility of a Master in Equity, whose duties and responsibility, as it is well contended by defendant's attorney, is not, in such a case as the present, to be measured by the rule applicable to trustees but by the rule which regulates the duties and responsibility of a ministerial officer of a Court. which not only recognized and authorized payments in Confederate currency, but in certain cases even directed the sale of the property of minors and its investment in Confederate securities.

It is, however, enough for me that the case of McPherson v. Lynah and Gray, although assailed in argument before the Supreme Court, has not been expressly overruled, and is therefore a controlling authority upon this Court until it is. And although the present Supreme Court might decide the question in that case differently if it was res integra, they may yet well hold that, having been so decided, they will in this case respect the maxim "stare decisis," as being in the interest of peace, because "interest rei-publicae ut sit finis litium."

The bill is dismissed.

the purposes of administration, because it was incumbent on him to show the reason-reverse the decree on the following grounds:

- quire Mr. Tupper to receive payment of his sales of property for cash and investments bond in any other than constitutional currency. Mr. Tupper, by receiving Confederate bills or notes and cancelling the bond held by him only for others, committed a breach of trust, and made himself liable for the loss which followed.
- 2. Because there is not only no proof that the complainants ever acquiesced in the payment in Confederate notes, but there is no proof that either of them ever heard of the

*365

transaction until a short time *before the filing of their bill, and it never was their duty to caution Mr. Tupper against receiving a currency which Mr. Dwight had no right to require him to take.

3. Because in releasing Mr. Dwight from his obligation to pay \$1,710 in constitutional currency in consideration of \$1,710 in Confederate notes, worth at the time about \$450. Mr. Tupper did not exercise the same care, diligence and caution which a prudent man would do in the management of his own funds.

4. Because, under the order of Court of Equity of the 22d May, 1861, Mr. Tupper's only authority was to hold Mr. Dwight's bond for the complainants until the trustee should accept and give security, and though perhaps the order did not mean that the bond should not be paid when it became due-if the trustee did not comply with it-it nevertheless means that it should not be paid in a depreciated currency which the obligor had no right to require the obligee to receive.

DeTreville and Noble, for appellants, contended that the receipt of the Confederate money was a breach of trust for which the Master was liable to the plaintiffs, and that, upon this point, McPherson v. Lynah and Gray had been overruled by the later cases. They cited the cases in the Circuit decree, and Sanders v. Rodgers, 1 S. C., 452; Allen v. Gaillard, 1 S. C., 279; Houseal v. Gibbs and Patterson, Bail. Eq., 485; Mulligan v. Wallace, 3 Rich. Eq., 111; Act 1839, 11 Stat., 161; Glover v. Glover, McM. Eq., 153; Wms. on Ex'ors, 1291; Wamack v. Austin, 1 S. C., 440; Head v. Talley, Amer. Law Times, September, 1870, p. 156; and Thorington v. Smith and Hartley, 8 Wal., 1.

Miles, with whom was McCrady, cited Bulow v. Witte, 3 S. C., 308; Lewin on Trusts, 513; Tollee v. Croft, 7 Rich. Eq., 45; Neely v. McFaddin, 2 S. C., 173; Lowndes v. Pinckney, 1 Rich. Eq., 164; Act 1791, 7 Stat., 258; Act 1806, 5 Stat., 526; Act 1821, 7 Stat., 323; Act 1840, 11 Stat., 113; Comer v. Hollinshead, 2 Ver., 90; Fenwicke v. Gibbes, 2 DeS., 94; Thompson v. Wagner, 2 DeS., 94; and Pollock v. Dubose, 7 Rich. Eq., 20. He also referred to several orders of the Cir-

1. Because Mr. Dwight had no right to re- cases to which minors were parties, directing of the proceeds in Confederate bonds. These were cited to show the practice of the Court in reference to Confederate money.

*366

*Aug. 14, 1873. The opinion of the Court was delivered by

MOSES, C. J. The bill seeks to set up the bond and mortgage against the obligor and mortgagee, Isaac M. Dwight, and failing in that, then to make Mr. Tupper, the late Master, liable therefor. So far as the pleadings have been brought to our notice, no liability is charged against him for the conversion of the Confederate Treasury notes received by him into Confederate bonds, nor do the grounds of appeal allege error in the Circuit decree for not holding him responsible for such change. Although one of the objects of the bill was to have the original securities set up against the obligor and mortgagee, the refusal to do so by the Court below is not charged as error asked to be corrected by this Court. In fact, the first ground on which the reversal is claimed assumes that the cancellation of the bond was a breach of trust, for which he is responsible. Our judgment will be restricted to the points made in the notice of appeal.

Whatever doubts may have been entertained in regard to the case of McPherson v. Lynah and Gray, 14 Rich. Eq., 121, as a binding authority, it has now been directly impugned, according to the mode permitted by our practice, and it is, therefore, our necessary duty to enquire whether it is to be considered a decision which we are bound to While we cannot adopt the argufollow. ment on which the Court founded its judgment, our examination leads us to the same result. If we regarded Mr. Tupper, the Master, a trustee, as the Court there did Mr. Gray, who occupied a like position, we do not see how a different rule could be applied to him than to any other trustee, charged with a breach of duty, by converting, without any adequate and sufficient reason, a security, admitted to be good and valuable, into one which, in open market, and with the most careful endeavor, could not be made productive of a value in any way approximating that for which it had been substituted. More especially would the breach be without excuse, if the new security was of the class least favored by the Courts for investments, and it would be without the shadow of extenuation, if the change was made for Confederate notes, which, when compared with gold and silver coin or national bank issues, had not only a depreciated value, but one daily fluctuating with the probable success or failure of the government which had iscuit Court made in the years 1862-'3-'4, in sued them, and, to any ordinary understanding, ultimately entirely worthless, unless (7 Stat., 223; 11 Stat., 113,) and that institution dealt exclusively in the prevailing

*the civil war which it was waging could resist the arms and powers of the United States, which were brought into requisition for its suppression.

Trusts are various. A debtor may be said to be a trustee for his creditor; a bailee is certainly one for his bailor, and an agent for his principal. Breaches of obligation in these relations may be relieved in the Courts of law. The rules which equity prescribes for the administration of a technical trust cannot, to their full extent, apply to them. A Master in Equity, in regard to the bonds committed to his charge, is the ministerial officer of the Court-the custodian of the treasury, holding it under its supervision, and disposing of the securities confided to him, under its direction, and in conformity with its course of proceeding; not only subject to its punishment for any wrong appropriation, or improper dealing, but responsible also to the party to whom loss may therefrom ensue. He does not hold the money in his hands as a trust, in the technical sense of the word, but as the financial agent of the Court, and where he has received it on a sale under proper authority, he stands in no different relation to it than a Sheriff or a Referee who has made it under proceedings in a Court of law. Money there paid goes into the care of the Court, and is held subject to its order; and yet he cannot be considered a trustee in the meaning in which the term is sought to be applied to the Master in the argument here. There may be cases in which the terms of the order might constitute him a trustee, and require of him all the duties, and impose on him all the obligations, which, in equity, attach to the position, as in Houseal v. Gibbes & Patterson, Bail. Eq., 485 [23 Am. Dec. 186], where he was directed "to apply the interest of the proceeds, and as much of the principal as might be necessary for the maintenance and education" of the person named, "and to improve the surplus at interest, or invest in public securities."

The Master (Mr. Tupper) was the officer of a Court, in a State which satisfied all its obligations and engagements with Confederate currency, and accepted it in payment of debts due to it, without question as to the time when they were contracted. He was required to deposit all money received by him in his official character in the Bank of the State,

(7 Stat., 223; 11 Stat., 113,) and that institution dealt exclusively in the prevailing currency, so far as its payment of deposits was concerned. It has been shewn in the argument that the Court recognized the cur-

rency, by ordering sales *for cash where no other medium existed, and directing stocks of a bank in Charleston of good repute, and State and city bonds, to be sold by the Master, and the proceeds invested in bonds or stocks of the Confederate States. At least one instance is known to a member of the Court, long a practitioner in the State. where the Court of Equity instructed the Commissioner to invest money received on a bond in which minors were interested, and which was secured by a mortgage of real estate, in the bonds of the Confederate Government. The notes accepted by Mr. Tupper "were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force by a government, obedience to whose authority in civil and local matters was not only a necessity but a duty. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity."-Thorington v. Smith, 8 Wallace, 11, 12, 13 [19 L. Ed. 361]. See, also, opinion of Mr. Justice Willard, in Neely v. McFadden, 2 S. C., 173-4. Should the Master, the mere officer of the Court, be held liable for doing that which had the implied sanction of the Court in its own mode of dealing with such notes? Was not the recognition of the currency by receiving it at par value, on the sale of even the estates of minors, a sanction for the act of the Master in the case before us? Was it, in the line of his duty, a prudent one, consistent with an honest and faithful discharge of it? The Court of which he was the officer had prescribed the course which, under the like circumstances, he should adopt, by commending it through its own example. And yet it is sought, through the equitable jurisdiction of the Court, to hold him responsible for an act which the tribunal of which he was the officer could not have considered a breach of duty; for it was in perfect consistency with its own order of proceeding.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *369

*WILSON v. HYATT, McBURNEY & CO.

(Columbia. April Term, 1873.)

[Execution \$244.]

One claiming the legal title to land cannot, on the mere ground that he is the legal owner, maintain a bill in equity to enjoin its sale by the Sheriff under execution, as the property of another; nor does it make any difference, it seems, that the plaintiff in the bill is the executivity of the debtor, as whose property the landwas levied on, and the execution is against herself as executrix.

[Ed. Note.—Cited in Klinck v. Black, 14 S. C. 245; Martin v. Martin, 24 S. C. 451; Bleckeley, Brown & Fretwell v. Branyan, 28 S. C. 450, 6 S. E. 291; Chapman v. Younger, 32 S. C. 299, 10 S. E. 1077; Gillam v. Arnold, 32 S. C. 510, 11 S. E. 331; Wheeler v. Alderman, 34 S. C. 538, 13 S. E. 673, 27 Am. St. Rep. 842; Latimer v. Ballew, 41 S. C. 520, 19 S. E. 792, 44 Am. St. Rep. 748; Kittles v. Williams, 64 S. C. 232, 41 S. E. 975.

For other cases, see Execution, Cent. Dig. §§ 673–680; Dec. Dig. \$\sim 244.]

[Equity \$\sim 427.]

Under the former practice of the Court only such relief would be granted, under the general prayer for relief, as the case stated in the bill would justify.

[Ed. Note.—Cited in Latimer v. Ballew, 41 S. C. 519, 19 S. E. 792, 44 Am. St. Rep. 748. For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. \$\$

[This case is also cited in Martin v. Martin, 24 S. C. 446, and distinguished therefrom.]

Before Graham, J., at Charleston, May Term, 1872.

Bill in equity filed by Jane C. Wilson and Frances L. Wilson against Hyatt, McBurney & Co. The case is stated in the decree of the Circuit Judge, which is as follows:

Graham, J. It appears from the records of these cases, the execution upon the judgment in the former, of which the bill in the latter (under the old equity practice) was filed to enjoin, and from the report of the Referee in the former, that John Wilson, the husband of Frances L. Wilson, in his lifetime, was indebted to Hyatt, McBurney & Co. for certain goods sold to him, upon which suit was brought against him in 1860, but abated by his death; and, from the report of the Referee in the latter, that in 1867 Frances Wilson, the executrix, by a deed reciting her power under his will to sell any part of his real estate to pay debts, or for the purpose of changing investment, and her willingness to become the purchaser of certain parts of the real estate for the sum of ten thousand dollars (\$10,000) in cash, which sum exceeded the assessed and actual value of the said real estate, conveyed the property afterwards levied upon, and the title to daughter, Jane C. Wilson, her heirs and assigns forever, in trust, nevertheless, to and for the use of the said Frances L. Wilson, her heirs and assigns forever, and to convey the said premises to the said Frances L. Wilson, whenever thereunto by her required, and that on the same day the said Jane C. Wilson re-conveyed the premises to Frances L. Wilson in fee simple.

That on the third day of January, 1868, suit was instituted by Hyatt, McBurney & Co. against Frances L. Wilson, as executrix, and judgment obtained thereon on the 9th of July, 1869. By the report of the Referee in the suit of Hyatt, McBurney & Co., against Mrs. Wilson, as executrix, it appears that

*370

Mrs. Wilson was the *agent of her husband in his business, and had full knowledge of this debt, and that no plea of plene administravit was filed. Execution was issued on the 16th of July, and under it the premises in question were levied upon as the property of John Wilson, in the hands of his executrix, and advertised for sale.

On the 19th of November Jane C. Wilson and Frances L. Wilson filed their bill in equity, stating the execution of the deeds, as above, and also that the said Frances L. Wilson, finding herself unable to pay the said \$10,000, the consideration for which the deed to herself purported to have been made, and for which she had, at the time, given her note, and which money she expected to have received from her separate and individual estate, at the request of Jane C. Wilson, and to discharge the said note, she had, on the 17th of July, 1869, (which, it will be observed, was the day after the date of the execution,) re-conveyed the premises to the said Jane C. Wilson and her sister, Amelia M. A. Wilson. Upon the filing of this bill a temporary injunction until the coming in of the answer of Hyatt, McBurney & Co., was granted by the Hon. R. B. Carpenter, then Judge of this Circuit, and upon the filing of the answer, December 28th, 1869, an order of reference was made to W. J. Gayer, Esq.

It should be observed that, on the day of June, 1868, Frances L. Wilson executed a bond and mortgage of the premises to Jane C. Wilson, for herself and her sister, A. M. A. Wilson, but the mortgage was not put on record.

Frances Wilson, the executrix, by a deed reciting her power under his will to sell any part of his real estate to pay debts, or for the purpose of changing investment, and her willingness to become the purchaser of certain parts of the real estate for the sum of ten thousand dollars (\$10,000) in cash, which sum exceeded the assessed and actual value of the said real estate, conveyed the property afterwards levied upon, and the title to which is the subject of this suit, to her

some \$10,000 in gold to Jane C. Wilson, a tutrix, to the said Jane C. Wilson, and the daughter of Mrs. Wilson, and his granddaughter; that an uncle, George Elford, ran the blockade in 1864, brought her this money, took it to Abbeville, and there paid it to her; that she lent it to her mother to pay her father's debts; that Mrs. Wilson, as executrix, paid two notes of John Wilson with this money, "one for \$5,000, and one for \$6,000, in gold; the one payable to John Mullins, and the other to William Mullins;" that

*371

Messrs. John and William Mullins were *English gentlemen; that Mr. John Mullins died, as Mr. Wilson had heard, in Nassau, in 1864, and that Mr. William Mullins is in England. This testimony was taken on the 19th of April, 1870, but no report was filed by the Referee until the 17th of May, 1872, when the case came up before me. The counsel for the complainants, the Wilsons, then objected to it because the Referee had not reported upon the facts, as directed, and under the order of reference I required another report. This second report was filed on the 31st of May, 1872, on which day the case again came up before me. The counsel for Messrs. Hyatt, McBurney & Co., while saying at the bar that there was little or nothing in the report to which he objected, claimed that the decision of a Referee is always open to review upon the facts in this Court, without any exception taken, and the Court should always look into the evidence, if questions were raised, to see whether there is evidence to support the facts, or any of them, as found by the Referee, and that no exception is necessary in order that the questions may be raised, and referred to the case of Liflee v. Field, 50 Barb., N. Y., 410, in support of this position. On the other hand, the counsel for complainant contended that unless exceptions are filed the findings of the Referee cannot be questioned. The counsel for Hyatt, Mc-Burney & Co. then offered to file the following formal exceptions, to wit:

The defendants in this case except to the report of the Referee, because-

1. He finds that the premises in question were sold "by the said Frances L. Wilson to the said Jane C. Wilson, etc.

"Whereas, it is submitted that no consideration whatsoever is proved to have been passed, and that, in fact, none ever did pass, and that the record and evidence reported shows that the conveyances from the said Frances L. Wilson to the said Jane C. Wilson, and from the said Jane C. Wilson to the said Frances L. Wilson, were made in attempt to defraud the said Hyatt, McBurney & Co., and other creditors of the said John Wilson.

2. "Because the report of the Referee, as far as it sustains the said sale and conveyance by the said Frances L. Wilson, execre-conveyance of the said Jane C. Wilson to the said Frances L. Wilson, is contrary to the law and evidence in the case.'

To which the counsel for Mrs. Wilson and her daughter objected that it was too late to do so after argument on the merits. The

*view I have taken of the report and of the case, as presented, does not require me to decide this point of practice, but I will only observe that it was the duty of the complainant to have speeded the cause, and as the report of the Referee was only filed or the morning of the hearing, after more than two years of reference, it would be hard to hold the defendants to its strict letter, if such be the rule in this Court.

The Referee finds the facts that Mrs. Fran ces L. Wilson was appointed executrix of John Wilson, and that by his will she was authorized to sell his property, real or personal, to pay debts or change investment He also finds the execution of the deeds above mentioned, and that the property in tended to be conveyed by them was a por tion of the estate of the testator; that the money for its purchase, it seems, was advanced as a loan to Frances L. Wilson, who testified that it was used to pay and satisfy the debts outstanding against the estate of the testator. The burden of proof rested entirely upon the complainants, and it is remarkable that during the two years while the references were open no effort appears to have been made by them to corroborate ... either by proof from England that such a person as James Elford ever lived, or that, dying, he left such a will as alleged. The will was a matter of record, if existing, and six weeks or two months would have sufficed for its production. So, too, as to the destruction of the notes which she claims to have paid. Mr. Buist, the Judge of Probate, has been within Mrs. Wilson's reach from the time she testified to the present, and it is singular that he was not introduced to prove that he had advised her that she might safely destroy the only evidence she possessed of so remarkable a transaction.

But while I cannot refrain from expressing my doubt as to the truth of complainant's case, it is sufficient that as the plea of plene administravit was not filed to the declaration of Hyatt, McBurney & Co., when that suit was before the Court, and as it appears from the record that Mrs. Wilson had full knowledge of the debt during her husband's life, and that suit had actually been commenced (January 3d, 1868,) against her as executrix before she filed her account (May 14, 1868,) with the Judge of Probate, which was relied upon by her counsel as a final account and discharge, but which appears to be only an annual account and not tion, whether still belonging to the estate of John Wilson, or to herself in her individual capacity, are liable to the execution in this case.

*373

*By the Statute of Uses the conveyance by Mrs. Wilson to her daughter, in trust to and for her own use, was, by operation of the statute, a conveyance to herself; and a trustee or executor, with power of sale, cannot convey to himself, (1 Sugden on Venders, p. 74,) or would the device of passing the title through her daughter have availed, even if the conveyance had not, by the Statute of Uses, put the title into herself at once; for "when a person cannot purchase the estate himself, neither can he through an agent."-Britton and Wife v. Johnson, 2 Hill Eq., 434.

This was held of a purchaser at open sale; a fortiori it will apply to a private one without notice to creditors or others.

It is, therefore, ordered that the temporary injunction heretofore granted in this cause be, and the same is hereby, dissolved; and that the Sheriff do proceed to execute the writ of fieri facias issued upon the judgment in this Court in the case of Hyatt, McBurney & Co., against Frances L. Wilson, executrix of John Wilson; and that he do proceed, under said execution, after the usual notice, to sell the premises mentioned in the pleadings for cash; and that from the proceeds thereof he do pay the said judgment, debt and costs of the said Hyatt, McBurney & Co., against the said Frances L. Wilson, executrix of John Wilson; and, also, the costs of the said Hyatt, McBurney & Co., as defendant in these proceedings.

The plaintiffs appealed, because:

1. The property levied upon by the defendants to satisfy their execution against the estate of John Wilson, deceased, is not subject to such levy and sale. Although said property once constituted a part of the estate of John Wilson, deceased, the report of the Referee shows that the same was duly sold by the executrix, Frances L. Wilson, to Jane C. Wilson, and the purchase money therefor duly received by her and applied in payment of the debts of the estate.

2. The Court, in making up its decision, did not confine itself to the facts reported by the Referee, or accept as final the findings of fact by the Referee, although no exceptions were taken by the defendants, or plaintiffs, to the report of the Referee before the final hearing of the cause, nor then, till after the final arguments upon the merits had been submitted. Even then the defendants did not ask that the report be recommitted.

a final discharge, that the premises in questifunction—the same should have been continued and made perpetual.

> Corbin & Stone, for appellants. McCrady & Son, contra.

Aug. 14, 1873. The opinion of the Court was delivered by

MOSES, C. J. The bill is filed by Jane C. Wilson, the daughter and her mother, Frances L. Wilson, the widow of John Wilson, to enjoin the sale of certain real estate described in the pleadings, levied on by the Sheriff of Charleston County, under an execution issued on a judgment of the respondents against the said Frances L. Wilson, executrix of the said John Wilson, on a debt due by the testator. Its whole purpose is to restrain the sale, on the ground that the land is the property in fact of the said Jane C., and not bound by and subject to the judgment. In the language of the bill, "that said lots of land are not, and have not been, since the 21st day of December, 1867, any portion, part, or parcel or in any way appertained to the estate of John Wilson, deceased." It interposes no equity by which the legal title is affected or qualified, seeks no cancellation or reform of deeds which may cloud the title, asserts neither fraud, accident, mistake or unfair advantage as the claim for relief, but merely seeks the injunction on the ground aforestated.

There is no special prayer but for an injunction "to restrain further proceeding against such lots of land by virtue of the said judgment," and no recital that would justify any relief under the general prayer. "Even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the Court will grant such relief only as the case stated will justify."-Story's Eq. Prac., § 42. And among the principal rules required as to this portion of the bill, Mr. Adams, in his Treatise on Equity, 309, includes as the first, "that it should point out with reasonable clearness what relief is asked." Mr. Kent, in Wilkins v. Wilkins, 1 John. Ch., 116, says: "With respect to this point, I apprehend the rule to be, that though the bill contain as usual a prayer for general relief, and also a prayer for specific relief, that the plaintiffs may have other specific relief, provided it be consistent with the case made by the bill."

*375

*Ch. Dunkin, in Barr v. Haseldon, 10 Rich. Eq., 58, refers to Ch. Harper, as holding, in regard to the rule that "where a proper case is made, though the specific relief prayed for cannot be granted, yet if there be a prayer for general relief, the proper relief *3. The Court erred in dissolving the in-will be afforded." To authorize, therefore, a grant under the general prayer, where the specific relief cannot be extended, a case must be presented in which, at least, the ground on which it is sought must appear

from the pleadings.

Equity may entertain a jurisdiction ancillary to a Court of law, where the party complaining can have no remedy in that Court, or is prevented from making an adequate defense, when brought before it, either by some defect in his title, which equity alone will cure, or some existing impediment which its interposition can alone remove. In the language of the counsel for the appellants, at page 6 of his printed argument, "the general question now before the Court is, whether the property levied upon by the respondents to satisfy their execution against the executrix of the estate of John Wilson, deceased, is subject to levy and sale therefor, upon the facts stated in the report of the Referee." To put the case in the light most favorable to them, suppose both or either had a valid, indefeasible title to the land, clear, in all respects, of any incumbrance by the judgment of the respondents, can a Court of Equity interfere to prevent the sale by the Sheriff? If the land was not that of the estate of the testator when the judgment was recovered against his executrix, the sale would confer no title, and in no event could it be asserted against the said Jane C., except through an action at law. Whether the land is subject to the judgment is a question for that Court, and equity will not interfere to prevent a mere trespass, unless the remedy at law is inadequate, as in waste, nuisance and irreparable mischief. So, if the bill had been framed with a view to reform the deed of September 21, 1867, as is suggested in the argument last furnished on their behalf, and the Court had so ordered, it would be without jurisdiction to grant the injunction. It has not the power to prevent a trespass, save where, in the language of Chancellor Kent, in Livingston v. Livingston, 6 John. Ch., 500, referring to Gartrin Asplin, 1 Mad. Ch. Rep., 150, and cited in Lining v. Geddes et al., 1 McC. Eq., 304 [16 Am. Dec. 606], "there is something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeop-

*376

ardy." To *grant an injunction in an application of the character before us would be to determine that the right of title to the land levied on is in one or both of the appellants, which is beyond the power of a Court of Equity.

The question is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C 376

STATE v. RAILROAD CORPORATIONS.

(Columbia. April Term, 1873.)

[Taxation \$\ighthapprox 49.]

An Act which requires every railroad comwithin the State to pay to the Treasurer, for the use of the State a sum of money, determined by the length of its road, is a tax upon property, and is unconstitutional and void, because not laid upon the value of the property.

[Ed. Note.—Cited in Ex parte Lynch, 16 S. C. 39.

For other cases, see Taxation, Cent. Dig. § 124; Dec. Dig. \$\infty\$=49.]

In the Criminal Court of Charleston, October Term, 1872.

The case is stated in the opinion of the

Porter & Connor, Barker, for appellants. Whipper, Solicitor, contra.

Aug. 18, 1873. The opinion of the Court was delivered by

MOSES, C. J. These were indictments, the first against the South Carolina Railroad Company, and the second against the Northeastern Railroad Company, under the seventh Section of the "Act to provide for a general license law," 15 Stat., 199, which reads as follows: "Every railroad company or corporation in this State shall be required to pay into the Treasury of the County in which its principal office within the State is located, for the use of the State, the following respective sums, to wit: Every company or corporation, the length of whose main track and branches, together, is greater than two hundred and fifty miles, the sum of twelve hundred and fifty dollars." The Section then proceeds to fix various rates according to a standard, the measure of which is the length of the road and its branches. The seventeenth Section declares it a misdemeanor to carry on any business or occupation named in the Act without first com-*377

plying with its requirements, *and prescribes the punishment. The respective appellants, now before the Court, were severally indicted for a violation of the provision of the said Section, convicted, and a fine imposed, on the one of twenty-two hundred and fifty dollars, and on the other of seventeen hundred and fifty dollars. Error is assigned, as well in the instructions of the presiding Judge to the jury as in his refusal to charge as requested by the counsel for the defense. In the view which we take of the grounds submitted, it will only be necessary to notice the refusal of the Court to instruct the jury that the Act imposes a tax, and is unconstitutional and void, because all property subject to taxation must be taxed in proportion to its value.

The Section of the Act on which the indictments are founded adjusts and fixes the amount to be paid into the Treasury by the length of the road. It is a tax imposed on the road as property. It is not laid on its income, or any franchise or privilege, but measured solely by the "length of the main track and branches." To what extent the capital stock, the dividends thereon, and the property of the said companies may be exempt from taxation by their respective charters, it is unnecessary here to inquire. If they are not thereby exempted, they are not subject to the imposition, for the non-payment of which the indictments have been preferred, for, so far as the provisions of the Act seek to make railroad companies amenable to it, in the way and manner it proposes, it is unconstitutional and void. The conclusion is so clear and undeniable that we shall content ourselves with a mere reference to the clauses of the Constitution which forbid the levy of any tax on property except in proportion to its value.

Section 36, Article I, declares that "all property subject to taxation shall be taxed in proportion to its value."

Section 33, Article II, that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax."

Section 1, Article IX, that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall provide such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed; and also excepting such property as may be exempted by *378

*law for municipal, educational, literary, scientific, religious or charitable purposes."

Article IX, Section 6, that "the General Assembly shall provide for the valuation and assessment of all lands, and the improvements thereon, prior to the assembling of the General Assembly of one thousand eight hundred and seventy, and thereafter in every fifth year."

The motion to arrest the judgment is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 378

STATE v. CHAPEAU & HEFFRON.

(Columbia, April Term, 1873.)

[Licenses \$\infty 42.]

Where an Act, providing for a general li-

by a vender of goods, by the amount of his annual sales, and the punishment, for a violation of the Act, by the sum to be paid for the li-cense, an indictment under the Act which does not allege the amount of defendants annual sales, is bad, and judgment thereon will be arrested.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 89; Dec. Dig. \$\infty 42.]

In the Criminal Court of Charleston, July Term, 1872.

The case is stated in the opinion of the Court

Hayne, Memminger, Porter, for appellants. Whipper, Acting Solicitor, contra.

Aug. 18, 1873. The opinion of the Court was delivered by

MOSES, C. J. The fourth Section of the Act entitled "An Act to provide for a general license law," 15 Stat., 196, declares that any person or company who shall engage in, or exercise the business of selling any goods, wares, &c., shall pay into the treasury of the County in which they shall design to conduct or carry on such business, for the use of the State, certain sums, varying in amount from five to two hundred and fifty dollars, according to the amount of their annual sales, the several sums having regard to the amount of the sales being fixed by the Act. The appellants were indicted under the said Act for carrying on business in the County of Charleston, in the vending of saddles and other wares, without any authority or license therefor. They demurred to the indictment. *379

*which, being overruled, they were tried and convicted, and sentenced to pay fifty dollars and costs. A motion in arrest of judgment being denied by the Court below, it is renewed here, and as it must be granted on the second ground, to wit: "Because the indictment does not charge what the alleged sales of saddles and other goods, wares and merchandise by the defendants amounted to annually," it is not necessary for the Court to express its opinion on the other exceptions on which the appellants rest it.

It is a recognized rule, in relation to indictments, that they shall be framed with sufficient certainty. Not only must the facts be so set forth that they may of themselves indicate its character, on which the jury are to pass, but they must also show the particular nature of the offense on which the Court may be called upon to pass judgment. The principle laid down by Lord Hale, (2 P. C., 187.) and followed in all the elementary works of criminal law, may be briefly expressed in the language of Ch. J. DeGrey, in The King v. Howe, Cowp., 682: "The charge must contain such a description of the crime that the defendant may know what crime it is which cense law, fixes the sum to be paid for a license he is called upon to answer; that the jury

sion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the Court may see such a definite crime that they may apply the punishment which the law prescribes." It would be difficult to find an authority contesting in any way the principle so announced, which recommends itself to adoption as a proper rule in criminal pleading, by its strict consistency with reason and common sense.

The Act, so far as it relates to sellers or venders of merchandise, divides them into several classes, according to the extent of their annual sales, requires, as a license to sell, the payment of proportional amounts, and the punishment for its violation is graduated by the sum required to be paid as a condition precedent to the privilege of selling. To say nothing of the right of the accused to be informed of the precise offense alleged against them, the omission in the indictment of an averment of the amount of their annual sales leaves nothing on the record by which the Court can graduate the offense, as required by the Act, and, therefore, it cannot inflict "a fine not less than double the amount of license imposed on such business or occupation."

The motion in arrest of judgment must prevail, and it is so ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *380

*STATE v. GRAHAM & CHAPEAU.

(Columbia, April Term, 1873.)

The principle of the preceding case of The State v. Chapeau & Heffron re-affirmed.

[Livery Stable Keepers = 14.]

No indictment, under the "Act to provide for a general license law," lies against a livery stable keeper for not paying for a license according to the rental value of his stable—the Act having prescribed no rate by which the sum to be paid is to be fixed.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 15; Dec. Dig. 14.]

In the Criminal Court of Charleston, July Term, 1872.

The case is stated in the opinion of the

Hayne, Memminger, Porter, for appellants. Whipper, Solicitor, contra.

Aug. 18, 1873. The opinion of the Court was delivered by

MOSES, C. J. The first count of the indictment charges an offense against the appellants, under the same Act, and in the like terms of that in the case of The State v. Chapeau & Heffron, in which the opinion of 130, 168; Dec. Dig. 55.

may appear to be warranted in their conclu- | the Court has this day been filed. The same ground of defense has been interposed, and must prevail for the reasons there given.

> The second count charges that the said Graham & Chapeau did engage in the business of keeping a livery stable in the County of Charleston without having paid into the treasury of the County "the sum of money required by law to be paid according to the rental value of the said livery stable," against the form of the statute, &c. The indictment assumes that, by the third Section of the "Act to provide for a general license law," 15 Stat., 195, a rate is fixed which a person engaging in such business is required to pay as the price of permission, or of a license to conduct it. A reference to the Section will show that no such exaction is made. Whether the Legislature, from inadvertence, omission, or any other cause, failed to express such a requisition as the context of the Act shows that they designed, the Court is not at liberty to supply any words which may operate to the prejudice of the parties charged. If the rate is not expressed in the Act, they have committed no wrong in not paying it, and are, therefore, not guilty of the offense alleged.

> The motion to arrest the judgment is granted.

> WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. *381

*McCANTS v. WELLS.

(Columbia. April Term, 1873.)

[Factors \$\insi\]11.] Where commission merchants are employed in Charleston to ship cotton to Liverpool and sell it there for the owner, and they use reasonable skill and ordinary diligence in the selection of a vessel and in placing the cotton on the selection of a vessel and in the country to the owner for board, they are not responsible to the owner for the negligence and delay of the master whereby loss occurs.

Note.—For other cases, see Factors, Cent. Dig. § 11; Dec. Dig. 5 11.]

[Principal and Agent 573.]
Where the agency is such that a sub-agent must be employed, who, from the very nature must be employed, who, from the very nature of the business, is not subject to the control of his immediate employer, the agent, if he dis-charges his own duty faithfully and well, is not responsible to the principal for the acts or omissions of the sub-agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 151; Dec. Dig. © 73.]

[Carriers 55.]

A bill of lading is a negotiable instrument, and, when endorsed and delivered, transfers the property in the goods to the assignee.

[Ed. Note.—Cited in National Bank of Chester v. Atlanta & C. A. L. R. Co., 25 S. C. 223; General Electric Co. v. Southern Ry., 72 S. C. 254, 51 S. E. 695, 110 Am. St. Rep. 600.

For other cases, see Carriers, Cent. Dig. §§

ber Term, 1872.

This was an action by Lockwood A. Me-Cants, plaintiff, against Edward L. Wells, defendant.

The complaint alleged:

- 1. That on or about the day of November, in the year of our Lord eighteen hundred and sixty-eight, at Charleston, in the County and State aforesaid, the said plaintiff placed certain goods and merchandise, to wit: Nine bags of sea island cotton, marked "L. A.," and weighing in the aggregate three thousand one hundred and ten pounds, in the hands of his agents and factors, Gaillard & Minott, for sale.
- 2. That the said Gaillard & Minott, with the knowledge and assent of the said plaintiff, engaged Daniel Lesesne and Edward L. Wells, then copartners, doing business together as commission merchants under the style of Lesesne & Wells, to ship to and sell the said cotton in Liverpool, England, and on the 14th day of November, aforesaid, delivered the same to the said Lesesne & Wells, at Charleston, aforesaid; and the said Lesesne & Wells, in consideration of a reasonable compensation, to be paid them by the said plaintiff, or his agents, Gaillard & Minott, agreed and undertook to ship and cause the said cotton to be carried to the city of Liverpool, England, within a reasonable time, and there to be put upon the market for sale, and to sell the same for or on account of the plaintiff.
- 3. That subsequently, to wit, on the third day of December, the said plaintiff placed another bag of the same quality of cotton, marked in the same way, and weighing three hundred and nine pounds, in the hands of the said Gaillard & Minott, who, with the like knowledge and assent of the said plaintiff,

*382

engaged the said *Lesesne & Wells to ship to and sell the said bag of cotton in the city of Liverpool, England, and delivered the same to the said Lesesne & Wells, which the said Lesesne & Wells, in consideration of a reasonable compensation, likewise agreed to ship and cause to be carried to the said city of Liverpool, within a reasonable time, and there to be put upon the market for sale, and to sell the same for or on account of the plaintiff.

4. That the said Lesesne & Wells did not fulfil their agreement to ship or cause the said ten bags of cotton to be carried to the said city of Liverpool, England, and there to put the same upon the market within a reasonable time, but, on the contrary, although thirty days were a reasonable time for carrying the same from the said city of Charleston to the said city of Liverpool, yet the said Lesesne & Wells so negligently and carelessly conducted themselves, and so misbehaved in regard to the same, that the said cotton did

Before Graham, J., at Charleston, Decem- not reach the said city of Liverpool, and was not put on the market until long after that period, but at what precise time the cotton arrived in Liverpool the plaintiff has never been advised, and does not know; but the said cotton was not sold until the eighteenth day of September following, (1869.)

- 5. That the plaintiff applied to the said Lesesne & Wells for full information concerning the shipping of the said cotton by them, but no satisfactory information has been given to him respecting the same, and, in fact, the last written request for such information has never been acknowledged, noticed or answered.
- 6. That the market value of the said cotton in the city of Liverpool, during the month of January, eighteen hundred and sixty-nine, (during which month the said cotton should have reached the said city of Liverpool, and then and there have been put upon the market,) was worth sixty pence, (60d.,) equal, with exchange, to one dollar and forty cents (\$1.40) per pound; but on the said eighteenth day of September was worth only and was sold for but thirty-nine pence, (39d.), equal, with exchange, to ninety cents (90c.) per pound, and that, by reason of the premises, the plaintiff was injured to his damage eighteen hundred dollars.
- 7. That the said Daniel Lesesne departed this life on or about the day of February, in the year of our Lord eighteen hundred and seventy-one, leaving the said Edward L. Wells surviving partner of the said firm of Lesesne & Wells.

Wherefore the plaintiff demands judgment

against the said *Edward L. Wells, surviving partner as aforesaid, in the sum of eighteen hundred dollars.

The answer stated the facts, and denied the charges of negligence, carelessness, misbehavior and breach of contract on the part of Lesesne & Wells, but, on the contrary, insisted that they had discharged the duty they undertook to perform.

The case is fully stated in the opinion of the Court.

Barker, for appellant. McCrady, contra.

Aug. 20, 1873. The opinion of the Court was delivered by

MOSES, C. J. The action is brought by McCants against Wells, the survivor of Lesesne & Wells, who, in the lifetime of Lesesne, were engaged in the business of commission merchants in the city of Charleston. Damages are sought to be recovered for their alleged negligence in the shipment and sale of ten bags of sea island cotton, delivered to them, with the knowledge and assent of McCants, by Gaillard & Minott, his factors, to be forwarded to Liverpool and there sold.

through which the loss complained of in the price of the cotton occurred. He must, therefore, make out his case according to his averment in the complaint, or fail in his action.

According to the proof made by the respondent, and on which the non-suit was asked, Gaillard & Minott, as his factors or agents, in November, 1868, employed the firm of the appellants to ship nine bales of sea island cotton to Liverpool, to be there sold. On 3d of December, another bag was delivered to them for the same disposition. It was made known to the shippers that the respondent and his factors preferred that it should be transported by a sailing vessel to a steamer, because "they did not care for it to reach Liverpool in November, as they considered the market would improve in January." The cotton, with the knowledge both of McCants and Gaillard & Minott, was delivered to the Borneo, advertised as an "A I B. R. ship," up for Liverpool, "having a portion of her cargo engaged and on board, to meet with despatch," and the cotton was consigned to the correspondents of L. & W. An advance was made on it to McC., through G. & M., of eighty cents per pound, amounting to \$2,771.20, for *384

which bills on the correspondents of L. *& W. in Liverpool, at sixty days, were drawn, and the bills of lading forwarded. The Borneo did not sail until March 31, 1869, arriving at her destined port the ensuing 22d of April. The cotton was sold on the 18th of September following at ninety cents per pound, while in the preceding January, it was worth one dollar and forty cents per pound, and the proceeds paid over to the factors. While she remained in port, dissatisfaction at her delay in sailing was made by McCants, both to his factors and L. & W., and, although they all united in the expression of great regret at her still being at her berth, no instruction was given to L. & W. to demand a return of the cotton. McCants did ask "if it was possible to get the cotton off the boat," to which Lesesne replied, "that was not practicable, because it had been drawn on."

The testimony of the plaintiff had been thus disclosed by the only witness examined on his behalf when he rested his case. No evidence had been offered to show the usage of trade in regard to the shipment of cotton by a commission merchant on account of others, so far as it affected the question of reasonable time. Mr. Minott, the witness, said: "when a ship is advertised to sail in that way, his calculation is that she ought to reach Liverpool in sixty days-that it is generally supposed that is long enough to get the cotton on the market." The appellant then moved for a non-suit on the grounds:

First. "That the plaintiff's own witness, who made the contract with L. & W., testifies that he did not make that contract with tion which they imposed. The motion is for

No fraud or collusive co-operation is charged them, as alleged in the complaint, and did not agree and undertake to ship and cause the said cotton to be carried to Liverpool within a reasonable time, for a compensation paid to them by G. & M., as stated in the second section of the complaint, and that upon the basis of that statement of the agreement the allegation of the fourth section falls to the ground. The plaintiff has failed to prove the undertaking, which is the basis of the whole case, and the charge of negligence cannot be sustained."

Second. "That there was no proof of any implied contract on the part of L. & W., arising out of any custom of trade presented by the plaintiff in this case, to ship and cause the said cotton to be carried to the city of Liverpool, England, within a reasonable time."

The fourth section of the complaint, referred to in the said first ground, charges the *385

negligence and carelessness of L. & W., *in not causing the cotton to be carried to the place of its destination in a reasonable time. as the breach of the contract, for which a reparation in damages is sought.

The motion for a non-suit was refused, and on appeal is renewed here.

Where the time for the performance of a contract is not specified the law requires it to be done in a reasonable time.—Chit. on Con., 730; Ellis v. Thompson, 3 M. & W., 452.

The rule is not confined to cases of common carriers, but is held to apply to all agreements where the parties in their stipulation omit to fix a day when the obligation is to cease, by reason of the execution of the duty which it imposes. If the undertaking looks to its completion by the party alone who assumes it, then he is bound to its fulfillment in a reasonable time, and the period must be measured by the implications which arise from the nature of the contract, and that which is adopted and applied in transactions of the like character. Where it is essential to its consummation that other agencies are to be employed, which are independent of his authority, and this necessity is incident to the very character of the transaction, then if the party sought to be made liable can show that so much of the contract as depended on his individual action was performed in a reasonable time, he cannot be held responsible, because the execution of the undertaking was not so complete, by reason of the failure of those whose intervention was not only material but indispensable to its accomplishment.

It is proper, therefore, to examine the character of the contract which L. & W. entered into with G. & M., on behalf of the respondent, so that we may ascertain the duties which devolved upon them, and the obliga-

to be governed alone by the evidence introduced by the respondent before it was made in the Court below, and, therefore, all questions arising on the exceptions to the charge of the presiding Judge are necessarily excluded.

What was the engagement into which L. & W. entered with McCants? It was to ship the cotton by a sailing vessel, and sell or cause to be sold in Liverpool. It bound them, for its proper discharge, to exercise "reasonable skill and ordinary diligence, and they are consequently liable for injuries to their employer occasioned by the want of reason-

able skill, and also for ordinary negli*gence." -Story on Ag., § 172; Story on Bailm., § 295; Jones on Bailm., 10.

But this requisition could only attach on so much of the execution of the contract as depended exclusively upon them. They were bound by it to the engagement of a sound ship for the conveyance of the cotton and the employment of judicious and reliable agents for its sale in Liverpool. It is not charged that they failed in either of these duties. With the knowledge both of the respondent and his factors, they shipped the cotton by the "Borneo," advertised by merchants of good repute as an "A I B. R. ship, having a portion of her cargo engaged and on board, to meet with dispatch." The right to a recovery is founded alone on the negligence of the appellant. The complaint does not allege liability from a knowledge, on the part of L. & W., either that the vessel would not sail with dispatch, accepting that term in the language of the witness of the respondent, to be found on the 6th and 9th pages of the brief, or that any action on their part contributed to the delay, or that they had done anything in regard to her detention which deprived McCants of any right of action against the ship owner for the loss which her stay at her berth in Charleston may have occasioned him. So far as their duty was involved in the selection of a vessel, it was completed when they engaged one that was seaworthy, and was to sail "with dispatch," and which, in the understanding of the witness, Minott, from the advertisement, would sail so as to reach Liverpool at the very time desired by McCants and his factors. L. & W. were commission merchants, dealt with in that character by G. & M., not as ship-owners or consignees of the Borneo. The nature of the transaction required the employment of a sub-agent for the completion of the duty they assumed. This was known to McC. as well as to G. & M., as was also the fact of the selection of the Borneo for the shipment. "The agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if he has used became bound to deliver it to no one who

a non-suit, and, in its consideration, we are reasonable diligence in his choice as to the skill and ability of the sub-agent; but the sub-agent will, in such cases, be responsible to the principal for his own negligence or misconduct."-Story on Ag., § 201; Paley on Ag., 17.

> The respondent, before he can be allowed to go to the jury, must sustain the allegations in his complaint by some evidence. His right of action, he avers, arises from the negligence of the firm of the appellant in the performance of their undertaking. The ques-

*387

*tion of negligence is usually one of fact for the jury, but it is for the Court to determine whether, in the particular case, any evidence has been offered from which the jury would be at liberty to infer it. The testimony, so far as presented, came from the respondent, and made no case of negligence against L. & W. in the discharge of so much of the contract as was well understood between the parties to it could be performed by them through their independent action.

If McCants has a right of action against them for not furnishing him "with proof of a binding contract between them and the sub-agent, made in due form, according to the usage of trade, which could be enforced by the plaintiff in his own name, or in the name of the defendant, against such subagent for his default," it cannot be enforced through the complaint they now submit. It would not be an incident so arising from, or appertaining to, the transaction, that negligence could be inferred from it, but a collateral circumstance, not entering into the present issue.

Nor can it be inferred from the fact that L. & W. made no demand for the return of the cotton to the shippers, when the delay in the sailing of the "Borneo" made it manifest that it could not reach its proposed destination in the month of January. A demand would have been fruitless. The title to it had passed to the consignees in Liverpool, on whom the bills had been drawn for the benefit of McCants, and who, by the assignment of the bills of lading, thus became the legal owners of it, alone entitled to its possession. A bill of lading is a negotiable instrument, and when endorsed and delivered, transfers the goods to the endorsee.-Smith on Mercantile Law, 177; Chit. on Con., 435.

In Akerman v. Humphrey, 1 C. and P., 53, Mr. Justice Burroughs said: "A bill of lading is exactly like a bill of exchange, and the property it refers to passes by endorsement of it." In a recent case, The Thames, 14 Wallace, 106 [20 L. Ed. 804], Mr. Justice Strong, delivering the opinion of the Court, says: "By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship

had not the order of the shipper." See, also, [Injunction 221.] The Vaughan, 14 Wall. 266 [20 L. Ed. 807]. A principle so generally recognized needs no reference to further authority for its sanction. L. & W. had, therefore, no more control over the cotton than did McCants him-

The rules which govern common carriers *388

cannot apply, without *modification, to the case in hand, and the argument for the respondent, therefore, fails, when it proceeds upon the assumption that the appellant was a common carrier, by invoking against him the principles by which that class of bailees are regulated. The ship owner here was the carrier, and the reference made by counsel to Flanders and Jacobsen have no force when applied to the appellant, but bear directly on the liability of the ship. He cannot be charged for the default of those to whom he entrusts the goods for carriage, unless, in his selection, he has failed to exercise reasonable diligence as to their skill and ability. If the cotton had been lost through the incompetency of the master, while the ship owner would have been liable, the appellant could not have been held to reparation by the respondent, unless a knowledge of such incapacity could be brought home to his firm.

We do not see in the evidence offered, on which the non-suit was asked, any ground on which the complaint can be sustained, and the motion made for it is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 388

COLUMBIA WATER POWER CO. v. CO-LUMBIA.

(Columbia. April Term, 1873.)

[Injunction = 230.]

It is not necessary that the matters alleged as ground of a charge of contempt, for violating an injunction order, should appear on the face of the rule to show cause.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 216, 27 S. E. 52.

For other cases, see Injunction, Cent. Dig. § 507; Dec. Dig. \$230.]

[Appeal and Error \$\sim 90.]

An omission to serve, with a rule to show cause, a copy of the affidavit, and other papers on which the rule was founded, is a mere irregularity, not affecting the merits, and not ground for an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 601; Dec. Dig. © 90.]

[Appeal and Error \$\sim 87.]

What time should be allowed for answering rule is matter of discretion with the Circuit Judge, and no ground for an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 580; Dec. Dig. ⊗⇒87.]

It is a conclusive answer to a rule for vio-lating an injunction order that the order had never been served on respondent.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 445; Dec. Dig. © 221.]

[Pleading \$\ins129.]

Material allegations in special proceedings, not controverted by the answer, are taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. ©=129.]

[Injunction \$\iiin 227.]

That a party acted under advice of counsel does not relieve him from the charge of con-It is matter of mitigation only, tempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 479; Dec. Dig. &=227.]

[Injunction \$\infty 232.]

Fines may be imposed for contempt in violating an injunction order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. &=232.]

[Costs 58; Injunction 233.]
The costs allowed by the Code are in cases of actions only, and not in special proceedings.

[Ed. Note.—Cited in Stegall v. Bolt, 11 S. C. 525; Carolina Nat. Bank v. Senn, 25 S. C. 584.

For other cases, see Costs, Cent. Dig. § 28; ec. Dig. 53; Injunction, Cent. Dig. § 518; Dec. Dig. \$\infty\$58;]
Dec. Dig. \$\infty\$233.]

[Injunction &= 133, 230.]

Neither by order for preliminary injunction, nor by proceedings for contempt of such order, can a defendant in the action be requested to deliver up the possession of property, unless he acquired the possession in breach of the order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 302, 516; Dec. Dig. —133, 230.]

[Injunction \$\sim 132, 133.]

[A preliminary injunction cannot be used to take property from one party and put it in possession of another.]

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. —132, 133.]

*Before Carpenter, J., at Chambers, Columbia, February 11, 1873.

This was a special proceeding against John Alexander, Mayor of the city of Columbia, and Samuel Hook, Superintendent of the City Water Works, for alleged contempt of an injunction order made in an action wherein the Columbia Water Power Company were plaintiffs and the city of Columbia defendant.

On the 7th February, 1873, an order for a temporary injunction was made, as follows:

"The plaintiffs in this case having filed their complaint, setting forth a contract between themselves and the defendant, and alleging that the defendant is interfering with. and preventing the plaintiffs from having and enjoying the full benefit of the said contract, ask for an order of injunction, pending the final hearing and decision of the case, restraining the defendant-

"1. From all interference with and hindrance of the plaintiffs in the performance of their said contract to supply the city of Columbia with water according to the terms of said contract.

from operating or causing to be operated the old water works; from forcing or causing to be forced into the distributing reservoir the

"2. From operating, or causing to be operated, the old water works, and from preventing the free use of and access to the old water works, and the old receiving reservoir, and the water accumulating therein.

"3. And from all and any manner of use and appropriation of the moneys collected by the defendant from water rents and water taxes, otherwise than in the payment of the plaintiffs.

"The present motion was fully argued before me on the 1st inst. After careful consideration, I am of the opinion that the plaintiffs have presented a case which entitles them to the temporary protection of the Court but not to the extent asked for. The contract which exists between the plaintiffs and the defendant seems to contemplate that, upon the completion, in accordance with the contract, of the water works therein specified, the plaintiffs shall be let into the full and complete performance of their duty of supplying water to the city, and to have the benefit of the water accumulating in the old receiving reservoir, and to be free from any interference by the defendant with the full enjoyment and execution of their contract. To all this the plaintiffs, in my opinion, have already become entitled upon the showing now made.

*390

*"On the other hand, I am not willing to assume, in advance, that the defendant will divert or misappropriate the funds which, under this contract, are to be set aside for the payment of the plaintiffs, and the plaintiffs have failed to show any such attempt or purpose on the part of the defendant. I assume, without hesitation, that the defendant is ready to perform the requirements of its contract, whenever it shall have been judicially ascertained that a valid contract exists.

"I shall, therefore, refuse so much of the present motion as asks for an order of injunction restraining the defendant from any use of the proceeds of water rents and water taxes, otherwise than in the payment of the plaintiffs.

"It is now, therefore, ordered:

"1. That, until the further order of this Court, the defendant herein, the city of Columbia, its Mayor and Aldermen, its officers and agents, be, and they are hereby, restrained from any and all manner of interference with and hindrance of the plaintiffs, the Columbia Water Power Company, in the performance of their contract to supply the city of Columbia with water according to the terms of said contract.

"2. That the defendant, its Mayor and Aldermen, its officers and agents, be, and they are hereby, restrained and enjoined

from operating or causing to be operated the old water works; from forcing or causing to be forced into the distributing reservoir the water which, from time to time, accumulates in the old receiving reservoir; from preventing the plaintiffs, or causing them to be prevented, from access to said old receiving reservoir, and from the use of the water, as it from time to time there accumulates, and from access to the said old water works at all times.

"The plaintiffs are hereby required, immediately upon the filing of this order, to execute to the defendant their bond in the sum of six thousand dollars, with one or more sufficient sureties, to be approved by the Clerk of the Court of this County, conditioned for the payment to the defendant of all costs and damages that may accrue to the defendant in case it shall finally be adjudged that the plaintiffs are not entitled to the relief claimed."

Upon the filing of the order, and notice thereof, the appellant, John Alexander, as Mayor of the city of Columbia, addressed to

*391

*Samuel A. Pearce, the representative of the Columbia Water Power Company, the following communication:

The Columbia Water Power Company

versus

The City of Columbia.

Columbia, S. C., February 8, 1873. To Col. Samuel A. Pearce:

Sir-I have this moment been served with the injunction order of His Honor Judge Carpenter in the above entitled case. This injunction of His Honor we mean to obey to the letter. From this day, then, we mean to hold the "City Water Works," now used by the said city, strictly inactive, and it shall remain in the place and condition it now is, until the further order of the Court, from the time when you begin to supply the city with water, subject to your use, at your expense, should any accident or unforeseen event occur which shall temporarily render your machinery inoperative. We trust, therefore, that you have the means at hand to comply immediately with your contract.

Reserving, in the meantime, all the rights of the city, and submitting only to the order of the Court, and rejecting your contract for non-performance and for other reasons,

I am, sir,

John Alexander, Mayor.

On the 10th day of February, 1873, Samuel A. Pearce caused to be presented to His Honor the Circuit Judge the following petition, on a special proceeding for a contempt:

The petition of Samuel A. Pearce, Jr., one of the plaintiffs in the above stated case, respectfully shows to this Honorable Court:

That, upon the service of the injunction

order in this case, his Honor John Alexander, the Mayor of the city of Columbia, assured your petitioner that, in obedience thereto, the plaintiffs would have possession of the water works, so as without further hindrance to carry out the terms of the contract recited in the complaint herein.

Your petitioner accordingly made arrangements to proceed with the work, and issued instructions to have the water works of the plaintiffs put in operation, when on yesterday he was informed that, by order of the brayor, the gates of the pipes leading from *392

the *plaintiffs' works to the distributing reservoir had been closed, and plaintiffs' access to the said reservoir thereby cut off.

Your petitioner further represents that he did this day make demand upon Samuel Hook, Superintendent of the City Water Works, that the said gates be opened and the keys thereof be surrendered to your petitioner, which demand was refused, and the said Hook stated on yesterday that he had been ordered by the Mayor to close the said gates and retain possession of said keys, and that it was the declared purpose of the Mayor to resist the opening of the said gates by the entire police force of the city, if necessary.

Your petitioner avers that the plaintiffs' water works cannot be put into operation without control of the gates referred to, and the possession of the keys thereof; that the action of the Mayor and his agent, the said Superintendent, in the premises, is an interference with, and hindrance of, the plaintiffs in the performance of their contract to supply the city of Columbia with water, according to the terms of their said contract.

Your petitioner therefore prays that the Mayor, John Alexander, and Samuel Hook, Superintendent of the City Water Works, may, by order of this Honorable Court, be required to open, or cause to be opened, the gates hereinbefore referred to, and surrender to your petitioner, in behalf of the plaintiffs, the keys thereof.

That the said Mayor and Superintendent be declared and adjudged to be in contempt of the authority of this Honorable Court, because of the action in the premises, and that · the said plaintiffs may have such other and further relief as to this Honorable Court may seem meet.

The petition was verified by the petitioner, and was supported by an affidavit as follows:

"Personally came T. Lamar Stark before me, and made oath that he was present this day and witnessed an interview between Samuel A. Pearce, Jr., and Samuel Hook, Superintendent of the City Water Works. Upon demand made by the said Pearce that the gates leading from the water works of the plaintiffs to the distributing reservoir of the city be opened, and the keys thereof surmatters and the things therein set forth;

rendered to the said plaintiff, the said Hook replied that he had been ordered by the Mayor on Saturday to close the gates and retain possession of the keys; that not doing so, the order was repeated yesterday, and he had closed the gates accordingly, and *393

in obedience to said *order now declined to open them or to surrender the keys without further orders from the Mayor."

And thereupon His Honor granted an ex parte order to shew cause the next morning at 10 o'clock, of which the following is a copy:

Upon hearing the petition of Samuel A. Pearce, Jr., and the affidavit of T. Lamar Stark, and it appearing that the said defendants, through the Mayor, the Hon, John Alexander, and Samuel Hook, Superintendent of the City Water Works, have refused to obey the order of this Court, herein made and filed 7th February instant: Ordered, That the Mayor of the city of Columbia, John Alexander, and the Superintendent of the City Water Works, Samuel Hook, do show cause before me, at my Chambers, in the office of the Clerk of this Court in Columbia, at 10 o'clock to-morrow morning, why they and each of them should not be attached for contempt.

At the time and place named in the said order John Alexander and Samuel Hook appeared, and, for cause, the said John Alexander made the following return to the rule as served upon him:

This respondent, John Alexander, Mayor of the city of Columbia, upon whom an order by His Honor R. B. Carpenter has been served to show cause before him this morning. at ten o'clock, why he should not be attached for contempt for refusing, as it is alleged. to obey the order of this Court, made and filed on the 7th of February instant, for return thereto, respectfully sets forth and replies as follows:

1. That if he has been guilty of any act disrespectful to this Honorable Court, or to the order of the Judge thereof, or in any other way whatsoever rendered himself liable as for a matter of contempt to this Honorable Court, he is certainly wholly unconscious of it.

II. This respondent, for a further return, respectfully says: That there is neither charge nor specification in the order served upon him as to the act, manner, matter, or thing wherewith or whereof he is charged and called upon to show why he should not be attached for contempt. The petition of Samuel A. Pearce, Jr., and the affidavit of T. Lamar Stark, upon which it appears that the order of His Honor Judge Carpenter was

*394

granted, have not *been served upon this respondent, and he is wholly ignorant of the

legations therein stated, he respectfully demands that the same may be served upon him, and further craves time to answer the same, and, if necessary, to introduce and submit counter affidavits to this Honorable Court, touching the facts stated therein, and any supposed contempt on the part of the respondent.

III. This respondent, for a further return, respectfully says: That he has used every means in his power to arrive at the true meaning and intention of the order made in this case. That in asserting the legal rights of the city of Columbia, he has not forgotten obedience to the order of this Court, and wherein he has been in default he is at this moment profoundly ignorant. And as an evidence of this, on the part of this respondent, he craves leave to refer to his early and prompt communication to the said Samuel A. Pearce, Jr., wherein he distinctly recognizes the authority of the injunction order, and hopes that the said Samuel A. Pearce would be ready immediately to comply with his contract.

IV. This respondent, for a further return, respectfully says: That he is so ignorant of the fact charged against him as a contempt, that he has been induced to believe that there might be some misunderstanding as to the fact of his having on yesterday taken the engine to pieces, and this might have been construed hastily into a disobedience of the said injunction order; but this respondent avers that the said engine was somewhat out of repair, and that his whole intention was, and is now, to have the said engine thoroughly cleaned and its parts adjusted together with all the apparatus of the City Water Works, so as to hold the same in complete order, subject to the provision of the contract, that if the works of the said Samuel A. Pearce should become temporarily disabled by accident or unforeseen event, he then may have the use of every part of the City Water Works in perfect and complete repair. And this respondent prays that he may be hence dismissed and the rule against him be discharged.

And the said Samuel Hook, on his behalf, appeared to the said rule, and for answer thereto submitted the following return:

This respondent, Samuel W. Hook, Superintendent of the City Water Works, upon whom an order by His Honor Judge Carpenter has been served to show cause before

*395

him this morning, at ten *o'clock, why he should not be attached for contempt for refusing to obey the order of the Court, made and filed on the 7th February, instant, for return thereto, respectfully sets forth and replies as follows: 1. That no such order was ever served upon this respondent, and if he has violated any injunction of the Court | did shut down the gates within the enclosure

and if called upon to answer the facts or al-i he is wholly ignorant of it. 2. That he knows nothing about what has been done in this case, further than he was ordered by the Mayor of the city that if Mr. Pearce called upon respondent and demanded the water works of the city, that they must be surrendered to him, which this respondent did as soon as demanded. 3. If this respondent has in any other particular made default, so that he would be held as for a contempt, he has no knowledge of it, and as the rule to show cause has set out no act of this respondent, he is unable to make any further return. And this respondent prays that he may be hence dismissed, and that the rule against him may be discharged.

Upon the hearing of these returns, it having been brought to the attention of the Judge that the petition and the affidavit of T. L. Stark had just at that moment (as appellants appeared before His Honor,) been served upon them, the additional time of two hours was granted, in which it was required that additional returns be made to the causes of contempt assigned in the petition and supported by the affidavit of T. L. Stark; and at the expiration of two hours the said John Alexander appeared and made to the rule the following additional return:

John Alexander, respondent, on the above return, for further return, respectfully says:

I. That in explanation of Section four of his above return, he begs leave to refer to the additional return of Samuel W. Hook, which he has seen in full; that this respondent denies that he has ever received any demand from Samuel A. Pearce, or from any other person, for the key of the gates in the enclosure of the distributing reservoir, nor has there been any demand made on this respondent to open the said gates to the distributing reservoir.

II. That this respondent denies that he has in any way interfered with the rights of the said Samuel A. Pearce, or in any manner obstructed the order of this Honorable Court in this case; but, on the contrary, has earnestly endeavored to comply with the same, and, at the same time, to protect the

rights of the city. That his *action in this behalf has been done entirely under the advice of his legal counsel.

And the said Samuel Hook also appeared and made the following additional return:

The respondent, Samuel W. Hook, for further return, respectfully says: 1. That since reading the petition and affidavit, which have now been served upon him, he for the first time understands what is the cause of the complaint against him. 2. That he never has been served with the injunction order in this case, nor did he even see it, and all that he has done has been in obedience to the order of the City Council and Mayor. That he of the distributing reservoir, but that he did and that a fine of one hundred dollars be, not know the object of the same. 3. That and the same is hereby, imposed upon the more than a month ago he was ordered by said Samuel Hook for his misconduct. the Mayor to overhaul and repair one of the valves of the engine. Samuel A. Pearce came to the respondent and the said John Alexander, for the costs and informed him that these water works now expenses herein stated; that the Clerk of belonged to him, Pearce; that respondent ex- this Court do issue executions in the name of pressed assent, and asked Mr. Pearce wheth- the State, at the relation of the said plainer he should not go on and put the valve tiffs, against the said John Alexander and in order. The said Samuel A. Pearce replied, "Yes, go ahead." That respondent accordingly did so with the approval of Mr. Pearce, the whole object being to put the engine in proper working trim.

Upon the hearing of these returns, the following affidavit of J. D. Evans was submitted on behalf of the said Samuel A. Pearce:

Personally came J. D. Evans before me, and made oath that, as Special Constable of the Sheriff of Richland County, he served personally upon his Honor the Mayor, John Alexander, a copy of the rule to show cause in the case filed on yesterday. The rule was so served at about 4 o 'clock in the afternoon. The said Mayor remarked to this deponent at the time of such service, that unless his lawyers so advised him, he would not open the gates to the pipes; that he has secured them down, and would go to jail before he would open them, unless his lawyers told him to do it. He said that Pearce would have to use the city pipes to the value of about forty thousand dollars, and that he would not allow it unless his counsel so ad-

*397

*The returns to the rule were heard on the 11th February, 1873, and on the 14th of the same month His Honor filed the following order:

On hearing the returns of John Alexander, Mayor of the city of Columbia, and Samuel Hook, Superintendant of the City Water Works, to the rule served upon them in this case, and argument thereon, it is adjudged-

That the returns are insufficient. That the said respondent, John Alexander, Mayor, by causing the gates of the pipes of the City Water Works to be closed, as alleged in the petition, and the said Samuel Hook, Superintendent, by closing the said gates, as alleged, are guilty of a violation of the order of injunction, entered in the above stated case, in that they thereby did interfere with and hinder the plaintiffs in the performance of their contract to supply the city of Columbia with water; and in that they did prevent the plaintiffs from access to the old water works.

That a fine of two hundred dollars be, and the same is hereby, imposed upon the said John Alexander for his misconduct; and that he do pay the costs and expenses of eighty-seven dollars and twenty-five cents, legal advice was sought as to the meaning of

And it is thereupon ordered that said plain-That on yesterday tiffs have leave to issue execution against against the said Samuel Hook, for the fines hereby imposed upon them, respectively; and that the amount of said fines, when collected, be paid to the Clerk of this Court, to abide the further order of the Court.

> Upon the suggestion of the defendant, by their counsel, that some order in regard to the possession of the keys, as desired by them, it is further ordered that the said keys of the water-pipe gates be delivered to S. A. Pearce, Jr., agent and clerk of the plaintiffs.

> The respondents appealed, and gave notice of the following points of exception to the above order:

> 1. Because the rule served upon John Alexander and Samuel Hook, on the evening of one day, to shew cause at 10 o'clock A. M. on the next day, did not specify directly

or indirectly any *matter wherein it was alleged they were liable as for a contempt in violating the injunction order of the Judge; and neither the affidavit nor the petition was served upon them in aid of the order whereby secondarily the charge against them as for a contempt might have been ascertained.

- 2. Because the petition and affidavit were never seen by either of the appellants until they were actually in the presence of His Honor the Judge at his Chambers, and then two hours only were allowed them to make a return of the facts charged against them in the petition and affidavit, and to prepare their defense, which time, it is submitted, put the parties to a disadvantage, and necessarily rendered their shewing and defense hasty and incomplete.
- 3. Because the said Samuel Hook had never been served with the injunction order, and had never read the same, or heard of its purpose, and was simply obeying instructions as Superintendent of the City Water Works, without any knowledge whatever that he was in any manner infringing any order of the Court or incurring censure as for a contempt.
- 4. Because the said John Alexander and Samuel Hook were not guilty of a violation of the said injunction order, but, on the contrary, obeyed the same; and to that end the injunction order is herewith submitted.
- 5. Because even if the injunction order had been technically violated, there was no wilthese proceedings, amounting to the sum of ful disobedience thereof; on the contrary,

the said order, and if there was an innocent mistake, and not a contumacious disobedience of the order of the Court, there was nothing whereof a contempt could be predicated, and in such case the practice of the Court and the settled rule is to discharge the rule; under such circumstances to make the rule absolute is without authority.

6. Because while Courts of Equity and Courts exercising equity jurisdiction, and applying equitable remedies, have always enforced their decrees by attachment, and commitment if necessary, to compel obedience and enforce performance, there is no authority in South Carolina by which obedience to decrees in equity can be enforced by fines by the Judge, or by which such fines can be ordered to be collected in the name of the State at the relation of parties to the decree, or by any other means.

*399

*7. Because the order making an assessment of costs on a proceeding by rule to the amount of eighty-seven dollars and twenty-five cents (the same being charged as if upon an action) is without authority by any act directing costs, and should be set aside; and to this end the bill of costs is submitted.

Tradewell, Pope & Haskell, Butler & Youmans, for appellants.

Melton & Clarke, Melton & Chamberlain, contra.

Appellant's points and authorities:

The case divides itself, on the question of contempt, into two parts—

- 1. A contempt committed in the presence of the Court.
- 2. A contempt not in the presence, but a contempt in the opinion of the Court arising upon matters of constructions and conclusions drawn as in any other case.—Har. Ch., Contempt, 267, 274.

Upon the first point the law is clear. The Judge may fine or imprison.—Vide Act 1731, § 4, 283, S. L., 3; Vide Act 1811, Vol. V., S. L., 642, § 1.

In the first case the matter is appealable, but unless the action of the Court is so excessive as to be unconstitutional (as against excessive fines) the Court will be hard to interfere.—Vide State v. Hunt, 3 Strob., 338.

But this is not our case.

In the second case suggested the Court will consider the whole matter in appeal as upon a special proceeding affecting a substantive right, and pronounce judgment.—Ludlow v. Knox, 7 Ab., N. S., 412; 1 Van Sanford Eq., 636.

1. The first point we wish to make is that the fine imposed upon S. Hook was error.

To this point the authorities are full.— Kerr on Injunctions, 638, 625 and 644; Hilliard on Injunctions, (generally,) 158; 2 Dan. C. P., *p. 707.

Knowledge to the party must come before

the said order, and if there was an innocent a contempt can be predicated, and the authormistake, and not a contumacious disobedience lities are to the same point.

2. The second point we wish to make is that there was no disobedience of the injunction order, and therefore no contempt by the Mayor of the city or any one else.

This will more fully appear by the prayer of the bill, the contract, and the injunction order, which are referred to here only to *400

*the extent involved in the question of contempt, not at all as affecting the merits of the case which is not before the Court.

But suppose the appellant, Alexander, was mistaken; this at once puts the case beyond the region of contempt.

The authorities are full to this point.—Hilliard on Injunctions, 170.

There was no wilful disobedience of the injunction order.—Kerr on Injunctions, 641, 646.

3. But in this case if there had been disobedience to the injunction order of the Court, it was error to impose a fine upon the appellants.

The Court may commit, and this failing, it may sequester, but the Court cannot, upon its own volition, enforce its injunction order by fines.—Adams Eq., *p. 324 and 395; Bacon Abr. "Chancery," Letter C, 2 Vol., 686, 687; 1 Daniel's C. P., 337, 350, 357; 2 Daniel's C. P., 412, *p. 709, 710, 711, *721, 22 note; Bouv. Inst., 4 Vol., 385, 516; 2 Sanders' Rep., 182; 3 P. Williams, 141; 1 Harrison's C., 241; Barlow's Eq., 40.

In the State of New York the Court has a right to enforce its injunction order by a fine not to exceed \$250, and such further fine as upon evidence may appear to be the actual injury to the party.—1 Van S. Eq., Contempt; Ludlow v. Knox (supra.)

Aug. 20, 1873. The opinion of the Court was delivered by

WILLARD, A. J. This was an attachment for contempt against J. Alexander, Mayor of Columbia, and S. Hook, Superintendent of the City Water Works, for an alleged contempt in the violation of an injunction issued by the Circuit Court in the above entitled action, pending in that Court. The parties appeared and answered to the alleged contempt, and a final order was made adjudging both parties defendant in such proceeding guilty of contempt, and imposing fines and costs upon them.

Both parties defendant have appealed from this final order, and the appeal presents several distinct questions that will be considered.

The first point of exception alleges that the rule to show cause "did not specify, directly or indirectly, any matter wherein it was alleged that they were liable as for a contempt in violating the injunction order of the

Judge." It was not necessary that the matters alleged as the ground of the charge of Circuit Court cannot enforce their authority by the imposition of fines, if not inconsistent

contempt should appear *on the face of the The rule was mere process, and was sufficient, if it appeared that the proceeding was one within the jurisdiction of the Court. This exception also states that neither the affidavit nor the petition upon which the rule was founded was served upon the defendants, Alexander and Hook. A rule to show cause should always be accompanied by a copy of the affidavits and other papers on which it was founded. If the party who should make such service fails to do so, it is ground for the opposite party to apply for time and the service upon him of the papers on which the rule issued. Advantage cannot be taken of such an omission on appeal, as it is, at most, an irregularity not involving the merits or substantial rights of the party affected by it. -Code, § 11, Sub. 3, § 199.

The second exception relates to matters entirely within the discretion of the Circuit Court. It was due to the parties to have reasonable time to make their defense, and we are bound to assume that in matters of this sort full justice was done to them.

The third exception, namely, that Hook had never been served with the injunction order, appears to be well taken. He so alleges in his return to the rule, and no proof of service of the injunction as to him appears in the proceeding. As to him, therefore, the order of the Circuit Court should be set aside.

The fourth exception is not sustained as it regards the defendant, Alexander. petition charged, on information and belief, that the gates connecting the works of the plaintiffs with the distributing reservoir were closed by the order of defendant, Alexander, after the injunction was granted. The averments of the petition were sufficiently distinct to put the defendant, Alexander, to his answer, whether the gates had been closed by his order after notice of the injunction In his return he fails to deny the order. facts charged in this respect, and, therefore, the charge stands confessed. The same rule, in this respect, should be applied to petitions and statements of the facts and grounds upon which relief is asked in a special proceeding that is applicable to formal pleadings; and by Section 191 of the Code all material allegations of the complaint not controverted by the answer are to be taken as true.

The proposition advanced by the fifth exception, if to be understood as clearing a party from the charge of contempt, where he has acted under the advice of counsel, is unsound. Such fact may be shown by way of mitigation alone.

*402

*The proposition set forth in the sixth curred.

exception, namely, that in this State the Circuit Court cannot enforce their authority by the imposition of fines, if not inconsistent with the nature of the authority exercised by the Courts, is at all events inconsistent with the provisions of the statute regulating the practice of the Circuit Court.—14 Stat., 136, § 1; Gen. Stat., 497, § 4.

The seventh exception is well taken. There is no authority conferred by the Code to tax as costs in a special proceeding the allowances as costs in an action. It appears on the record that this was done, and although the attention of the Circuit Judge does not appear to have been called to the point, yet, occurring in a final order, we are bound to notice it as an erroneous construction of the law governing costs.

The order contained in the concluding paragraph of this final order appealed from, and which directed the parties to deliver up certain keys, was not in conformity to the nature of the proceedings. No such order was contained in the original injunction or-Had it appeared that, subsequent to the service of the injunction order, the defendants had possessed themselves of the keys in question, in violation of that order, a compulsory restitution would have been appropriate. But we must conclude that at the service of the injunction the keys were in the possession of the defendants. It is not the province of a preliminary injunction to compel the transfer of property of any kind from one party to another. The party asking for an injunction is assumed to be in possession of the property in respect of which he demands protection, and all the injunction can require on the part of the opposite party is that he should forbear from interfering with that possession. He cannot be required to perform any act whatever. the plaintiff cannot enjoy his rights without compelling the defendants to perform some act, he must wait until he has established them by his judgment.

It is ordered and adjudged that so much of the final order appealed from as adjudges the defendant, S. Hook, guilty of a contempt, and awards damages and costs against him, be reversed and set aside, and that the proceedings as against said defendant be dismissed. It is further ordered and adjudged that so much of said order as fixes the costs and expenses of the proceeding at the sum of eighty-seven dollars and twenty-five cents be vacated and set aside; and that so much

of said order as directs "that the said *keys of the water pipe gates be delivered to S. Pearce, Jr., agent and clerk of the plaintiffs," be vacated and set aside, and that the case be remanded to the Circuit Court.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. 403

STATE v. HAYNE.

(Columbia. April Term, 1873.)

[Attorney and Client \$28.]

An indictment against an attorney at law for practicing without "authority or license," which does not allege that the defendant was in default for the non-payment of a sum imposed by law as a tax upon him by reason of his profession, as the ground of the charge, nor in any way point to the Act "to provide a general license law" under which the indictment was intended to be laid, is bad, and judgment thereon will be arrested.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 41; Dec. Dig. &==28.]

[Licenses 5.7.]

A tax on professions or occupations is not forbidden by the Constitution of the State, either in terms or by implication.

[Ed. Note.—Cited in State v. Columbia, 6 S. C. 7; Charleston v. Oliver, 16 S. C. 47, 51; Information against Oliver, 21 S. C. 325, 326, 53 Am. Rep. 681; Charlotte, C. & A. R. Co. v. Gibbes, 27 S. C. 396, 4 S. E. 49: Information against Jager, 29 S. C. 443, 444, 7 S. E. 605; Thomas v. Town of Moultrieville, 52 S. C. 185, 29 S. E. 647; Florida C. & P. R. R. Co. v. City of Columbia, 54 S. C. 276, 32 S. E. 408; Cowart v. City Council of Greenville, 67 S. C. 44, 45 S. E. 122.

For other cases, see Licenses, Cent. Dig. §§ 8, 19; Dec. Dig. € 7.]

[Licenses @-41.]

For non-payment of a tax on business a penalty may be imposed, to be recovered by indictment, as for a misdemeanor.

[Ed. Note.—Cited in Information against Jager, 29 S. C. 443, 7 S. E. 605.

For other cases, see Licenses, Cent. Dig. § 87; Dec. Dig. \$\infty\$=41.]

[Licenses 57.]

Such a tax may be constitutionally imposed by a separate Act and take effect in the same fiscal year in which a tax on property is laid and collected.

[Ed. Note.—Cited in Mauldin v. City Council of Greenville, 42 S. C. 300, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723.

For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. © 7.]

[Licenses 5.]

[Cited in Corwin v. Comptroller General, 6 C. 400, to the point that where the constitution undertakes to regulate the exercise of the taxing power by prescribing the mode by which the revenues of the state shall be raised, in the absence of the expression of a clear intent exclude other modes of raising revenue than that prescribed, such regulation, while it must be construed as imposing a political duty on the legislature, cannot be held as circumscribing its constitutional powers, so as to exclude a resort to other means of raising revenue, where, in its judgment, an exigency exists calling for a resort to such auxiliary means of raising revenue.]

Cent. Dig. § 4; Dec. Dig. \$25.]

[This case is also cited in Charleston v. Oliver, 16 S. C. 54: State ex rel. George v. Aiken,
42 S. C. 243, 20 S. E. 221, 26 L. R. A. 345;
Mauldin v. City Council of Greenville, 42 S.
C. 298, 30 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723; State v. Parler, 52 S. C. 218, 29 S. E. 651, as to construction of sections of constitution pertaining to powers of legislature.]

In the Criminal Court of Charleston, July Term, 1872.

The indictment alleged that I. W. Hayne, late of Charleston, attorney at law, on the tenth day of April, in the year of our Lord one thousand eight hundred and seventy-two, at the said Charleston, and there on divers other days and times, between that day and the day of the finding of this indictment, to wit: on the first day of July, in the year of our Lord eighteen hundred and seventy-two, without any authority or license therefor duly had and obtained according to law, did carry on or conduct business as an attorney at law, against the form of the Act of the General Assembly, in such case made and provided, and against the peace and dignity of the same State aforesaid.

The defendant pleaded "not guilty," and a jury was duly called and sworn. The acting Solicitor stated that the defendant was indicted for carrying on business as a lawyer in violation of Section 10 of the Act of Assembly entitled "An Act to provide for a general license law," approved March 13, 1872, and, to maintain the issues on the part of the State, he called as a witness Samuel L.

*404

*Bennett, who testified that he is Auditor of Charleston County, that he knows the defendant, and knows that defendant has been carrying on business as a lawyer in the County of Charleston since the tenth of April. 1872, and that he knows that defendant has not paid the sum required by the said Act to be paid in such cases, and has declined to pay the same.

The defendant asked the Court to instruct the jury as follows, to wit:

That the indictment cannot be sustained— 1st. Because it is not unlawful to carry on or conduct business as an attorney at law, without a license therefor. That the "Act to provide for a general license law," under which the indictment is framed, requires every person engaged in the profession or calling of attorney at law to pay into the treasury of the County in which such person resides, for the use of the State, a certain sum of money, but does not require such person to take out a license. It is not made the duty of a lawyer to take out a license, nor is it declared unlawful to carry on or conduct such business without one.

2d. That the indictmen cannot be sustained, because the said Act of Assembly is unconstitutional, null are this, that though called a "license law, it is in fact a tax Act, or Act to raise supplies, and as such is repugnant.

1st. To Article IX, § 1 of the State Con-

stitution, which declares "that the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation."

2d. To Article IX, § 2 of the Constitution, which declares "that a poll tax shall not exceed \$1 on each poll."

3d. To Article IX, § 3 of the Constitution, which limits the taxing power of the General Assembly to "an annual tax sufficient to defray the estimated expenses of the State for each year."

4th. To Article IX, § 4 of the Constitution, which declares that no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object such tax shall be applied.

5th. To Art. II, § 33 of the Constitution, which declares "that all taxes upon property, real or personal, shall be levied upon the actual value of the property taxed, or shall be ascertained by an assessment made for the purpose of laying such tax."

6th. To Art. I, § 20 of the Constitution, which declares that "no person shall be imprisoned for debt except in cases of fraud."

*405

*7th. That it is repugnant to the whole scheme of the Constitution in reference to the powers of taxation therein granted to the Legislature. That there is no special grant of power to the Legislature to be found in the Constitution to enact a law of this kind, and the Act is therefore repugnant to Art. I, § 41 of the Constitution, which declares that all powers not therein delegated to the General Assembly remain with the people.

The Court refused to give the instructions asked for by the defendant; and charged the jury that the defendant was indicted for not paying the license fee required by law, and that if they were satisfied of the truth of what was stated by the Auditor, they must find a verdict of guilty. To which the defendant excepted. The jury found a verdict of guilty. The defendant then moved in arrest of judgment on the following grounds, to wit:

1. Because the indictment does not charge that the defendant has carried on the business of attorney at law without paying the fee required by law therefor, but charges that he has carried on the business of attorney at law without having a license therefor, and it is not unlawful to carry on or conduct business as an attorney at law without a license therefor. That the "Act to provide a general license law," under which the indictment is framed, requires every person engaged in the profession or calling of attorney at law to pay into the treasury of the County in which such person resides, for the use of the State, a certain sum of money, but does not require such person to take out a license, nor is it declared unlawful to carry on or conduct such business without one.

II. Because the said Act of Assembly is unconstitutional, null and void, in this, that though called a license law, it is in fact a tax Act, or Act to raise supplies, and as such is repugnant to the same provisions of the Constitution mentioned in the 2d instruction asked of the Court.

This motion the Court overruled, and sentenced the defendant to pay a fine of \$20 and costs.

The defendant appealed.

Hayne, Memminger, Porter, for appellants.

Whipper, Solicitor, contra.

*406

*The following points and authorities were submitted for appellants in this case, and also in the cases of the State v. Chapeau & Heffron, (ante, p. 378,) and The State v. Graham & Chapeau, (ante, p. 380.)

The indictments in each of the above cases allege violations of one or more of the provisions of the "Act to provide for a general license law," approved March 13, 1872.

The first indictment charges that "I. W. Hayne, without any authority or license therefor, duly had and obtained, did carry on and conduct business as an attorney at law, against the form of the Act," &c.

The first count of the second indictment charges that R. Graham and F. F. Chapeau, "without any authority or license therefor, duly had and obtained according to law, did engage in the business of selling goods, wares and other merchandise, to wit: horses and mules, and bridles and saddles, and harness, against the form of the statute," &c. The second count of same indictment charges that said defendants, "without having paid into the County Treasury of the County in which the livery stables by the said Graham & Chapeau is kept, then and there situate and kept, for the use of the State, the sum of money required by law to be paid according to the rental value of said livery stable, did engage in the business of selling horses, mules and other goods, wares and merchandise, against the form of the statute," &c.

And the third indictment charges that F. F. Chapeau and J. F. Heffron, "without any authority or license therefor, duly had and obtained according to law, did then and there carry on their business of vending saddles and other goods, wares and merchandise, against the form of the Act," &c.

To the first indictment, the defendant pleaded "not guilty," and asked the Court to give certain instructions to the jury, which are set forth in the brief in that case. The Court refused to give the instructions asked for, and charged the jury: "that the defendant was indicted for not paying the license fee required by law, and that if they were satisfied of the truth of what was stated by the Auditor, they must find a verdict of guilty." To which charge the defendant

excepted. The jury rendered a verdict of guilty, and thereupon the defendant moved in arrest of judgment upon the grounds stat-

*407

ed in the brief. This motion *the Court refused and passed sentence that the defendant pay "\$20 and costs." From this judgment the defendant appeals.

The instructions asked for and the motion in arrest of judgment depend upon and embrace the same principles of law and may be considered together. The two points made and distinctly stated in, and which fairly arise upon, the record of the case, are:

1st. Is the indictment, as framed, sufficient in law to sustain the judgment of the Court? and

2d. Is the Act of March 13th, 1872, consistent with, or repugnant to, the Constitution of this State?

The same points are presented by the records in the other two cases. In each of them a general demurrer was filed, and in each the demurrer was overruled and the defendants found guilty. Motions in arrest of judgment were likewise made and overruled in each case, and sentence passed upon the defendants, from which they now appeal to this Court.

Appellants ask that all the points arising upon the records in these cases may be considered and decided by this Court.

1. The indictment against I. W. Hayne is defective and insufficient in law, in that it charges that the defendant carried on business as an attorney at law "without any authority or license therefor, duly had and obtained," whereas the charge should have been that he carried on said business "without having paid into the Treasury of the County in which he resides, for the use of the State, the sum of ten dollars." The only duty imposed on any person or persons carrying on or conducting any business named in the Act is "to make return of his or their respective occupations or business, under oath, to the Auditor of his or their respective Counties," within certain times limited in the Act, "and to pay into the Treasury of his or their respective Counties," on or before the dates therein specified, "the sum or sums required to be paid on his or their respective occupations or business."-See § 13. The Act nowhere makes it the duty of such person or persons to take out or have a license, nor enacts that it is unlawful to carry on business without one. Section 15 makes it the duty of the Treasurer, upon the receipt of the first quarterly instalment of the sum or sums specified to be paid upon any occupation or business, to give the person paying the same a certificate to the Auditor, specifying the sum paid and the occupation on which it was paid, and the Auditor, upon presentation of the certificate, is au*408

*This Section imposes certain duties, then, upon the Treasurer and Auditor-they are "authorized and required" to do certain things, but no new duty is imposed upon the citizen—the citizen has performed his whole duty when he has made return under oath, and paid the sum required within the time designated in the Act.

2. The same defect and insufficiency exist in respect to the first count in the second indictment, and to the third indictmentthe charge in each is that the defendants carried on the business named "without any authority or license therefor duly had and obtained," whereas they should have been charged with having carried on said business "without having paid into the Treasury of the County in which they carried on such business, for the use of the State," the sum required by law to be paid in such cases.

3. The first count of the second indictment, and the third indictment, are moreover defective in this: That they do not charge what the alleged sales of goods, wares and merchandise amount to annually. The Act prescribes that any person or persons engaged in selling or vending goods, wares, merchandise, &c., shall pay into the Treasury, &c., certain sums, varying in amount from \$250 to \$5, according to the amount of the "annual sales" of such person or persons.—See § 4. And the penalty for not paying is a fine "not less than double the amount of license imposed, and imprisonment," &c., &c., "either or both, at the discretion of the Court." It is manifest, therefore, that unless the amount of the "annual sales" is alleged, the record does not furnish the Court with sufficient data to enable it to impose a fine of "not less than double the amount of license imposed."

4. The second count of the second indictment cannot be sustained, because the Act omits to declare what sum a livery stable keeper shall pay. "Every hotel, inn, livery stable, tavern or saloon," it is enacted, "shall be classified and rated according to the rental value thereof, and every keeper or keepers of the same shall be required to pay into the County Treasury in which such hotel, inn, tavern or saloon" (livery stable being omitted) "is kept," &c., "the sums, according to said rental values, as follows, to wit:" and then the Section proceeds to specify the sum to be paid by "such hotel, inn, tavern, or saloon," again omitting livery stables.

The foregoing objections are, to a certain extent, purely technical, and though appellants think them sufficient in themselves to quash the indictments, yet they are present-

*409

ed chiefly with a view to *strengthen and give force to some of the positions taken in regard to the validity of the Act under which thorized and required to issue a license, &c. the indictments are framed. This latter point is the one which appellants desire to bring most prominently forward, and they ask that it be considered and decided by the Court, whatever conclusion may be arrived at in regard to the other points presented.

In considering the constitutionality of the

Act we must enquire:

First. Whether it is properly termed a "license law."

Secondly. If a "license law," does the purview of the Act establish as its object a regulation for the purpose of police, or does it shew that the Act was passed with a view to revenue, and solely as a means of "raising supplies"—that it is in fact a "tax Act."

And, Thirdly. If a "tax Act," or passed with "a view to revenue," has the General Assembly exceeded its powers of taxation

in enacting such a law.

1. In determining these questions we must look to the enacting part of the Act and not to its title.—Dwarris on Statutes; State v. Allen, 2 McC., 61.

2. It is a misnomer to call the Act of 13th March, 1872, a "license law"—though called a license law, it is, in fact a "tax Act." The command is to pay money for the use of the State. The license is a mere incident, intended as a convenience to the person who has paid. It is simply a receipt for the tax.

3. But assuming that it is properly called a "license law," is it to be referred to the police power of the Legislature, or to the

taxing power?

The limit to the exercise of the police power is this: The regulations must have reference to the safety, comfort or welfare of society; they must be, in fact, police regulations, and the fees exacted must bear some relation to the expense of issuing the license and of enforcing the regulations. The Act of March 13 is manifestly not of this class. It contains none of the requisites of a police regulation, and cannot, therefore, be referred to the police power of the Legislature.—Ash v. The People, 11 Mich., 347; People v. Jackson, 9 Mich., 307; Cooley's Cons. Lim., 201, 576, 578.

4. Where license fees are exacted with a view to revenue, the license fee is only a species of taxation, and must be referred to the taxing power of the Legislature.—License Tax Cases, 5 Wallace, 462; Brown v. State of Maryland, 12 Wheat., 555; Ward v. State of Maryland, 1 Amer. Rep., 54; Cooley's Con. Lim., 496.

*410

*5. The Act of March 13 is then either a Tax Act, though called a "license law," or, if a license law at all, it "requires the payment of a license fee by way of raising a revenue," and, in either case, we must refer to the "taxing power" of the Legislature, in order to determine whether the General Assembly has power to tax in the mode and manner prescribed in the Act.

6. Referring, then, to the taxing power of

is the one which appellants desire to bring the Legislature, the Act in question is remost prominently forward, and they ask pugnant to the Constitution:

- 1. Because the rates of taxation are not "uniform and equal," which is an essential requisite of a valid tax Act.—Section 1, Article IX, of the Constitution; Bank v. Hines, 3 Ohio, N. S., 15; Weeks v. City of Milwaukee, 10 Wis., 258; Knowlton v. Supervisors of Rock Co., 9 Wis., 410; Cooley's Cons. Lim., pp. 503, 504.
- 2. If regarded as a "poll tax," it is repugnant to Article IX, Section 2 of the Constitution, because the tax "exceeds \$1 on each poll."
- 3. It is repugnant to Article IX, Section 3 of the Constitution, because "an annual tax sufficient to pay the estimated expenses of the State" is otherwise provided for, and the taxing power of the General Assembly is limited to the levying of one tax annually.

4. It is repugnant to Section 4, Article IX of the Constitution, because the tax is not "levied in pursuance of a law which states its object;" there is no object stated in the Act to which the tax shall be applied.

- 5. It is repugnant to Section 20, Article I of the Constitution, which declares that "no person shall be imprisoned for debt except in cases of fraud." The penalty for not paying the tax, or debt due to the State, is fine or imprisonment, either or both, in the discretion of the Court, whether the failure to pay arise from fraud, inability to pay, or wilful neglect.
- 6. The Act is repugnant to the general scheme of the Constitution in reference to taxation.
- 7. And, lastly, there is no express grant of power to the Legislature, under the Constitution, to enact a license law for the purpose of raising a revenue, and the Act is, therefore, repugnant to Article I, Section 41 of the Constitution.

Aug. 27, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The indictment is insufficient to sustain the judgment. It does not allege that the defendant was in default *411

for *the non-payment of a sum imposed by law as a tax upon him, by reason of his occupation as an attorney, as the ground for the charge of conducting such business without "authority or license." Nor does the indictment in any way point to the license Act as the foundation of such charge. Unless the indictment can be supported under the license Act it is bad. It cannot be supported under that Act, for it does not allege that which, under the Act, constitutes a misdemeanor, namely, carrying on such business without paying the tax imposed, nor in any manner refer to the Act so as to point out, even indirectly, the ground of the wrong charged.

This view is sufficient to dispose of the

whole case, but as both the defendant and the persons and localities within the State, and for a decision on the question whether the Legislature had constitutional authority to enact a tax law imposing taxes of the character imposed by the license law, and as the question is of public importance, we will consider and decide it.

The question to be considered arises upon a request for certain instructions to the jury which was refused by the Court. These instructions resolve themselves into a single proposition, to the effect Section 10 of the Act entitled "An Act to provide for a general license law," approved March 13th, 1872, (15 Stat., 195,) is unconstitutional and void, in so far as it attempted to impose on the defendant, as an attorney at law, the payment of the sum of ten dollars, in the nature of a tax, for the use of the State, and that the provisions of Section 17 of that Act, making it a misdemeanor to carry on such business without first paying the amount so imposed and charged, are inoperative and void, and, therefore, insufficient to support the indictment under which defendant has been convicted.

If Section 10 of the Act in question was valid, there can be no doubt of the power of the Legislature to make the prosecution of that business without payment of the tax imposed by that Section a misdemeanor. Whether attaching the penalty of imprisonment to such offense would be in contravention of the clause of the Constitution abolishing imprisonment for debt, is a question that need not be considered here, for no part of the judgment before us imposes the penalty of imprisonment on the appellant.

The question then presents itself, is the provision of Section 10 imposing a tax of ten dollars, for the use of the State, on persons engaged in the profession or calling of an attorney at law, unconstitutional and void?

*412

*It is contended that the Constitution indicates the mode in which the revenues of the State are to be raised; that an annual tax on property, real and personal, is the mode sanctioned by the Constitution; that there is a clear intent expressed that ordinary expenditures and annual deficiencies should be provided for from this source of revenue; that this amounts to such an exhaustive regulation of the taxing power, that it is not competent for the Legislature to authorize the imposition of taxes in any other mode than that prescribed.

For the purpose of examining the merits of the rule of constitutional construction involved in the objection just stated, we will assume, without particular examination, at the present stage of the discussion, that the Constitution makes it the duty of the Legislature to provide, by an annual tax, to be laid upon property, upon the basis of actual value, and according to a rate uniform as to all ticular time, is to deprive it of elasticity, and,

Attorney General have pressed this Court which shall afford a sufficient revenue to meet all the demands upon the State for the fiscal year to which such tax relates, whether these demands are of the class of ordinary expenses, or of deficiencies of a previous year. We will also assume, for the same purpose, that the Constitution does not, in terms, inhibit a resort to other modes of raising revenue by taxation. We will, then, proceed at once to consider whether there is any rule or principle of constitutional construction that authorizes an implication from the express terms there employed, the effect of which implication is to limit the taxing powers of the Legislature to that particular mode of exercise expressly enjoined, and to deprive it of efficiency when exercised in any other mode than that prescribed.

The propositions which we have just assumed are sufficient premises to enable us to lay hold of the sound rule and principle of construction that should be carried into the text of the Constitution, and will be found. when we come to look into the Constitution. to form a statement more favorable for the argument of appellant than the Constitution itself authorizes.

The taxing power must be regarded as the primary power of government, as the maintenance of peace is its primary duty. This results from the fact that its end is the acquisition of means upon which the exercise of all the powers of the government practically depend. It is indispensable, because the validity of the government depends upon it.

The inexorable necessity that is laid *upon it is to get adequate revenue. Subject to its fitness to attain this end, it should be so shaped in its exercise as to distribute fairly the burden imposed on all that should contribute. It should not be tied up with any theory of what is the most equal or productive mode of raising revenue; but, as a constituent function of government, it should be competent at all times to carry out the views of economic policy that may for the time being control the legislative mind.

It surely does not need argument to show that these propositions are founded in truths that lie beyond all theory and speculation.

Economic policies must change, whether under the influence of experience or theoretical considerations. If, then, any line of economic policy is attempted to be exclusively enforced by the Constitution, the Constitution itself must be in a state of change to keep pace with the different views entertained at different times as to such policy. To attempt to conform the structural scheme of the government to a strict and exclusive relation to what may chance to be the peculiar ideas of the political body in regard to matters of administrative and economic policy at any parconsequently, of vitality. As well might we ment, but the nature of the power and the attempt to improve the human race by producing a distinct and peculiar skeleton for a laborer, an artisan, or professional man, containing peculiar adaptations to his customary employment.

The entire system of constitutional construction, as matured in the American Courts, rests on the recognition of these ideas as constituting a ground of distinction between fundamental and ordinary legislation.

Looking, then, to the general object had in view by the Constitution, and the nature of the subject under consideration, and we may safely affirm that when the Constitution undertakes to regulate the exercise of the taxing powers, by prescribing the mode by which the revenues of the State shall be raised, in the absence of the expression of a clear intent to exclude other modes of raising revenue than that prescribed, such regulation must be construed, while imposing a political duty on the Legislature, as not circumscribing its constitutional functions, so as to exclude it from authorizing a resort to other means of raising revenue, when in its judgment an exigency exists calling for resort to such auxiliary means of raising revenue.

It must be borne in mind that we are not

*414

considering the pro*priety of lessening the force conveyed by the primary and ordinary sense of terms employed in the Constitution. on any theory of what ought to be said or what ought not to be said in a Constitution. On the contrary, we are considering whether we are bound to add to the natural force and effect of terms employed, on the ground that such increased effect was in the mind and contemplation of the framers of the Constitution as apparent from the terms employed. As we are called upon to frame words on the principle of implication, to enlarge the expressed intent, we are bound to look to it that our emendations of the text flow from fixed and necessary principles of constitutional construction. If the Constitution should lose symmetry in consequence of our judicial exposition of its terms, the responsibility would not rest on the framers of that instrument. It is in this light that it becomes important that we should have in view what is conformable to the nature of a Constitution of government, and what is non-conformable to it.

It is true, as a general rule, that where powers are derived from an instrument that prescribes the mode in which they must be exercised, they cannot be legitimately or effectively exercised in any other mode than that prescribed.

It may, perhaps, be conceded that it makes no difference, as it regards the applicability of the rule, whether the instrument conferring such powers is a contract between individuals, a statute, or a Constitution of government. It is not the nature of the instru-

object of its creation, that is to determine whether the prescribed mode of its exercise is to be regarded as a circumscription of the power itself or a direction as to its exercise, inferred by some penalty falling short of an entire destruction of the whole force and effect of the power itself.

There is no judicial authority of acknowledged weight sanctioning the consequences that would result from the application of that rule to the case of a legislative body clothed with general legislative power, and in respect of a power vital to the existence of the State, the intermission of which would derange the entire machinery of the government.

Such a case cannot be brought within the idea on which the general rule is based. It starts off with assuming that there is no absolute and indispensable necessity for the exercise of the power independent of the case involved in the limitations to which it is subjected. The rule could not conclude that the

*415

act contemplated *by the power ought not to be done, unless done in the way prescribed, if the fact stood in full view, that the failure to exercise the power was in itself a greater wrong, and a public evil of greater magnitude, than its performance in an improper manner would be.

But the proposition we are now considering does not render it necessary for us to say that the general rule adverted to is or is not a test of the validity of political powers relating to a vital public function when the conditions of the case fit those of the rule. In the present case we must assume that there are no words in the Constitution that declare that there shall be no exercise of the taxing power except in the mode specifically prescribed, for that is demanded by the terms of the assumption under which we are examining the rule of construction. As we have already said, if such words are to be read in the Constitution, they are to be put there on the principles of construction. We shall hereafter look into the text of the Constitution to verify this assumption.

The case we are considering is one where in one clause of the Constitution general taxing power is conferred on the Legislature, and in another part of the instrument that body is required to provide for an annual tax of a particular kind sufficient to meet all the requirements of the State; and the question is, can the Legislature, under any other circumstances, resort to the use of any other kind or mode of taxation than that specifically prescribed.

Every power to which the general rule is applicable must be regarded as a particular and specific power, in contra-distinction to a general power, while by the terms of the Constitution and the nature of the power, the power of taxing must be regarded as a gento its use.

If we consider the object for the sake of which the taxing power is lodged in the hands of the Legislature, we shall conclude that the purpose intended by the general rule just stated does not embrace the case of a general grant of taxing power to a legislative body.

There are but two modes in which government can secure the means of maintaining itself in efficiency. One is by arbitrary seizure, taking, when and where it can most conveniently be found, that which may be deemed necessary to enable the government to perform its functions; the other is by systematic proceedings for the purpose of raising money, having regard to the principle that the burdens of supporting the government should be

distributed fairly *according to some equitable rule of contribution. That sovereign States will and must resort to extraordinary means of self preservation, in exigencies of peril, is settled by the experience and common judgment of all mankind. Any attempt in a written Constitution to restrain the possible exercise of such power in emergencies would not conform to the nature of government or the views that mankind entertain of duty in cases of extraordinary peril, and would be likely to be disregarded in such cases. The suggestion of prudence is that the Legislature should be clothed with powers sufficiently elastic to eliminate such necessity, as far as possible. To do this they must be able to adopt the mode of raising revenue to the condition in which they find public affairs from time to time.

To indicate a mode by which the current, ordinary, or anticipated expenditures of the Government should be liquidated is not necessarily inconsistent with the conservation of the power of resorting to extraordinary means under the impelling power of extraordinary and unanticipated exigencies. It is only when the habitual mode of raising revenue is claimed to operate to exclude all other modes that such restrictive enactments threaten the integrity of the governmental powers.

Extreme rigidity in the forms through which sovereign authority is required to be exercised is a temptation to arbitrary assumptions of authority. If we should hold the express provisions of the Constitution requiring certain taxes to be imposed to exclude a resort to all other taxation, we would impair the strength of the Constitution by narrowing the scope and efficiency of the vital powers communicated to the public agencies established in order to exercise its functions and discharge its duties. It is proper to observe that the argument seeking to impose such rigid limits to the exercise of

eral power, though attended by directions as | public authority proceeds upon certain assumptions that will be briefly noticed.

> It is assumed that experience has established that limitations imposed by the Constitution on the powers and modes of action of the Legislature have a salutary effect. This may be conceded, for the tendency to increase the limitations in this direction, manifested in recent constitutional changes in various States, exhibits this conviction of the public mind. The argument assumes also that the narrower the limit within which the exercise of legislative powers can be conferred, the less likely are abuses of legislative power to arise. This assumption has no support in the

*417

experience of States. *If the limitation imposed tends to impair the integrity of the legislative authority, by separating from it something that ought, according to the nature of such authority, to appertain or belong to it, it can be positively affirmed that such a limitation will result injuriously, and that affirmation can be made on general principles prior to any actual demonstration of the practical results flowing from it.

The question as to what abridgment of the unlimited power of legislation can be made without the destruction of some important legislative function, is one that ought not to be speculatively determined. An American Constitution grows out of the habits, necessities and practical wants of the people: it is not the result nor product of a priori reasoning. It is only when the want of a modification of the fundamental laws has become generally felt throughout the body politic that a movement of adequate force to accomplish such modification can be successfully set on foot. It is true that the existence of a demand for some specific modification is frequently seized upon as the occasion of opening the whole Constitution to discussion and revision, in much the same manner in which a publication that has outlived the peculiar popular taste that called it into existence is reproduced and conformed to existing taste. This practice is, however, exceptional. Fortunately, it has not yet been extended to the Constitution of the United States, and it is to be hoped that the early advent of constitutional adolescence will render absolute this mode of dealing with the fundamental law, and allow the expressions employed in the distribution and limitation of the great powers of government to become venerable so far as that can be permitted consistently with progressive adaptation and improvement in subordinate matters.

To originate a new line of constitutional construction when the antecedent experience has not fully prepared the way for such step of progress, is to deal blindly and unskillfully with the most complicated and intricate organization that is placed within the control of human agency. We are not at liberty to

enter upon the origination of novelties in this | proceeded to inquire, on the ground of such department of legal science.

Experience has shown that certain subjects of legislation may, with safety and propriety, be removed from the legislative control, such as the power of passing ex post facto laws, or of impairing the obligation of contracts. It has also justified the imposition of certain restrictions and conditions that may become

tests of the *validity of legislative action, such as the requirement that compensation shall be made to an individual where it is sought to take his property for public purposes. But the attempt to tie up the action of the Legislature in the course of exercising one of the great fundamental powers of government, such as the taxing powers, to a single line of action, dictated as a formula for all times and exigencies, may safely be characterized as an untried experiment not yet commended to the practical sense of the American political communities as worthy of trial.

Nothing can be more conformable to the nature and true office of a Constitution of government than to set up standards and measures of right, derived from the moral convictions of the public mind, and designed to be applied to the legislative power, in order to secure the integrity of the State, the individual, and the laws, from legislative abuses; but when it shall attempt to reduce all possible modes of providing means for the security and efficiency of the government to one technical mode of proceeding, as it would frame a writ or mode of forensic proceeding, it will be found to have received its shape under the control of ill-informed and speculative minds, rather than that of experienced and practical minds.

We have thus far attempted to consider the true rule of constitutional construction, applicable to the present subject, independently, as far as possible, of the special provisions of our Constitution, and testing it rather by what is common to all similar instruments than by what is peculiar to our own.

Following this line of inquiry, we have assumed certain propositions as the basis of our inquiry. We have assumed that the Constitution makes it the duty of the Legislature to provide, by an annual tax laid upon property, on the basis of actual value, and according to a rate uniform as to all persons and localities within the State, and which shall afford sufficient revenue to meet all demands upon the State for the fiscal year to which such tax relates, whether these demands are of the class of ordinary expenditures, or deficiencies of an antecedent year; and we have also assumed that the Constitution does not, in terms, inhibit a resort to other modes of raising revenue. We then ready said what it is in view of that science

assumptions, whether there was any rule of constitutional construction that authorized an implication, from the express terms thus

employed, the effect of which was to *limit the taxing power of the Legislature to that particular form or mode of exercise expressly enjoined, and to deprive it of efficacy where exercised in any other mode than that prescribed. We came to the conclusion that, where the Constitution undertakes to regulate the exercise of the taxing power, by prescribing the mode by which the revenues of the State shall be raised, in the absence of the expression of a clear intent to exclude other modes of raising revenue than that prescribed, such regulation, while it must be construed as imposing a political duty on the Legislature, cannot be held as circumscribing its constitutional powers so as to exclude a resort to other means of raising revenue where, in its judgment, an exigency exists calling for a resort to such auxiliary means of raising revenue.

As we proceed to examine the particular features of our Constitution, it will be found that the true means of solving the present question lie within the principles of the proposition just stated.

It is necessary to consider very fully those parts of the Constitution that have a bearing on the question as to what is the nature of the power of imposing taxes as conferred on the Legislature, and whether its exercise has been limited in such a way as to preclude that body from authorizing the imposition of a tax of ten dollars on all persons carrying on the business of an attorney at law within the State, for the general use of the State Government. For the sake both of exactness and convenience it is preferable to consider the law imposing this tax from this restricted point of view, rather than with direct regard to all its features, as the right of the Legislature to impose the particular tax on the defendant covers the question of the validity of the law as a whole.

The only features of the tax imposed that need be considered as bearing upon the question of its validity under the Constitution, are, that it is not a tax on property, ad valorem, and the proceeds of the tax may be applied to any of the uses of the Treasury, including the payment of current and ordinary expenditures, that, under the Constitution, as it is contended, should have been provided for by a tax on property. It is also to be observed that the license law, as it is called, was passed in a fiscal year in which a tax on real and personal property was levied and collected. The questions to be considered arise out of these facts. then, is the nature of the taxing power in the hands of the Legislature? We have al*420

that deals with the exposition *of constitutional law upon principles and rules derived from all systems of government, but particularly those based on written Constitutions. It remains to enquire whether the language and sense of the Constitution imposes any different or peculiar character on these great fundamental functions of government.

Section 1, Article II, declares that "the legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate,' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina." Although the particular office of this Section is to fix certain important features of the body through which the function of legislation is to be exercised, yet it describes in an authoritative way the nature of the power thus vested. It is no less than the legislative power of the State. It is not such and so much of the legislative power of the State as were intended to be used by that particular body, but it was the whole legislative power of this State, its whole capacity of making laws and providing the means for their enforcement. It was not intended that the Legislature should exercise this power without limitation and restraint, for the Constitution that uses these words of grant imposes many such restrictions and limitations affecting the extent to which it may be effectively exercised. The form of expression here employed shows that the people of South Carolina entertained the same view of the nature of legislative power that is accepted by other similar communities, and intended that it should receive, in this respect, the construction ordinarily put upon grants of such powers in other similar instruments; that is to say, they intended a general grant of that branch of governmental power and faculty described as the legislative power of the State, though subject to many restrictions affecting its exercise. But it has been argued that Section 41 of Article I narrows this from a grant of general capacity to one of limited powers. It is said that the powers of the Legislature of South Carolina must be held to be special and enumerated powers, like those of the Congress of the United States, and that such as are not in terms granted must be regarded as withheld and retained by the people, and that such is the force and effect of Section 41, Article I.

That Section is as follows: "The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not here-

*421

in delegated remain *with the people." The true effect of this declaration is, that it reserves to the people whatever is not granted by the instrument; as, for instance, the right

to make changes in the form of government is not granted, and, under this clause, remains in the hands of the people, capable of exercise when they may see iit so to do. As the legislative power is granted in express terms, importing a grant of general powers, such general powers of legislation cannot be regarded as reserved to the people under this Section. Such general language as that contained in Section 41 of Article I cannot be allowed such force and effect as to change entirely the nature of legislative power, and to introduce anomalous ideas in the structure of the government.

The last Section of Article II, organizing the legislative department, prescribes that "all taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." There is no special grant of authority to levy taxes contained in this Article. The right to levy taxes is conferred under the grant of general legislative power. Section 33 assumes the existence of such power, and undertakes to prescribe the rule of its exercise, where such exercise consists in the imposition of a tax of a particular description, namely, taxes upon property, real and personal. If the Constitution had intended to deprive the Legislature of a function that it had always enjoyed in common with similar bodies, and to confine it to that mode of taxation referred to in the Section under consideration, it is impossible to conceive that that Section would have taken the form in which it stands in Article II. It would probably have read thus: "All taxes shall be laid upon property, real and personal, according to the actual value of the property taxed," &c.

Or, inasmuch as it was elsewhere in the Constitution provided, that there should be a certain poll-tax imposed, it would have read, "all taxes except the poll-tax, as hereinafter provided, shall be laid on property, real and personal, &c." The difference between the Section as it stands, and as it would stand in the case supposed, is precisely this: in the one case it would amount to a constitutional declaration of what taxes shall be levied, while in the other case no such declaration is made.

The limitation imposed as to taxes of a particular class implies the possibility of other modes of taxation to which such limitation would be inapplicable.

*422

*A comparison of the provisions of Sections 36 and 37, Article I, and Section 33, Article III, will lead to the same view of the intentions of the Constitution. The Sections first named appearing in the Bill of Rights, and Section 33 in the Article fixing the powers of the Legislative body, must be regard-

ed as framed while the framers had in view of which alone shall be taxed; and, also, exthe establishment of a proper balance between the powers of the Legislature and the rights of individual members of the community, and if it was intended to make any cardinal changes affecting this balance, here is the place where we would naturally look for evidence of such intention. What, then, say these Sections? Section 36 says, that "all property subject to taxation shall be taxed in proportion to its value." Section 37. that "no subsidy, charge, impost tax, or duties shall be established, fixed, laid or levied under any pretext whatever, without the consent of the people, or their representatives lawfully assembled." The clear implication from these Sections, taken together, is that a much larger range of modes of collecting revenue is open to the Legislature than that involved in the imposition of a tax on property. So that, instead of finding the powers of the Legislature limited in this important part of the instrument, we find the people and their "representatives legally assembled" put in the same category, as it regards the right to resort to extraordinary as well as ordinary means of support and aid to the government.

If, then, the construction contended for must prevail, it can only be regarded as arising from the provisions of Article IX of the Constitution, which we will proceed to consider.

Art. IX is entitled "Finance and Taxation." Its leading provisions relate to taxation and other sources of revenue for meeting the current and ordinary expenses of the government, including the payment of the deficiency of revenue in any given year to meet the ordinary expenses of that year; it fixes the class of exceptions from taxation that may be allowed by the Legislature; it provides for periodic assessments of the value of real property; it authorizes the creation of public debt to meet extraordinary expenses, and establishes the mode and manner in which such debt must be authorized and contracted; it makes provision for the exercising of the powers of taxation by municipal corporations, and lays restrictions on such exercise; it regulates the issue of evidences of debt by the State, provides for the custody and payment of public moneys, and for the accountability of fiscal officers; it estab-

*423

lishes the fiscal year; *finally, it forbids the payment of debt contracted in aid of rebellion.

Sec. 1 is as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds cepting such property as may be exempted by law for municipal, educational, literary, scientific, religious and charitable purposes.'

Unless this Section can be construed as inhibiting other taxes than those on property. except the poll tax, provided for in the next Section, there is nothing in Article IX that can, by any possibility, be construed as limiting the Legislature to that particular mode and form of taxation. We will first consider this Section standing by itself, and next as connected with the third Section of the same Article.

Section 1, apart from its provisions in regard to exemptions, advances two ideas; first, equity in all taxation and assessment, and, second, valuation, as the means of securing such equality, in the case of taxes on property. The first clause, namely, "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," is not, by its terms, applicable alone as peculiar to taxes on property. It does not use the word value, which is significant of taxation as applied to property. That expression occurs in the second clause in connection with the subject to which it belongs, namely, taxation of property. These clauses are connected by the conjunction "and;" accordingly their grammatical relations admit of their bearing independent force and effect, if the nature of the subject-matter admits of it. It is clear that the first clause, establishing the rule of equality, must be regarded as affecting the poll tax, authorized by the second Section. .The maximum of that tax is fixed at one dollar per poll, but there is nothing in the last named Section, standing by itself, that makes it necessary that all polls should be considered equally in regard to that tax. The first clause of Section 1 supplies this deficiency, and, we must conclude, was intended to supply it. It therefore follows that the first clause prescribing uniformity was intended to have and has an operation beyond the scope of the second clause, to the extent, at least, of regulating one form of

*424

tax not embraced *in the second clause, namely, the poll tax, to which the principle of valuation is inapplicable. If, then, the first clause is not confined to its operation to the class of taxes mentioned in the second clause, as calling for valuation, it may be affirmed that the object and intent of the first clause was to introduce the principle of equality and uniformity into any and all classes of taxes that might be authorized by the Legislature, and that it was not intended as a means of ascertaining what taxes might and what might not be levied. This being the true construction of the first clause, the second admits of no construction that can confer on it an import beyond that plain"that it should be the duty of the Legislature to provide the means of securing equal and just valuation on all property subject to taxation, the 36th Section of Article I, and the 33d Section of Article II, having already fixed upon value as the means of distributing the burden that ought to be borne by property, on all property that should contribute to bear it."

The only other Sections in Art. IX that contemplate any particular kind of tax are Sec. 2, relating to the poll tax, Sec. 5, relating to exemptions from a property tax, Sec. 6. providing for the first and succeeding assessments of real estate; and these Sections throw no light on the subject under consideration. It has been argued that Sec. 3 of Art. IX bears on this question; but that view is clearly erroneous. That Section is as follows: "The General Assembly shall provide an annual tax sufficient to defray the estimated expenses of the State for each year, and whenever it shall happen that such ordinary expenses of the State for any year shall exceed the income of the State for such year, the General Assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." Comparing this Section with Sec. 7, authorizing the creation of public debt, in order to meet extraordinary expenditures, it becomes evident that the leading object of Sec. 3 is to require that ordinary expenses, embracing the expenditures necessary for maintaining the government shall be met from year to year, and paid from the annual income and resources of the State, and that public debt shall not be created for the purpose of liquidating that class of expenses. The importance of such a provison as a means of preventing the improvidence of one generation

*425

from casting a burden of un*necessary debt upon a successive generation, is obvious, and fully explains the object and intent of Sec. 3. Inasmuch as such expenses recur annually, it was proper that an annual income should be provided, and as the income of the State must in the main arise from taxation, the declaration that the Legislature shall provide an annual tax was the natural and convenient form of securing the object already referred to.

There is no limitation as to the kind of tax to be annually imposed contained in this Section. Whatever answers the description of a tax, and may be imposed annually, is within the terms of this Section. This Section, standing by itself, so far from enforcing the imposition of any particular kind of tax, is wholly indifferent as to kind, but intent on its annual recurrence, and sufficiency to meet annual expenditures. As "other

ly signified by the terms employed, namely, sources of revenue" are spoken of in this Section, it is obvious that the object of the Section was not to render it necessary that a particular and designated fund should be raised for annual expenses, and that resort should be had to no other, but that its chief object was to designate, imperatively, annual taxation as a means of making good any insufficiency of income from other sources to meet current annual expenditures and deficiencies of a preceding year. In a word, this Section does not designate any fund as the primary fund for the payment of annual expenditures and deficiencies, but conforms itself simply to providing that adequate means are supplied from some source.

The third Section not having the effect to limit the authority of the Legislature, as it regards the kind of taxation that may be resorted to, there remains only one additional source from which such a limitation could possibly arise, and that is Sections 1 and 3 read together. An argument drawn from a comparison of the last named Sections, and tending to limit taxation for the purpose contemplated by the third Section, to a tax on property, ad valorem, would have to be based on the idea, that because a particular kind of tax is mentioned in the second clause of the first Section, the third Section must be deemed to refer exclusively to and intend such tax. No such conclusion can arise from the direct sense of the terms, or from any implication proper to the structure of these Sections. If such a conclusion is to prevail, it can only result when there is no other tax that can fully satisfy the requirements of these two Sections. In other words, if we

*426

can find anything in *the nature of a tax on property, as contradistinguished from other modes of taxation, that can exhibit a motive in the Constitution to place that mode of tax, not only before all others, but to the exclusion of all others, then we may possibly have some ground for enquiring whether these Sections, construed together, evince an intent to make such a distinction; if no ground for such motive can be found, there is nothing to rest such a construction upon. If, on the contrary, the obvious motive lies in the opposite direction, then such construction would not only be faulty, but subversive of the intent of the Constitution.

An examination of the nature of these modes of taxation, and the effect of confining resort, under all circumstances, to the one, to the exclusion of all other kinds, cannot but establish the conclusion that such a mode of proceeding would violate the spirit and intent of the Constitution, as expressed in Section 1, Article IX, to the effect that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," and, also, as expressed in the last clause of Section 36, Article I, which is

life, liberty and property, according to standing laws. He should, therefore, contribute his share to the expense of his protection, and give his personal service when necessary.'

A just and equal system of taxation requires that all that receive protection from the government should contribute to its support, and so Section 36, Article I, in effect, defines it. Government not only protects the life, personal liberty and realized possessions of the citizen, but protects him as well in respect to his occupation or means of obtaining support and making accumulations. The poll tax may be regarded as representing the amount of personal contribution that each individual should make, independent of the nature of his property or occupation. The tax on property equalizes the burden fairly, so far as it is a contribution on account of the property held by the individual. If business or occupation, as distinguished from property, ought to contribute its share, then some other mode of taxation than those enumerated must be resorted to.

There are two kinds or classes of business that should be considered in this connection. One class is characterized by the fact that the profits of the business sustain some kind of relation, fixed or variable, to the amount

*427 of capital employed in the business. In *the other class of occupations the profits are not limited by, nor proportioned to, the amount of capital employed, using the word capital as meaning tangible property in some form. It will only be necessary to give a single instance as illustrative of each of these classes. To the former belong mercantile occupations, to the latter the professions. A tax on capital, considered as property, may, to a certain extent, reach the class who operate on capital, but even then the ad valorem principle yields a very imperfect result, considered as a tax on business, for the reason that the relation between the amount of capital and of profits varies through wide limits, as between the different kinds of business. A property tax cannot, however, reach those occupations, so as to act as a tax on occupation, where no necessary relation exists between the amount of profits realized and the amount of capital employed. A single instance may be taken from the commercial classes that illustrates the whole question. A merchant usually requires capital invested in merchandise as the basis of his business operations; a broker, on the other hand, does not, beyond an inconsiderable amount, to enable him to conduct his business. The one pays taxes on his merchandise, considered as capital, the other pays nothing, so far as it regards the means employed for

as follows: "Each individual of society has a rafforded by government is as important to right to be protected in the enjoyment of the broker or to the professional man as to the merchant; yet, under a tax laid on property, exclusively, he escapes contribution so far as the profits of his business are concerned.

> Whether at any particular time the one description, of tax, or both descriptions, will be most equal and productive, is a question for the Legislature; but to hold that the Legislature must confine itself to one of these modes of taxation, to the exclusion of the other, is to exempt, by the Constitution, certain persons pursuing particular avocations from the necessity of contributing to the support of the government, as it regards the profits or advantages of such occupations.

> Are we then at liberty to ascribe such an intent to the Sections under consideration? If such was the expressed intent, we would only have to declare that such is the will of the supreme authority of the State. But as we are called upon to enlarge the sense of the Constitution, on the ground of construction, and can only do so by a resort to certain implications based upon the reason and justice of the case, we are precluded from

*428

adopting such a construction, upon *considerations of justice and equality, not only enforced by the presumed intent of the Constitution, but by the express language already quoted.

We find, therefore, no ground in the Constitution for excluding the Legislature from resorting to a tax on occupations in aid of taxes imposed on property.

It remains only to consider whether the fact that the Act in question was passed and intended to take effect in a fiscal year in which a tax on property was laid in the usual manner and collected, affects its validity, on the ground that but one tax can be laid in any year.

The question is not whether it is unwise or oppressive to accumulate tax levies within any one year. We are bound to assume, unless the Constitution forbids such a tax as that under consideration, that it was necessary and called for by the circumstances of the case. This is an intendment due to every Act of the Legislature, passed with constitutional authority. The only question for us is, is such a tax forbidden by the Constitution, whatever may have been the necessities of the State that prompted its adop-

The declaration that the Legislature shall levy an annual tax is the ground on which the argument against the constitutionality of the tax is based. We have seen that the leading object of this Section (Section 3, Article IX,) was to secure adequate means for the payment of current expenses and deficiencies of a past year, without resort to borcarrying on the business. The protection rowing money. The Constitution intended, nually recurring expenditures must be met by annually recurring revenue. It is only extraordinary expenditures that can be postponed through the medium of a public debt. The object in view was substantial, not technical. The present objection is purely technical and formal. It proposes that all measures adopted by the Legislature in any one year, to provide income for its expenditures, must, as matter of form, be embraced in a single Act or statute, and must not consist of two distinct legislative Acts or resolutions. The objection is without force; it proposes stringency for system, to hamper the Legislature, instead of limiting it in a mode suitable to a due discharge of its functions. Its effect would be destructive, rather than constructive. If it is found convenient to mature the measures for the annual tax, in two or more distinct legislative enactments, no good reason can be assigned why the legislative action should not take that form.

*429

*One distinct Act might regulate the poll tax, another the tax on property, and a third a tax on occupations as distinguished from property, without violating the nicest sense of legislative propriety. The advantage of such a division of the subject is, that it presents the various matters for legislative consideration, in a separate and distinct form, and favors the full consideration of the merits, and the proper examination of each detail. The objection to such a course is fanciful. and without any foundation in legislative experience. The Legislature, during its sessions, may, if it please, make two or more distinct and separate provisions to secure adequate income from taxation to meet all expenses that should be liquidated from that Source

All such measures, whether in the form of Acts or Joint Resolutions, must be considered together as forming the single constitutional act of levying an annual tax, and the fact that the different taxes authorized call for different modes of procedure for their imposition and collection, does not interfere with their constituting a single tax in the sense of the Constitution.

The term annual tax, as employed in the Constitution in connection with the levying of taxes, is not new in the Constitutions of the various States. Its introduction may be traced back to the struggles that resulted in the overthrow of the system of imposing fixed taxes, that placed the revenues of the government in the hands of the Executive, and rendered unnecessary the annual convening of Parliament, substituting therefor a system under which the annual intervention of the representatives was necessary, in order to place the requisite means for maintaining government in the Executive hands. These

by this language, to say, in effect, that an- | familiar facts of constitutional history serve to account for the use of the word annual in the Constitution, without rendering it necessary to assume that some new and exceptional sense was intended to be attributed to the expression.

> We cannot but consider the law under examination, as forming, with the customary levy of the year in which it passed, a single annual tax, in the proper sense of the Constitution, and therefore not open to the charge of inconsistency with the Constitu-

> On the ground stated in the first part of this opinion, the judgment should be set

> MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *430

*MORTON, BLISS & CO. v. COMPTROL-LER GENERAL.

(Columbia, April Term, 1873.)

[Statutes = 125.]

See. 20, Art. II, of the Constitution of the State, that "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." does not render unconstitutional and void a provision in an Act entitled "An Act to provide for the appointment of a Land Commissioner, and to define his powers and duties," authorizing a pubfine his powers and duties," authorizing a pub-lic debt to be contracted for the uses and pur-poses of the office created by the Act.

[Ed. Note.—Cited in Walker v. State, 12 S. C. 203, 289; Connor v. Green Pond, W. & B. R. Co., 23 S. C. 436; State v. Town Council of Chester, 39 S. C. 317, 17 S. E. 752; Aycock-Little Co. v. Southern Ry., 76 S. C. 332, 57 S.

For other cases, see Statutes, Cent. Dig. § 189; Dec. Dig. \$\infty\$125.]

[Statutes =121.]

So, also, authority to contract a public debt, for the uses and purposes of the same office, may be introduced into a later Act entitled "An Act to amend an Act entitled "An Act to provide for the appointment of a Land Commissional Contract of the Act o sioner, and to define his powers and duties,' and for other purposes.

[Ed. Note.—Cited in State ex rel. Ray v. Blease, 95 S. C. 421, 79 S. E. 247.

For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. \$\sim 121.]

[Statutes \$\infty\$105.]

The extent and scope of the terms "sub-ject" and "expressed in the title," in the sense of the above recited provision of the Constitu-tion, considered and declared.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. € 105.]

[States = 116.]

A declaration in an Act authorizing a public debt to be contracted, "That an annual tax, the interest on the loan hereinbefore authorized, at the times when such interest shall fall due," is a compliance with the direction of Section 7, Article IX, of the Constitution of the State, that "every such law shall levy a tax, annually, sufficient to pay the annual interest of such debt," there being at the time of the passage of the Act a general law of force, under which it be-came the duty of an Executive officer of the State to fix the amount of the tax and order its collection.

[Ed. Note.—For other cases, see States, Cent. Dig. § 115; Dec. Dig. ⊕=116.]

[States \$\infty\$] 116.]
So, also, a declaration in an Act to borrow money on bonds of the State, "That the faith and credit of the State is hereby pledged for the payment of principal and interest on said bonds, and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually," is a compliance with the above recited direction in Section 7, Article IX, of the Constitution of the State.

[Ed. Note.—Cited in Walker v. State, 12 S. C. 281, 282.

For other cases, see States, Cent. Dig. § 115; Dec. Dig. \$\sim 116.]

[Statutes \$\infty\$=121.]

The intent of the Constitution in the above last recited direction was to secure an exhaustive exercise of the power, so that there should be no need for further legislation to fix the amount of the tax, or enforce its collection, and such power is exhausted by the terms of each of the Acts above mentioned, and the provisions of the general tax law of the State.

[Ed. Note.—Cited in State ex rel. Wallace v. Hayne & Mackey, 8 S. C. 376; Whaley v. Gaillard, 21 S. C. 561, 573; Southern Ry. Co. v. Kay, 62 S. C. 32, 39 S. E. 785; Rice v. Shealey, 71 S. C. 168, 50 S. E. 868.

For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174: Dec. Dig. \$\sim 121.]

[Constitutional Law \$\infty\$=137, 142.]

The inhibition of the Constitution of the United States that "No State shall pass any law impairing the obligation of contracts," inheres in a debt of the State created under an Act providing, as the Constitution of the State directs, for the levy of "a tax, annually, sufficient to pay the annual interest on such debt," and prevents the Legislature of the State from depriving the public creditor of his remedy to enforce the collection of the tax under the law of force at the passage of the Act.

[Ed. Note.—Cited in State ex rel. McKinlay v. Cardozo, 8 S. C. 79, 80, 28 Am. Rep. 275; State ex rel. Branch v. Leaphart, 11 S. C. 459, 471; Herndon v. Moore, 18 S. C. 355.

For other cases, see Constitutional Law, Cent. Dig. §§ 322, 354; Dec. Dig. ⊗⇒137, 142.]

[States \$\infty\$127; Taxation \$\infty\$906\%.]

The provision in Section 4, Article IX, of the Constitution of the State, that "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object such tax shall be applied," "appropriation made by law" of the money raised by a tax to pay the interest of a public debt, and makes it the duty of the State Treasurer to apply such money to the specific object mentioned in the Act directing the levy of the tax, and such duty can be enforced by the Courts.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125: Dec. Dig. © 127: Taxation, Cent. Dig. § 1737; Dec. Dig. © 906%.]

[Statutes 21.]

The provision in Section 7, Article IX, of the Constitution of the State, that no law to create a public debt "shall take effect until it 62.] [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102; Dec. Dig. ...

shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays," &c., requires only a vote of two-thirds of a quorum of each House, and not a vote of two-thirds of the whole membership of each House.

[Ed. Note.—Cited in Walker v. State, 12 S. C. 202, 285; Whaley v. Gaillard, 21 S. C. 574; McWhirter v. Town of Newberry, 47 S. C. 428, 25 S. E. 216; Smith v. Jennings, 67 S. C. 328, 45 S. E. 821.

For other cases, see Statutes, Cent. Dig. § 22; Dec. Dig. ©=21.]

[Statutes \(\sigma 21. \)]
Where an Act to create a public debt, by a loan on bonds of the State, is passed in the mode prescribed by the Constitution of the State, but some requirement of the Act, as, for in-stance, that the bonds shall be sold at the high-*431

est market price, is not *complied with by the officer charged with its execution, it is competent for the Legislature, by an Act, not passed by the vote of two-thirds of the members of each House, to waive the objection and validate the bonds.

[Ed. Note.—For other cases, see Cent. Dig. § 22; Dec. Dig. \$21.] see Statutes.

[Mandamus @=114.]

Mandamus is the proper remedy to compel the officer charged, by law, with the perform-ance of the duty, to direct the levy of a State tax to pay the interest of a public debt.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 241; Dec. Dig. &—114.]

[Mandamus \$\sim 71.]

To be entitled to the writ of mandamus the relator must show that the respondent is bound to the performance of some certain specified duty of a ministerial character, imposed by law, in the performance of which the relator has a legal interest.

[Ed. Note.—Cited in State v. Cardozo, 5 S. C. 315; Ex parte Barnwell, 8 S. C. 270; State ex rel. Harley v. Lancaster, 46 S. C. 289, 24 ex rel. Ha S. E. 198.

For other cases, see Mandamus, Cent. Dig. § 133; Dec. Dig. € 71.]

[Mandamus \$\infty 71.]

A duty imposed by law upon an officer is specific when a case or state of circumstances exists proper for its discharge; it may be imposed directly, or may arise out of a general duty imposed by law; it is certain, when it must be absolutely performed, and the officer has no discretion; and it is ministerial when an individual has such a legal interest in its performance that neglect becomes a wrong to him.

[Ed. Note.—Cited in Ex parte Lynch, 16 S. C. 39; State ex rel. Fouche v. Verner, 30 S. C. 280, 9 S. E. 113; State ex rel. Burgess v. Bowman, 66 S. C. 145, 44 S. E. 569.

For other cases, see Mandamus, Cent. Dig. § 133; Dec. Dig. © 71.]

[Constitutional Law \$\infty\$=62.]

There is nothing in the Constitution of the State that prevents the Legislature from passing an Act delegating to a ministerial officer the duty of ascertaining the rate or per centage of taxation to be applied to the assessed value of the taxable property of the State—the data for making the computation being furnished by the Act

[Taxation \$\sim 305.]

The direction in the general tax Act that the State Auditor shall, on or before the 15th day of November, "annually give notice to each County Auditor of the rates or per centum authorized by law to be levied for the various State purposes," &c., delegates to the Comptroller General, upon whom the duties of the State Auditor have been devolved by law, the duty of fixing the rates or per centum of taxation in all cases where the Legislature has furnished the data for making the computation but has not fixed the rates or per centum.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 498; Dec. Dig. ←305.]

[Mandamus =176.]

Where mandamus is applied for as a civil remedy to compel the proper officer to levy the tax to pay the interest on a particular State bond, held by the relator, and mentioned in his petition, the remedy must be confined to that particular bond, and cannot be extended so as to include all other bonds of the same class and entitled to the same remedy if applied for.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 394; Dec. Dig. € 176.]

[Mandamus \$\infty\$16.]

The law having designated the 15th day of November as the day on or before which the annual notice to each County Auditor of the rates of taxation shall be given, if the officer charged by law with the duty has neglected to include in the notice the rate of a particular tax which should have been included, it is too late after the 15th day of November to apply for mandamus to compel him to give the notice.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. —16.]

[Mandamus =14.]

Where an officer charged by law with the performance of a particular duty on or before a day fixed by law, gives notice before the day that he does not intend to perform the duty, mandamus lies to compel him.

[Ed. Note.—Cited in Sanders v. County Com'rs, 7 S. C. 363.

For other cases, see Mandamus, Cent. Dig. § 46; Dec. Dig. \$\infty 14.]

[Statutes = 125.]

[In a statute creating a public office, whatever is regarded by the legislature as requisite to describe or establish the nature of the office, the character, limit, and effect of the powers communicated, the extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by him, as well as all provisions intended to afford means of carrying out the objects contemplated by the establishment of such office, may be regarded as part of the subjectmatter and entering into the proper subject of the statute.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 189; Dec. Dig. ⊕ 125.]

[Statutes \$\infty\$106.]

[There is nothing in the constitution as to the requisites of an act authorizing the creation of a public debt, or fixing the procedure in such cases, which can render it necessary that authority for such purpose should be communicated by an act relating exclusively to the proceedings for the creation of such debt, nor improper that provisions for the creation of such debt should be incorporated with some other subject

to which they properly appertain, and that it should be treated of under such general subject.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 119; Dec. Dig. \$\sim 106.]

[This case is also cited in Whaley v. Gaillard, 21 S. C. 561, as to facts, and in State v. Cardozo, 5 S. C. 320, as to the construction of Const., art. IX.]

These were five several petitions for mandamus by Morton, Bliss & Co., of the city of New York, relators, against Solomon L. Hoge, Comptroller General of the State, respondent.

The pleadings in each case consisted, besides the petition, of the return of the respondent to a rule to show cause, and reply thereto of the relators, and a rejoinder of respondent.

The petitions were numbered from 1 to 5, inclusive, and the cases were heard together upon the pleadings, but for a full understanding of the questions decided, it is only necessary to give the petitions and return in the case, marked No. 1. Such differences as the other cases presented being fully shown by the opinion of the Court.

The allegations and prayer of petition, designated No. 1, are as follows:

*432

*1. That under and by virtue of the authority granted to the Governor of the State aforesaid, in and by the Act of the General Assembly of the said State, duly passed on the 26th day of August, A. D. 1868, and entitled "An Act to authorize a loan to redeem the obligations known as the Bills Receivable of the State of South Carolina," bonds of the said State were executed and issued conformably to the directions and provisions of the said Act; that the said bonds so issued amount, in the aggregate of their principal sums, to five hundred thousand dollars, as shown by the annual report of the State Treasurer, N. G. Parker, to the General Assembly, dated 31st of October, A. D. 1871, and that your petitioners are the holders and owners in good faith, and for valuable consideration paid, of one of those bonds which is dated 1st October, A. D. 1868; bears six per cent, interest, payable on the 1st of April and 1st of October in each year; is numbered 483; is for the principal sum of one thousand dollars, to be paid on the 1st day of April, A. D. 1888, and has been duly registered in the office of the Treasurer of the said State.

2. That in and by the first Section of the said Act, it is provided that the interest upon the bonds thereby authorized to be issued (being at the rate of six per cent. per annum) shall be payable semi-annually; and in the sixth Section of the same Act it is further provided "that an annual tax, in addition to all other taxes, shall be levied upon the property of the State sufficient to pay the interest on the said bonds, when such interest

shall fall due;" that in and by the first Sec-1 of October and 1st of April, 1872, still remain tion of the Act of the General Assembly of the said State, approved 13th March, 1872, and entitled "An Act relating to the Bonds of the State of South Carolina," it is enacted that the aforesaid bonds, issued on behalf of this State, as mentioned and set forth in the aforesaid report of the State Treasurer to the General Assembly, were duly and lawfully issued in conformity to the true intent and meaning of the said Act of 26th August, 1868; and that in and by the fourth Section of the said Act of 13th March, 1872, the aforesaid sixth Section of the Act of 26th August, 1868, is declared to be a part of the said Act of 13th March, 1872, and by the same Section of the aforesaid Act of 13th March, 1872, it is again enacted "that an annual tax, in addition to all other taxes, shall be levied upon the property of the State sufficient to pay the interest upon the aforesaid bonds," until the principal of the said bonds shall become due.

*433

*3. That by the law of the said State the Comptroller General is required, on or before the fifteenth day of November in each year, to give notice to each County Auditor of the rates per centum authorized by law to be levied as public taxes for the various State purposes, "which rates or per centum," it is enacted, shall be levied by the County Auditor on the taxable property of the County, and charged on the duplicate, with the taxes required to be levied and collected for other purposes."

4. That on the 13th March, 1872, J. L. Neagle was the Comptroller General of the State, and continued so to be until the 7th day of December in the same year; that during this period, and as such officer, the said J. L. Neagle was bound by law as aforesaid to give notice to the County Auditors, respectively, of the rate or per centum necessary to be levied in order to produce a sum sufficient to pay the interest which became due upon the said bonds during the year 1872, together with the interest on the same which would become due during the succeeding year, 1873, as provided for by the Acts of the General Assembly hereinabove mentioned; and that, nevertheless, no due or lawful notice to such effect was ever given to the County Auditors, respectively, of the said State by the said J. L. Neagle, while he was the Comptroller General as aforesaid.

5. That on the 7th day of December, A. D. 1872, Solomon L. Hoge became, and now is, the Comptroller General of the said State, and the successor in office of the said J. L. Neagle; that on the 1st day of April, 1873, other and additional sums became due and payable, for interest upon the aforesaid bonds, and those sums, with the interest that became due upon the said bonds on the 1st

in arrear and wholly unpaid.

6. The very recently, and since the 1st day of April, 1873, your petitioners demanded of the said S. L. Hoge, Comptroller General, as aforesaid, that he should proceed forthwith to give to the County Auditors, respectively, of the said State, the requisite notice of the rate or per centum upon the taxable property of their respective Counties necessary to be levied in order to make payment, as well of the interest upon the aforesaid bonds already due as of the interest upon the same that will become due on the 1st October, 1873, so that the interest due and in arrear upon the bond held by your petitioners, as aforesaid, might be paid to them

*434

without delay out of *that tax when collected, and that out of the same the interest upon the said bond falling due on the 1st October, 1873, might then also be paid to them, and that the said S. L. Hoge, Comptroller General, as aforesaid, declined and refused to give such notice.

7. That thereupon your petitioners demanded of the said S. L. Hoge, Comptroller General, as aforesaid, that he should give due notice on or before the fifteenth day of November, 1873, to the County Auditors, respectively, of the said State, of the rate or per centum necessary to be levied upon the taxable property within their respective Counties, in order to raise a sum sufficient to pay the interest already due and in arrear upon the said bonds, together with the interest upon the same that will become due on the 1st October, 1873, and the 1st April and 1st October, 1874, so that your petitioners might be paid out of that tax, when collected, the interest that should then be due upon the bond held by them as aforesaid, and be also paid the sums for interest upon the same payable on 1st April and 1st October in the year 1874, when the same respectively should become due, and that the said S. L. Hoge, Comptroller General, as aforesaid, likewise declined and refused to give such last mentioned notice.

8. And your petitioners further show that they have suffered wrong and injury, as aforesaid, by reason of the refusal of the said S. L. Hoge, Comptroller General, as aforesaid, of the State, to give due notice to the County Auditors, as aforesaid, of the rate or per centum to be levied upon the taxable property of the State for payment of the annual interest upon the said State bonds as provided for by the Acts of the General Assembly hereinabove mentioned, and that your petitioners are entirely without remedy in the premises, unless it be afforded by the writ of mandamus; and your petitioners therefore pray that a peremptory writ of mandamus may issue out of this Court against the said S. L. Hoge, Comptroller General, as aforesaid, commanding him forthwith to give to the County Auditors, respectively, of the said State, the requisite notice of the rate or per centum upon the taxable property of their respective Counties necessary to be levied, in order to make payment as well of the interest upon the aforesaid bonds already due as of the interest upon the same that will become due on the 1st of October, 1873, so that the interest due and in arrear upon the bond held by your petitioners, as aforesaid, may be paid to them without delay out of that tax when collected, and that out

*435

of the same the inter*est upon the said bond falling due on 1st October, 1873, may then also be paid to them; or else that a peremptory writ of mandamus may issue out of this Court against the said S. L. Hoge, Comptroller General, as aforesaid, commanding him to give due notice, on or before the 15th day of November, 1873, to the County Auditors, respectively, of the said State, of the rate or per centum necessary to be levied upon the taxable property within their respective Counties, in order to raise a sum sufficient to pay the interest already due and in arrear upon the said bonds, together with the interest upon the same that will become due on the 1st of October, 1873, and the 1st of April and 1st of October, in the year 1874, so that your petitioner, may be paid out of that tax, when collected, the interest that shall then be due upon the bond held by them, as aforesaid, and be also paid the sums for interest upon the same payable on 1st April and 1st October in the year 1874, when the same, respectively, shall become due, as provided for by the Acts of the General Assembly hereinabove mentioned; and that such other order may be made in the premises as justice may require.

The petition was verified by one of the attorneys for relators, and was accompanied by an affidavit of Niles G. Parker, late State Treasurer, stating that the bond mentioned in the petition had been duly registered in the office of the State Treasurer of the State, and that no interest had been paid on the bonds issued under the Act of August 26, 1868, since December 31, 1871, and by an affidavit of Walter Watson, stating that he was a member of the firm of Morton, Bliss & Co., and that said firm were the owners and holders, bona fide and for value, of the bond mentioned in the petition.

The return of the respondent is as follows: Solomon L. Hoge, Comptroller General of the said State, upon whom an order of said Court has been served, requiring him, on a day therein named, to show cause "why a writ of mandamus should not issue against him as prayed for in the petition," for cause shows:

First. That it is not the clearly prescribed be delusive unless the Court has the authorministerial duty of this respondent to give ity to order the payment of the money when

eral, as aforesaid, commanding him forthwith to give to the County Auditors, respectively, of the said State, the requisite notice of the rate or per centum upon the taxable property of their respective Counties necessary to be levied to pay the interest due and to become due, upon the bonds referred to in the petition, because—

1. The authority to ascertain and determine the rate or per centum of taxation is delegated by the Constitution to the General

*436

*Assembly, and not to the Comptroller General or to any other State officer; whilst the duty of this respondent, in this regard, is solely to give notice annually, on or before November lifteenth, of the rate or per centum so by the General Assembly ascertained, determined and authorized.

2. Neither the rate or per centum necessary to pay the interest due and to become due upon the bonds referred to in the petition, nor the rates or per centum to be levied for the various State purposes on or before November fifteenth next, have been ascertained and authorized by the General Assembly, and this respondent is, therefore, without the authority requisite to the performance of his duty in the premises.

3. This respondent is informed, and so charges the fact to be, that a large number of the bonds, issued in pursuance of the Act referred to in the petition, have been returned to the State Treasury, and there redeemed by the substitution of other bonds of the State: so that the number of bonds outstanding is unknown to this respondent, and cannot be ascertained without inquiry and the exercise of discretion which do not pertain to the office or the duty of this respondent. And this respondent submits, that if the duty of ascertaining and determining the rate or per centum, as demanded by the petitioners, were devolved upon him by law, he would be without the data requisite to its performance.

4. That the notice of the rates or per centum authorized by law, for the current fiscal year, having been already given by this respondent, there is no authority for the notice of any other rates for or during the current fiscal year.

5. That if the rates or per centum for the fiscal year, to commence November 1, 1873, were ascertained and authorized by law, the petition for a mandamus to require this respondent to give notice thereof to the County Auditors before the 15th day of November next is premature, and, according to established practice, cannot be granted.

Second. For further cause this respondent shews—

1. That the proceeding by mandamus is founded upon the authority of the Court to order the final performance of the duty claimed; that the remedy herein prayed for would be delusive unless the Court has the authority to order the payment of the money when

the Treasury "but in pursuance of appro-*437

priations made by law;" *that no appropriation has been made to pay the interest as claimed by the petitioners; and that, therefore, the judgment of this Court herein would be vain and nugatory.

2. That by the provisions of the Act of the General Assembly, approved March 23, 1872, referred to in paragraph 2 of the said petition, a registration of all the bonds and stocks, which constitute the public debt of the State, is authorized and directed to be made: and it is in terms declared that the State Treasurer and Financial Agent of the State, in the city of New York, shall not pay interest on the said bonds and stocks, until they have been registered according to the requirements of the said Act; that this respondent is not informed whether the bonds referred to in the petition have been, and he here charges that they have not been, so registered; and he submits that, until such registration be completed, the judgment of this Court requiring the levy of a tax to pay interest thereon would be vain and nugatory.

Third. For further cause this respondent shrews that the bonds, upon which payment of interest is sought by the petitioners, do not constitute valid obligations of the State for the reasons-

1. That by the Act of the General Assembly, ratified August 26, 1868, under which said bonds purport to have been issued, it was expressly provided that the bonds authorized by said Act should be "sold at the highest market price by the Financial Agent of the State, in the city of New York, and not less than for a sum to be fixed by the Governor, Attorney General and the Treasurer;" and this respondent is informed, and so charges the fact to be, that the said bonds were not sold in conformity with these requirements of the law.

2. That a large portion of the bonds so issued have been returned to the State Treasury upon the substitution in their stead of other bonds of the State; and this respondent is informed, and so charges the fact to be, that the bonds so returned, and thereby redeemed and paid, have been re-issued without warrant of law.

3. That the said Act is unconstitutional and void, in that it purports to authorize the contracting of a public debt, and does not levy a tax annually sufficient to pay the annual interest of such debt.

Fourth. For further cause this respondent shews, that, according to the established practice in mandamus, the writ will not be allowed, ordering a levy to pay a debt, until such *438

debt shall first have been *ascertained by the

collected; that no money can be drawn from | of refused; that in respect of a debt due by the State, no such judgment can be had without the consent of the State; and this respondent submits that this Court is, therefore, without jurisdiction by mandamus to enforce the same against the State, either directly or through its officers.

> Fifth. For further cause, this respondent shews, that the bonds referred to in the petition, if valid obligations of the State, are part of the public debt of the State, the aggregate amount of which public debt, according to the Treasurer's report of October 31, 1871, referred to in the petition, is fifteen millions, eight hundred and fifty-one thousand, three hundred and twenty-seven dollars and thirty-five cents (\$15,851,327 35-100.) upon all of which there is interest now past due and uppaid: and if it be the ministerial duty of this respondent to give notice to the County Auditors of a rate per centum to be levied to pay the interest upon the bonds referred to in the petition, this Court will not order the mandamus to issue as prayed for, without, at the same time, requiring that the rate per centum to be levied shall suffice to pay the interest upon the entire aggregate of the public debt.

> Sixth. This respondent further shews and charges that, to the extent at least of \$7,-191,700, the aggregate, herein above referred to, is not the valid debt of the State, and that the bonds enumerated in said report, if outstanding, are to that extent outstanding without authority of law; and in view of this condition of the public debt, this Court, if it have jurisdiction to require this respondent to give notice of a rate per centum to be levied to pay the interest upon the public debt, should not order such writ to issue until an investigation shall first be had to ascertain what portion of the said aggregate of public debt subsists as the valid debt of the State.

> Seventh. This respondent further shews that, by the provisions of the Act of March 13, 1872, referred to in said petition, the General Assembly, having in view the condition of the public debt, and to the end that the true amount thereof might be definitely ascertained, has authorized and directed a registration of all outstanding bonds and stocks to be made by certain appointed agencies, which registration, as this respondent is informed and so charges, is yet incomplete. This respondent submits, therefore, that if the Court has jurisdiction under proceedings in mandamus to direct an inquiry as to the true amount of the valid public debt, it

*439

should not assume *so to do pending the registration thus directed by the General Assembly, and now being prosecuted by its own appointed agencies.

Eighth. For further cause, this respondent submits, that by the Constitution of this judgment of a Court, and the payment there- State, the power to contract a public debt, and to provide for the mode and manner of B., 327; Gelpeke v. Dubuque, 1 Wal., 175; its payment, is delegated exclusively to the Supervisors v. Schenck, 5 Wal., 772; Bis-General Assembly: that the time at which, and the mode in which provision shall be made for its payment, involve questions and considerations of public policy which can only be determined in law and of right by the General Assembly; that any interference therewith by the judicial department of the government is expressly prohibited by the Constitution; and this Court is without authority, directly or indirectly, to take jurisdiction of the matter.

Ninth. And this respondent respectfully submits to this honorable Court that the writ of mandamus, as prayed for by the petitioners, would be, for the causes hereinbefore shewn, in direct contravention of sound public policy, justice and good government.

The return was duly verified by the respondent.

Chamberlain, Carroll & Janney, for relators.

Melton, Attorney General, and C. D. Melton, for respondent.

For the relators, the several Acts of the General Assembly and Sections and Articles of the Constitution of the State, referred to in the opinion of the Court, were cited, and also the following authorities:

Moses on Mandamus, 16, 15, 18, 213; Tap. on Mandamus, 62-3, 348, 352, 359; Kentucky v. Dennison, 24 How., 66; Step. N. P., 2291; The Prop. St. Luke's Ch. v. Stock, 7 Cush., 226; People v. Allen, 6 Ward., 487; Torry v. Millbury, 21 Pick., 67; Cooley on Const. Lim., 74, 78, 90, 87, 371, 381, 141; People v. Draper, 15 N. Y., 543; Fletcher v. Peck, 6 Cranch, 137; Dartmouth College v. Woodward, 4 Wheat., 643: Jefferson Branch Bank v. S. Kelly, 1 Black., 436, 448; Mathis v. McGee, 4 Wal., 153; New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 How., 133; Ohio Life & Trust Co. v. De-Bolt, 16 How., 416; Dodge v. Woolsey, 18 How., 331; McGee v. Mathis, 4 Wal., 143; Home of Friendless v. Rouse, 8 Wal., 430; Reid v. Railway, 13 Wal., 269; The Commissioners of Knox County v. Aspinwall, 24

*440 How., 376; *Van Hoff v. City of Quincy, 4 Wal., 535; City of Galena v. Amy, 5 Wal., 705; Riggs v. Johnson County, 6 Wal., 166; Green v. Biddle, 8 Wheat., 84; Woodruff v. Trapnall, 18 How., 202; Furman v. Nichol, 8 Wal., 44; Curran v. Arkansas, 15 How., 304; Hawthorn v. Calif, 2 Wal., 10; Antoni v. Wright, Court of Appeals of Virginia, 1872, Law Times, Dec., 1872, p. 472; Gosher v. Stonington, 28 Conn., 97; Bronson v. La-Crosse, 2 Wal., 283; Wood v. Lawrence, 1 Black, 386; Alexander v. Springfield, 2 Metc., thorize a loan to redeem the obligations 534; Nelson v. Cowing, 6 Hill, N. Y., 339; known as the Bills Receivable of the State

sel v. Jeffersonville, 24 How., 299; Mayor v. Lord, 9 Wal., 409; City of Lexington v. Butler, 14 Wal., 282; Bright., Fed. Dig., 814, Tit. Statute; Barday's Dig. Rules of Congress, 214: Walker v. Caldwell, 5 La. An., 268; People v. Mahoney, 13 Mich., 494; Mutual Ins. Co. v. Mayor of New York, 8 N. Y., 253; State v. County Judge of Davis Co., 2 Iowa, 282; Conner v. Mayor of New York, 5 N. Y., 293; Davis v. Wadsrough, 9 Iowa, 104; Sharp v. Mayor of New York, 31 Barb., 572; O'Leary v. Cook Co., 28 Ill., 534; Mozier v. Hilton, 15 Barb., 657; People v. Cann, 16 N. Y., 58; Bath Co. v. Amy, 13 Wal., 244; Hayne v. Hood, 1 S. C., 16; Commonwealth v. Alleghany, 32 Penn., 223; Commonwealth v. Pittsburg, 34 Penn., 512; Commonwealth v. Commissioners, 37 Penn., 246; Ohio v. Clinton Co., 6 Ohio R., 280; Gergas v. Blackburn, 14 O. R., 252; Sayer v. Minns, Cowp., 57.

The following are the authorities cited by respondents' counsel:

Tapp. on Mandamus, 78-9, 15, 16, 69; Story on Const., 369; Black, on Tax Titles, 1, 665, 26, 155; Attorney General v. Newbern, 1 Dev. and Bat. Eq., 217: 2 Cranch, 390; Cooley on Const. Lim., 116, 517, 141, 479; 11 Johns., 80; 4 Pet., 563; Moses on Mandamus, 84, 18; People v. Lawrence, 2 Hand, 141; Kendal v. United States, 12 Pet., 524; Decatur v. Paulding, 14 Pet., 515; Brashear v. Mason, 6 How., 102; United States v. Guthrie, 17 How., 304; United States v. Seaman, 17 How., 230; United States v. The Commissioner of the General Land Office, 5 Wal., 565; Reeside v. Walker, 11 How., 291; People v. Tremain, 29 Barb., 96; Ex Parte Fleming, 4 Hill, 581; United States v. Fisher, 2 Cranch, 390.

*441

*Aug. 27, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The relators have filed five petitions, setting forth in each petition that they are the owners and holders of a bond of a certain specified class, issued by the State, on which interest is due and unpaid, and demanding that a writ of mandamus issue to compel the respondent, as Comptroller General of the State, to issue directions to the respective County Auditors to levy a tax, in addition to all other taxes imposed by law, for the payment of the interest due and to become due on such bonds.

The five bonds set up in the five petitions are, each, for the sum of \$1,000, and are of the following classes: That in petition No. 1, issued under an Act entitled "An Act to au-The Royal Bank v. Turquand, 6 Ellis and of South Carolina," passed August 26, 1868, (14 Stat., 17;) that in petition No. 2, issued under an Act entitled "An Act to authorize a State loan to pay interest on the public debt," passed August 26, 1868, (14 Stat., 18;) that in petition No. 3, issued under an Act entitled "An Act to authorize a loan for the relief of the Treasury," passed February 17, 1869, (14 Stat., 182;) that in petition No. 4, isued under an Act entitled "An Act to provide for the appointment of a Land Commissioner, and to define his powers and duties," passed March 27, 1869, (14 Stat., 275;) and that in petition No. 5, issued under an Act entitled "An Act to amend an Act entitled 'An Act to provide for the appointment of a Land Commissioner, and to define his powers and duties,' and for other purposes," passed March 1, 1870, (14 Stat., 385.)

The ground upon which the relators place their demand for the relief sought is, that, by the Constitution of this State and the several statutes passed in pursuance thereof, under which the bonds in suit were issued, it is made the absolute duty of the respondent to take such steps as are authorized by the statutes fixing the powers and duties of his office, in order to cause a tax to be levied on the taxable property of the State, sufficient in amount to pay the interest upon the bonds of the relators of the five specified classes.

The various questions presented for discussion and adjudication appear, distinctly, in the various objections to the issuing of the writ interposed by the respondents' return, and can be advantageously and fully discussed in the form presented by the respondent.

The first class of objections that will be *442

noticed as going to the *foundation of the relators' right involves the constitutionality of the five enumerated Acts on several grounds, some of which affect all five Acts, and others one or more of such Acts.

The first objection will be found stated in petition No. 4, with reference to the Act set forth in that petition, and is as follows: "That the said Act is unconstitutional and void, in that it relates to more than one subject, and that so much thereof as purports to authorize the contracting of a public debt is not expressed in its title."

The clause of the Constitution, which is the ground of this objection, is in Section 20 of Article II, and reads as follows: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title."

In considering whether the Act, to which the objection relates contravenes this provision of the Constitution, it becomes necessary to inquire what is a "subject," in the sense of the Constitution, and what is the force of the word "expressed."

In the most general sense, the subject of a statute is some right, obligation or power,

either public or private, created, modified or destroyed, for the purpose of attaining some end, either of public or private advantage, which constitutes the object of the statute.

Where the rights, obligations or powers, which are the subject of the statute, appertain to a public function of the government, to be exercised through or by means of a public office, such office, by its established title, or the public officer who holds it, by his name of office, is, according to Parliamentary usage and common understanding, the immediate and direct subject of the statute.

If the statute intends merely a modification of some particular power or duty appertaining to an existing office, the office is still, in a reasonable sense, the proper subject of the statute; but if, as in the present case, the object of the statute is to create or bring into existence an office not theretofore existing, such office is, in the strictest sense, the proper subject of the statute.

In a statute creating a public office, whatever is regarded by the Legislature as requisite to describe or establish the nature of the office, the character, limit and effect of the powers communicated, the nature and extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by such incumbent, as well as all provisions intended to afford means of carrying out the *443

objects contemplated *by the establishment of such office, may be regarded as part of the subject-matter and entering into the proper subject of the statute.

The Act in question purports, by its title, to deal with the Land Commissioner and his office. Do the provisions of the Act authorizing the creation of a public debt, for the purposes and uses of the Land Office, properly appertain to the subject of the Act?

There is nothing contained in the Constitution bearing on the requisites of an Act authorizing the creation of public debt, or fixing the mode of procedure in such cases, which can have the effect of rendering it necessary that authority for such purpose should be communicated by an Act relating exclusively to the proceedings for the creation of such debt, nor rendering it improper that provisions for the creation of such debt should be incorporated with some other subject to which they properly appertain, and that it shold be treated of under such general subject.

The Section of the Constitution that affects the question of the requisites of a statute valid for the creation of public debt is Section 7, Article IX, hereinafter cited at length. Section 7 requires that the object of creating a debt shall be stated in the Act. The object referred to is the thing intended to be procured or done by means of the money to be raised by borrowing. It allows only a sin-

gle object of expenditure to be provided for in any Act authorizing the creation of public debt. If the Act attempts to confer authority to borrow money in reference to two or more disconnected objects of expenditure, it is not in conformity to the Constitution. The object must be distinctly specified in the Act. It is also required that, to become effectual, it must pass by a vote of "two-thirds of the members of each branch of the General Assembly." The vote on its passage is required to be recorded by yeas and nays on the journals of each House respectively. It is also required that every such law shall levy a tax annually sufficient to pay the interest of such debt. Finally, the object of expenditure must be "extraordinary." Does compliance with these requirements of Section 7 render it necessary that an Act authorizing the creation of public debt should treat the conferring of such authority as the proper and exclusive subject of such Act, and that such subject should specifically appear and be expressed in the title? It is obvious that such is not the intent or effect of Section 7. As it regards the mode of passing the Act, nothing need be said in this connection, for a regulation as to the forms of authentication cannot, in itself, operate to determine *444

what *the Act shall, and what it shall not contain, and how its contents shall be stated. Whatever it may contain, in order to take effect under the Constitution, as authority for creating public debt, it must pass in the required manner.

So the clause requiring that such Act shall levy a tax to pay interest, while it determines its necessary character as to one particular, yet it cannot operate to determine to any extent what or how many other distinct matters, not inconsistent with that feature, shall be contained in the Act.

It remains, then, only to consider whether that which the Constitution requires in regard to the character and mode of stating the object of expenditure controls the Act, as it regards the exclusion of matters other than what is necessary for a mere statement of a single object, and the provisions for borrowing money with reference to such object.

It is required that the object shall be stated. Assuming that it is a sufficient statement to satisfy this requirement that the object of expenditure shall be merely named so that it can be recognized and distinguished from all other objects of expenditure, there is nothing in the language or meaning to prevent the Legislature from going beyond such mere mention of the object by its name, and fixing, by definite legal enactment in the same Act, the precise intention as it regards such object of expenditure, and covering all the demands that may be made for legislative direction in the course of carrying such object into practical realization.

This may be illustrated by supposing that the object of expenditure was the erection of a public building. There are two provisions to be made by the Legislature. In the first place, authority is to be conferred upon some officer to construct the building, and in the next place, means are to be provided for the construction. If these means are to be obtained by borrowing on the public credit, other provision is to be made by a law conformable with the Constitution for obtaining money by borrowing. The question under immediate consideration is, whether there is anything in the Constitution that would prevent all these measures requisite to the attainment of a single object from being incorporated together in one legislative Act.

Now, the object of expenditure in the case supposed, is the erection of a public building. It appears to be an extraordinary expenditure—that is to say, it forms no part of the *445

regularly *recurring current expenses of the government. The authority to borrow money must be confined to this specific object, and no other object, such as the building of a canal or other distinct public improvement, can be associated with it, as participating in the fund to be created by borrowing. This object must be distinctly stated as the object of expenditure contemplated, as it regards the money borrowed. Now, when the Legislature have put all these matters in the Bill, in conformity to the Constitution, can they go on and describe the building intended to be erected, fix its location and the materials out of which it shall be constructed, limit its cost, and supply all other needful legislation, so that the work may be completed without further appeal to the Legislature for direction? If the provisions of the Constitution forbid this, it must be because it was within its intention, in saying that a single object of a certain class should be distinctly specified, to declare that no other legislative directions as to the nature of the object or the mode or means of its accomplishment shall be included, beyond the mere naming of such object of expenditure. It is not the province of a Court to search out such hidden and unexpressed intentions. The thought of the framer of the Constitution must be fixed in the terms employed, as read, in view of the objects he is seeking to attain. fore the Court could find any such intent, by any implication, it would be necessary to find some real and obvious incongruity in the associating together in one Act of various provisions, having for their end the definition of the object of expenditure and the means of its attainment. There is no such incongruity. It is the most natural and proper thing, in providing for the construction of a public work, in all its details, to go on and complete the arrangements for the construction of such work, by indicating the sources from which

the means of its accomplishment are to come, a tax annually sufficient to pay the annual and directing the steps by which the means can be placed in hand, applicable to the prosecution of the work. All these matters are properly parts of one general subject, that may be treated together or divided up and considered in separate acts, as that body finds either course most convenient.

Looking, then, to the Act in question, we see that its subject is the powers and duties of the Land Commissioner; that as it is necessary to have means to carry out the object of creating that office, so it was proper in the Act providing for the creation of such office to provide such means; that as the

*446

expenditure required was *clearly extraordinary, borrowing on the credit of the State for that purpose was attainable under the Constitution; and, therefore, it was proper that provision should be made covering the acquisition of such means by borrowing.

As it appears that, properly considered, the Act in question has only one subject, the remaining inquiry is whether that subject is, in the language of the Constitution, "expressed in the title." Expression in its legal sense is used in opposition to implication. It is not sufficient, then, that the title is such that the subject of the statute can be made out from it by implication; it must be actually named or expressed in it. That has been done in the Act in question. The proper subject of the Act is in the Land Commissioner, his powers and duties, and that subject is fully expressed in its title.

The objection just considered is also taken in reference to the Act in Petition No. 5, but as that Act is amendatory to the Act in reference to which the objection just considered was applied, and as the title of the last named Act was repeated, in express terms, in the title of the amendatory Act, as the subject of its amendment, what has already been said in regard to the Act in Petition No. 4 applies with equal force to that in Petition No. 5.

The next objection is raised as affecting the validity of all the five Acts, and is as follows: "That the said Act is unconstitutional and void, in that it purports to authorize the contracting of a public debt, and does not levy a tax annually sufficient to pay the annual interest of such debt." The clause of the Constitution in question is in Section 7. Article IX, which Section is as follows: "For the purpose of defraying extraordinary expenditures, the State may contract public debts: but such debts shall be authorized for some single object, to be distinctly specified therein, and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by of an agency of the government competent yeas and nays in the journals of each House to offer and accept propositions in the name

interest of such debt."

The language of the Act in Petition No. 1, to which this objection is applied, is as follows: "That an annual tax, in addition to all other taxes, shall be levied upon the property of the State sufficient to pay the interest on the loan hereinbefore authorized at the times when such interest shall fall due." The language used in the other four Acts is either the same as that quoted, or not substantially differing from it.

*447

*The proposition of respondent is, that the introduction of the clause in question is not a sufficient compliance with the last clause of Section 7, Article IX, requiring the levy of a tax to pay interest, and on this ground he alleges the unconstitutionality of the five several Acts.

The first matter to be considered is the object and intent of the clause of the Constitution in question, which reads that "every such law shall levy a tax annually sufficient to pay the annual interest of such debt." The direct object of this clause was to secure so full an exercise of the legislative power at the moment of communicating authority for creating public debt that it should not again become necessary to appeal to that body in order to secure means or authority for the payment of annual interest on the sums so borrowed. Under this clause there cannot be a full exercise of the legislative power to contract public debts, unless that legislative Act amounts to an exhaustive exercise of the power of providing means for the payment of annual interest.

The Constitution intended to place the proceedings by which means are to be acquired for the purpose of paying interest on the public debt beyond the control of the Legislature. The object of this was, obviously, to reduce the question of the payment of interest on any public debt created under the Constitution to a mere executive duty, that might be compelled through a remedy under the control of the bondholder.

In considering the correctness of the position just assumed, the proposition presents itself that this provision of the Constitution was intended, mutually, for the benefit of the State and its bondholder. In framing enactments with a view to the borrowing of money, whether those enactments are intended to form part of the fundamental law or of ordinary legislation, the leading objects are, first, to facilitate such borrowing, and, second, to prevent abuses of such power. The idea of facilitating the act of borrowing involves the offering of inducements to the lenders of money to loan the required amount on favorable terms and the creation respectively; and every such law shall levy of the government and of carrying into pracupon within the authority of the public agent. A loan of money to a State, unless belonging to the class of forced loans, not involved in the present case, is a voluntary act of the lender, that proceeds upon offers

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or inducements pre*sented by the borrower or his accredited agent, and accepted or rejected, according to the view the lender may take of his interest in the matter. Such a transaction is preceded by negotiation, which is the presentation of the offers of the borrower to the mind of the lender in the form most attractive—that is, most in accord with his views of his own interest in the matter. The object of negotiation is not simply to induce him to lend, but to lend on the most favorable terms. The ideas that are uppermost in the mind of the lender are, first, what his money is worth in the way of interest, assuming that it is certain to be repaid, and, second, if the risk of repayment is not too great to permit him to make the transaction, what is the equivalent, in the way of an increased rate of compensation, for the risk that he must assume in this respect. In other words, the lender is seeking profit on his money and security. These incidents must be regarded as present in every transaction of that class, and form the basis of the legal conception of the relation existing between borrower and lender. Whatever there is within the propositions made by the borrower looking to an increase of security on the part of the lender must be regarded as part of the inducement, and, if capable of doing so, as entering into the very essence of the contract.

When a sovereign State enters into a contract of borrowing with an individual, it assumes to be bound, in all particulars, as an individual under like circumstances would be bound, by what is expressed or properly implied by the terms of such contract. The measure of its obligation is that applied to individuals. It is only in the consequences that flow from a breach of the contract that there is a difference between the case of a State and an individual. The individual can be sued; the State cannot. The reason of the difference is that a suit presupposes the submission of a controversy between two or more to a third party, independent of both, and, therefore, capable of dealing with the question in a judicial spirit and with judicial authority. When a sovereign State violates its contract, no such independent source of authority can be appealed to, for the fact of sovereignty in the State precludes the possibility of its existence. The idea that a State cannot be sued for a breach of its contract then means, simply, that there is no power that can be invoked, within the means and appliances afforded by civil government, by which it can be compelled, against its tract, then it follows that such provisions en-

tical operation such terms as may be agreed; will, to do that which in right and justice

ought to be done in the case. A State *that should deny the existence of its obligation, as resulting from its contract voluntarily made, on the ground that no means of compulsion existed to oblige a performance of its duties, would at once espouse the principles and enter upon the practices of the confirmed criminal classes of society, with whom obligation means nothing more than the pains. and penalties that may flow from its denial or disregard. For the same reason, the State is bound, as it regards all the incidents properly appertaining to such a contract. obligations thus assumed by a State have the force and effect of law, while, as it regards the States comprising the American Union, the fundamental law of the nation enters into such a contract, as well as into every contract made by a citizen, becoming an efficient part of it, through the operation of that provision of the Constitution that prohibits the passage of laws impairing the obligation of a contract. Should the State so far forget its exalted duties as to undertake to exercise its law-making power by way of denying or destroying its solemn contract, the life and spirit of the nation, flowing through its fundamental law and entering such contract, would lift it above the power of the State to obliterate or impair the record of its obligation.

When the law-making power makes a contract with an individual, the legislation conferring authority upon its agent and limiting his powers is to be considered as part of the contract, of which one dealing with the State is bound to take notice. If the agent of the State transcends his legal authority, or fails to conform to it, the person dealing with the State, through such agent, with knowledge of the action of the agent, gains no right against the State through such action. This shows that, to all intents and purposes, the legislation conferring authority upon the agent and prescribing the mode and manner of its exercise, as well as the limits of his authority, becomes part and parcel of the contract. It being thus seen that when the authority under which a contract of borrowing is made proceeds wholly from the Legislature, the Act and proceedings of that body in reference to it enter into and become part of such contract, it follows that where the powers of the Legislature are limited and controlled by a written Constitution, so as to become a test of the validity of the contract. the same principle just applied, as between the Legislature and its executive agent, must be applied as between the Constitution and the Legislature. If the provisions of the Constitution can become, under any circum-*450

*stances, a test of the validity of the con-

ter into the contract and become part of it.

It would follow that whatever is contained in the Constitution which shall be construed as bearing on the amount or kind of security that the lender to the State should hold and enjoy must be regarded as part of the inducements presented to his mind in the course of the negotiations that led him to form the contract with the State, and as part and parcel of that contract.

We come now to consider more carefully the exact bearing of the clauses of the Constitution under consideration, under the view just presented. The inquiry is, whether the provision as to the payment of annual interest was intended to facilitate the borrowing of money, by presenting to the mind of the lender an inducement, in the form of complete legislation, providing for the annual imposition and collection of a tax devoted by the Constitution to that express object, which, as affording a higher degree of security, as it regards the payment of interest, would tend to make the terms of borrowing more favorable to the State. If we thus conclude, it will follow that, as has been already stated, one of the objects, and a leading object, of the adoption of that clause was to secure advantages mutual to the State and the lender, the State getting its money on better terms and the lender being compensated therefor by obtaining more perfect security.

It is a historical fact that we are bound to notice that in 1868, the time when the Constitution was made, the position of the State, as it regarded financial credit, was unfavorable. It had just emerged from a war that had wasted, to a great extent, the property of the State in public and private hands, and had deranged, to a serious extent, the industries and occupations of the people. A considerable public debt existed, with no adequate means to meet demands for accruing interest. For the three preceding years the government of the State had been in a disorganized and anomalous condition. people were just preparing for the institution of regular government. It was obvious that circumstances might arise calling imperiously for the exercise of the borrowing power, and it was the dictate of prudence to place that power in a condition for efficient exercise in the event of such a contingency, and, so far as the introduction of wise provisions in the Constitution would accomplish it, to remove as far as possible the disadvantages that surrounded any effort of the State to make a favorable impression on the minds of

*451

*those upon whom it must rely for pecuniary aid in such exigency as to its ability and fixed intention to meet its obligations. This was the occasion that accompanied and influenced the framing of the Constitution, and points the motive that is the key to its interpretation,

The difficulties that, under the most favorable circumstances, surrounded the attempts of the States of this Union to make available their financial credit in domestic and foreign markets, and only overcome after a long practice of public probity and prudence, was increased by the exceptional financial and political situation of the State. To remove at once, though only to a limited extent, the causes that acted unfavorably in all efforts of the States to make available their financial credit, was a necessity, in a condition of affairs so exceptional and embarrassing, and the highest dictate of prudence. The States of our Union, in addition to immunity from civil prosecution, enjoyed, in common with all other States, exercising sovereign or lawmaking power, were free from the apprehension of being compelled to discharge their duties by an act of war on the part of any aggrieved State or nation. They could neither be compelled to fulfill their obligations by civil remedies or by war. Such immunities carried with them their disadvantages. The financial credit was to that extent diminished. Their claim upon the money lender was his opinion of the force of the principle or the sentiment of honor that actuated the sovereign borrower-the degree of enlightenment that actuated its legislation from the standpoint and stimulus of self-interest, and the strength of his faith in governments regarded as established institutions with natural tendencies to conservative action. The lender lacked an element essential to reduce his idea of the risk attending a transaction with a State so circumstanced to the lowest possible point, namely, the power to enforce its obligation lodged in his own hand.

Under these circumstances, there was presented to the framers of the Constitution but one practicable course to overcome the difficulties in the way of obtaining money by borrowing, and that was to place in the hands of the lender a remedy of some kind or extent that would enable him to pursue the satisfaction of his demand in whole or in part. To bring into existence such a remedy, as independent of and opposed, possibly, to the law-making power of the government, was placing in the hands of the subject of law power to coerce the law-making authority.

*452

Such a course the Constitution *did not adopt. On the other hand, it was practicable to place in the hands of the lender a complete and perfect remedy, without bringing about the anomaly of a State compelled by its subject. This could be accomplished by attaching to the authority of the Legislature to contract public debts a condition covering the required remedy, without compliance with which condition the debt could not be brought into valid legal existence. This condition must be, that in the Act itself authorizing the creation of the debt there must be a com-

plete performance on the part of the Legis- | Though carrying the principle of placing the lature of everything necessary to be done, in demand of the bondholder on the highest order to make the steps requisite for requiring the means of paying the public creditor and applying these means to the discharge of his demand a mere ministerial act that could be compelled by a judicial remedy at all times within the power of the creditor. Such a remedy would not seek to enforce the obligations of a State, by compulsion applied to the State, and bearing equally upon its legislative and executive functions, but it would seek merely to compel an executive officer to perform that which was already commanded by the law-making power, and which was, in itself, law that the ministerial officer was bound to obey and the Courts had the right to enforce. Such a scheme would favorably impress the money lender, as he already knew that if such legislation was consummated, and if, on the faith of it, he had made with the State a contract by a loan of his money, that the Constitution of the United States, as well as of the State, would perpetuate the legislative features of such contract by destroying all subsequent legislation tending to impair their force or effect.

It was possible for the framers of the Constitution to carry out such a design to the extent of reducing the whole future action of the State government to a mere ministerial act of its officer or agent, both as it regarded the principal and interest of his debt. If they had seen fit, they could have required that, in every Act authorizing the creation of a public debt, provision should be made for an annual tax sufficient in amount to extinguish the annual interest on the amount borrowed, and also to pay a per centum of the principal of that debt. They could have appropriated such moneys as realized-that intended for the payment of interest to that direct purpose, and that intended to sink the principal into the hands of trustees, who would be amenable to the Courts for the honest discharge of their duties-and thus provision could be made by which the creditor of the

*453

State would hold in his hands a com*plete remedy, and yet the sovereign dignity of the State would not be compromised. The State would exhibit its good faith by at once giving to its agents all the instructions requisite to enable them to meet the payment of its obligations at maturity, which instructions, under the operation of one of the greatest and most conservative features of our Constitutions, State and National, would become fixed and unalterable law.

The framers of the Constitution were not prepared to go to the length of making full provision by irrepealable legislation covering the payment of principal as well as interest. They deemed it prudent to limit such provision to the case of payment of interest. possible ground consistent with the nature of a State endowed with sovereignty no further than was necessary to give such high security as to the payment of interest, yet they evince a determination to place the payment of interest on the highest ground of constitutional certainty.

We will next consider, more immediately, the requirements of the clause under consideration, and which is in the following language: "And every such law shall levy a tax annually sufficient to pay the annual interest of such debt," having in view the line of inquiry on which we are proceeding. namely, whether this clause was intended to operate mutually for the benefit of the State and its creditor, parting with his money on its faith and credit, or exclusively for the benefit of the State. In other words, whether it was intended that this clause should afford some kind of remedy to the bondholder as it regards the interest accruing on his bond.

The motive of the clause will be better understood after an exact understanding of its purport, and if its intended effect is attained, what, then, is the exact end sought by the Constitution in this clause?

The immediate end is the levying of a tax of a particular character. The object of that tax, as disclosed, is to provide means to pay the interest annually accruing on certain bonds. The duty enjoined on the Legislature is to "levy a tax." A tax is the means by which a burden primarily borne by the State is transferred to the citizen. The obligation may have relation to debt already incurred, or it may be in anticipation, dependent on future contingencies. Three things are essential to a tax, as that term is under-*454

*stood by our Constitution. First, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of tax payers; second, a legal imposition of that sum as an obligation on the collective body of tax payers; third, an apportionment of such sum among individual tax payers, so as to ascertain the part or share that each should bear. The precise nature of each of these acts depends to a large extent on the standing tax laws, as established by the Constitution and the Legislature. Their general character is, however, fixed in the nature of regular government, and modifications merely result under the peculiar mode of employing them adopted in the tax laws of different States or countries.

The first two acts above described, namely, the ascertainment of a sum to be imposed on the collective body of tax payers, and its imposition by a legislative declaration to that effect, are essentially legislative acts,

or acts proper, directly, to the law making law, for what is wanting to complete such executive authority for its decision, nor could they be so left without endangering the balance of power between the parts of the government, which rests on natural principles. The Legislature should at all times retain in its own hands whatever tends to affect the limit of public obligations and expendi-In addition to this, every State has more or less public property and sources of revenue independent of taxation, and the Legislature is the proper authority to determine to what extent public property and revenue should be applied to meet the pecuniary wants of the State, and how far the collective body of tax payers should be called upon to contribute to such end.

The third act, namely, the apportionment of the whole sum imposed by way of tax on the collective body of tax payers upon the separate individuals composing that body, is usually an administrative act, performed under specific statutory directions, ascertaining the mode and time of its performance. When the system is that of taxation based on property according to value, this act consists in ascertaining the persons holding property subject to taxation, the kind, amount and value of the property so held, and by a simple act of division, as applied to the whole sum to be raised, based on the ratio that the value of the property of the individual tax payer bears to the aggregate value of property held by the collective body of tax payers, to arrive at the share or por-*455

tion of each such indi*vidual tax payer. In practice, the amount to be raised is divided by the aggregate value of taxable property, and the quotient is a sum, which, multiplied by the value of the property of an individual tax payer, gives the amount which he should pay. When the aggregate value of property is ascertained at the time the tax levy is ordered, the Legislature frequently makes the division, and directs the levy to be made according to the resulting rate, which is thus established by law, instead of merely fixing the amount to be levied and leaving the rate to be ascertained by computation, after the aggregate valuation of property, subject to taxation, is ascertained and known. Both modes are resorted to, and both are equally appropriate to adoption by the legislative body.

As there are two distinct stages in this process, the result of one of which is to fix an indebtedness on the collective body of taxpayers, and the other on the individual taxpayer, so the word "levy" is indifferently employed, as commonly used, to express either one of these processes separately, or both collectively. A tax is said to be levied when

function of the government. These matters levy is supplied by the standing tax laws, are not usually, if they are ever, left to the and consists in a course of administrative action. When the levying of a tax is spoken of as a legislative act, it is commonly understood to describe such action on the part of the Legislature as would, with the standing tax laws, complete the legislative authority requisite to enable the administrative department to distribute and collect the tax.

The Constitution, in the clause under consideration, in imposing a duty on the Legislature, as the condition of its resorting to borrowing money, intended to give a certain form to Legislative proceedings in such cases. The word "levy" must then be taken in the sense proper, when used to describe that part of the process of imposing taxes proper to be performed by the legislative body itself. To the extent that it enjoins action on the Legislature, it must be regarded as enjoining complete action. In other words, the tax directed to be levied must be so far imposed. in order to comply with the letter and spirit of the Constitution, that no further legislation will be necessary to enable its collection. This is obvious; for if the imposition of such tax was of so much moment as to be a proper subject for consideration and provision in the Constitution itself, then, clearly, a perfect and complete act is the least that can satisfy the requirements of the Consti-

*456

tution. In a word, *the Legislature must, at once, and before money is borrowed, exhaust its legislative functions, so far as it regards making provision by taxation for the payment of the interest on any loan to be made.

The object of the tax is declared to be the payment of annual interest. If this requirement stood alone and unqualified, it could, perhaps, be complied with in two ways: first, by directing a tax to be enforced annually, sufficient for the payment of the sum annually accruing as interest; or, second, it could direct a gross sum to be raised at once, to be held as a fund to sink interest as it should arise year by year. The first named of these methods is the one rendered appropriate by a proper construction of the words "annually sufficient." These words make it certain that the tax must be annually recurring and fix the extent which it shall be imposed, namely, to the amount of interest accruing. It is no objection to this view, that at the time the law authorizing the borrowing of money is passed, the extent to which money may be borrowed under it is not capable of being ascertained, because it depends upon the future will of the lender of money, as well as upon the will of the Legislature. As has already been said, the action of the Legislature in authorizing the collection of a tax is not comthe amount or rate to be imposed is fixed by plete and consummate until the amount to

ascertainment. The process of issuing or creating the debt, as inferred by the Constitution, is such that the amount of interest, annually accruing, is ascertainable by a mere computation based on facts, evidenced in a manner provided for in the Constitution itself. These provisions are set forth in Section 14, Article IX, in the following language: "Any debt contracted by the State shall be by loan or State bonds, of amounts not less than fifty dollars each, on interest, payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all such bonds shall be kept by the Treasurer, in numerical order, so as always to exhibit the number and amount unpaid and to whom severally This Section determines made payable." both the evidence that shall entitle the public creditor, and that which shall guide the executive officers in all duties appertaining to such indebtedness. The creditor must hold a bond of a certain character and number, and the executive officer must test the validity of such evidence of debt by the official registry, required by the Constitution. Now, if these requirements of the Constitution are

complied with in any *case, it is evident that the amount of interest to be annually paid is ascertainable by a mere computation, applied to evidences established by the Constitution for that purpose. In order to test the intent and meaning of the Constitution, which we are now attempting, we must not inquire, in any given case, whether such issue and registry has been made, but we must inquire what was contemplated, on the assumption that all things were properly carried out. Should it become material hereafter to consider what might be the effect of a departure from these requirements of Section 14, either on the rights of the creditor or the duty of the executive officer, that subject will receive attention in its appropriate place.

*457

The conclusion, as bearing on the present question, is that the Constitution intended as a necessary requisite of every Act authorizing the creation of public debt that it should make full legislative provision for the imposition and collection annually of a tax sufficient in amount to pay the interest thus accruing, which Act, taken together with the other provisions of the Constitution referred to above, and the standing tax laws, should be full authority to the administrative officer to proceed to impose and collect the tax.

It is impossible to ascribe any reasonable motive and object to such a regulation, unless it was intended as a certain and unalterable provision for the payment of interest on all sums of money that might be borrowed under any such Act. It was in con-

be raised is either fixed or made capable of ascertainment. The process of issuing or creating the debt, as inferred by the Constitution, is such that the amount of interest, annually accruing, is ascertainable by a mere computation based on facts, evidenced in a manner provided for in the Constitution its self. These provisions are set forth in Section 14, Article IX, in the following language: "Any debt contracted by the State shall be by loan or State bonds, of amounts

It has been argued that these provisions, after all, do not complete any title or remedy in the hands of the creditor, because, although the tax should be imposed and collected, still the money cannot be claimed by the creditor, unless a specific appropriation be made authorizing its application to his payment. What effect such an argument might have if it rested on a foundation of fact, whether it would be regarded as virtually destroying all idea of remedy as associated with the requirements of the Con-

*458

stitution, or *as merely impairing the completeness of that remedy, need not be considered, for the Constitution itself operates as an appropriation of funds so collected and deprives the Legislature of all power of changing the destination of any such fund.

Section 4, Article IX, provides that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object such tax shall be applied." These concluding words, in directing the application that shall be made of the funds resulting from the collection of such a tax, do all that it is the province of an appropriation to do. Should these words be placed in an Act of legislation authorizing the borrowing of money and levying a tax for the payment of interest on the money so borrowed, they would have to be construed as amounting to an appropriation or authority for the Treasurer to disburse such moneys towards the objects they were intended to subserve. In that case the object of their insertion in such Act would have to be regarded as identical with that sought to be enforced by the Constitution. If it had been intended that the Legislature should have any discretion as to the objects to which such funds should be applied, this clause would not have been inserted in the Constitution. Its insertion evidences the intent of the Constitution to deprive the Legislature of all power of misapplication, by an authoritative and imperative appropriation to the specific object set forth in the tax law as the ground of raising the specific tax. If the construction of the constitutional provision stopped short of this, it might entirely defeat the intent, for money might be raised by the Legislature under an Act strictly conformable to the Constitution as a mere pretext, and, afterwards, applied to any purpose desired by the Legislature. The ef-the five several Acts, as it regards the levy ficient remedy was to stamp at once upon the of an annual tax, differs in some subordifund the direction in which it should be disbursed, and thus effectually to appropriate it in the sense of Section 12 (Article IX,) which reads as follows: "No money shall be drawn from the Treasury but in pursuance of an appropriation made by law." An appropriation made by the Constitution itself is in every sense an appropriation made by law.

Thus it is seen that, in addition to the dispositions already referred to as made to furnish some sort of security and remedy to the holder of obligations issued under the Constitution, a disposition of the funds raised by taxation for the purpose of paying interest on such debt is made of such a

*459

nature that the disbursement towards *such object is an administrative act that may be compelled by the action of the Courts.

We come now to consider more narrowly the question raised by the respondent, that these requirements of the Constitution, as it regards provision by an annual tax for the payment of interest on the debt issued under the five Acts of the Legislature set forth in the several petitions of the relators, has not been complied with, and, therefore, the authority under which the relators' bonds were issued was incomplete and imperfect, and that the bonds are void. It is profoundly to be regretted that a necessity should arise compelling the law officer of a great State to urge a technical failure of duty on the part of the Legislature as the ground of holding invalid obligations contracted by the State, in form at least, and upon which the State has received, or must be assumed to have received some value. As painful as this duty may be, it is possible that a case may arise in which circumstances would justify the interposition of such a defense. The responsibility of determining the propriety of such a defense properly belongs to the law officer of the State, when that officer is before the Court, and with that question we have nothing to do. The point is made before us, and we must give it the consideration due to all questions of a judicial character presented before us.

In putting a construction on the language of the five Acts in question, we are bound to assume, unless excluded from that assumption by the clear terms of the statutes themselves, that the object of the Legislature in framing the clauses under immediate consideration was to comply with the requirements of the Constitution as affecting such clauses. This is an assumption always due to the public authority, and particularly to the lawmaking body, for it proceeds upon the idea that the discharge of public duty is the primary motive influencing the action of the public authority. The language employed in question.

nate respects, but all agree in substance. The language of the Act in petition No. 1 is "that an annual tax, in addition to all other taxes, shall be levied upon the property of the State sufficient to pay the interest on the loan hereinbefore authorized at the times when such interest shall fall due." same language occurs in the Acts set forth in petitions Nos. 2 and 3. The language in the Acts in petitions Nos. 4 and 5 differs somewhat, and will be considered hereafter.

*460 *There is but one view of the language of the Acts just quoted which, if supported by the text of the statute, could by possibility lead to a conclusion that there was a failure of compliance with the requirements of the Constitution in this regard. If the language in question may be read as intending nothing beyond a mere declaration of an intent on the part of the Legislature to provide at some future time or times, by suitable enactments, for the levying of an annual tax to pay interest, and as communicating no authority that would warrant the executive officers in proceeding to make the imposition of the tax effectual, then it might with propriety be said that that which the Constitution intended had not been accomplished by the Legislature. Comparing this language with the Constitution, it becomes clear that the Legislature could have no motive to depart from the requirements of the Constitution such as a Court of Justice would be at liberty to impute to that body. To say that they intended non-conformity to the Constitution would be to charge dishonesty of motive, when the necessary bearing of such action on the rights of the bondholder is considered. We cannot admit such an assumption in the construction of this language. The primary and ordinary sense of the words used imports a command of something to be done, which is fully understood when we look into the standing tax laws. When the Legislature declares that a tax "shall be levied," the direct sense of the terms imports a command rather than a promise, if it is possible for these words to operate effectually as a command. It is only when they cannot operate effectually as a command that we would be thrown back. constructively, upon the conclusion that a promise was intended as to certain future action to be taken by the legislative body itself. These words are capable of full efficacy as a command, inasmuch as the standing tax laws afford all the means requisite to enable the tax to be completed as an administrative act. They must, therefore, be construed as commanding such acts as, under the standing tax laws, are requisite for the imposition and enforcement of the tax in

It has already been said that the Constitution intended that the action of the Legislature, preliminary to the creation of public debt, should be exhaustive of its authority, to the extent of a full provision for the payment of annual interest on such debt; it is not necessary, however, that the words introduced into the statute should express this idea. The Constitution fixing the force

*461

and ef*fect of the statute is read with it, and it is superfluous to repeat either the provision of the Constitution or its substance in the Act.

The language employed in the Act, in petition No. 4, is as follows, (14 Stat., 276, Sec. 5): "The faith and credit of the State is hereby pledged to the payment of principal and interest of said bonds, and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually." The language here employed, in its primary sense, imports neither a command nor a promise, but the declaration of a fact. The question is, whether such declaration is, in legal signification, equivalent to a command, as affecting the duties of the officer charged with the imposition and collection of taxes. It is clear that, unless it can operate as a command, it is entirely nugatory. We are, therefore, bound to look for some sense in the terms employed that would give them operation as authority to impose and enforce such tax by executive agency, and until such a construction is impossible we are not at liberty to declare it nugatory and meaningless. It is not an unusual thing for an enactment intended to bring about a certain change to take the form of a declaration of the existence of such change. Such a declaration draws after it everything that is properly attendant and consequent upon the fact declared. If such declaration carries the force of law, the rights and duties of public officers, as well as of citizens, attach to the fact declared, and become conformed to it by a vital power operating in the system of the laws, and such modifications of right and duty are recognized and enforced by the Courts. Within these principles, perfectly self-evident, when an adequate experience of the operations of laws and government is present to enable them to be appreciated, there is no difficulty in finding the solution of the present question. The declaration of the fact that a tax was levied sufficient to pay interest estops and precludes the denial of such fact as effectually as if the statute was cast in the form of a command, so that an executive officer who should refuse to perform a duty dependent on the fact thus declared would be compelled to contradict the express declaration of the statute in order to excuse his want of due compliance. This cannot be done. It is clear, therefore, that the fact declared must be held to exist according to such

It has already been said that the Constituon intended that the action of the Legislaire, preliminary to the creation of public bot, should be exhaustive of its authority.

*462

*The same language as that last considered occurs in the Act set forth in petition No. 5, and must receive the same interpretation.

The objection of the respondent to the constitutionality of the Acts in question, on the ground that no such provision was made by tax for the payment of annual interest, is not well taken.

The next objection to the constitutionality of the Acts in question is applicable only to the Acts set forth in petitions Nos. 3, 4 and 5, and is, in substance, that those Acts were not passed by a constitutional vote of the Legislature. The exact point involved in this objection has been stated by the counsel for both parties to be, whether, under Section 7, Article IX, of the Constitution, it is competent to pass Bills intended to create a public debt by two-thirds of a quorum of each House, or only by two-thirds of the whole membership of each House.

The provision of the Constitution involved in this question is part of Section 7, Article IX, and is as follows: "And no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each House, respectively." The object of this provision was to create a check, operating directly on the respective Houses of the General Assembly, tending to limit the exercise of the power of creating public debt to cases where its expediency was determined as the result of a clear and solid judgment of the legislative body. Experience had shown that a mere majority does not necessarily express a conviction of that nature, but often depends on a mere accident, that, according to its occurrence, at one time or another, may reverse the conclusions of the deliberating body. Although this fact is well understood, it has not produced a change in the practice in cases involving ordinary subjects of legislation, probably because prompt and incisive judgment is generally the best, and, also, because tending to prevent the expense of protracted legislative sessions. Where, however, a strong temptation is present, tending to misdirect the judgment, an opportunity for reflection is of as much importance as unhesitating action is in cases free from such disturbing causes. A case of creating public debt frequently belongs to this class; for the satisfaction that will be afforded to a constituency, where a burden that ought to be met and provided for to-day is pushed over to a future time, is a ground of temptation to the representative of such a constituency to conform his vote to their present convenience.

*463

*These considerations have led to constitutional provisions requiring, in certain cases, that a greater number than a mere majority should unite where acts of a certain class of a more important character than the ordinary subjects of legislation are involved.

If the ground and motive of this class of constitutional enactments has been justly apprehended in the observations just made, then it is not difficult to draw a general conclusion that safely operates as a rule in construing such enactments.

As is usual in such cases, our Constitution fixes the quorum competent to transact business on a numerical basis. A majority of each House is competent to transact all business not embraced in certain special provisions requiring for action the concurrence of a greater number of votes than the number required to constitute such quorum.—Section 14, Article II. A quorum is, then, when competent to act for all legal interests and purposes, the "Senate," or the "House," as the case may be; and whatever authority is conferred on the bodies designated by such names, or upon the General Assembly as a whole, must be regarded as fully vested, for all actual purposes, in the quorum thus constituted. It is, indeed, for all legal purposes, as much the body to which it appertains as if all the component parts were present. When, therefore, either branch of the General Assembly is spoken of, in the absence of a clear intent to the contrary, the quorum of such body must be understood as intended. Tt would follow that provisions ascertaining the mode in which the body should divide, in order to complete action in any given case, whether by a mere majority or by a still greater proportion, must be interpreted primarily as applicable to the body as legally organized at the time such action is taken. If the rule is the mere majority rule, then a majority of the quorum present and acting is intended; if the rule is that of two-thirds, then two-thirds of such quorum must concur for effective action. This rule is substantially laid down in Cooley on Constitutional Limitations, page 141, on the authority of certain cases there noted. But the rule is, in itself, reasonable, and tends to harmonize together provisions of the Constitution that otherwise would, to some extent, conflict.

This rule becomes clearly applicable to the present case, when we consider the operation of certain clauses that require that a larger number of the membership of each House than is requisite to form a quorum shall unite

*464

for the purpose of action in certain *specified cases. Such an instance occurs in Section 12, Article II, where the city of Columbia is established as the seat of government "until otherwise determined by the concurrence of

resentation." The effect of such a provision is to render the quorum, at the minimum point fixed by the Constitution, incompetent to act in a matter of that kind. In the instance just quoted from our Constitution, the expression "two-thirds of the whole representation" clearly indicates an intention that the minimum quorum shall not act. words "whole representation" are not in common use in such connection, and cannot with propriety be used to describe the body as organized with a mere majority. If these words could be read so as not to interfere with the operation of Section 14, Article II, fixing the quorum, they should be so read, because that interpretation is the best that admits of the various enactments in different parts of the same instrument, and relating to the same subject-matter, to stand and operate together. Such an interpretation is precluded by the form of expression employed, denoting a clear intent to apply a different rule, in this respect, than that stated in Section 14. The subject-matter of this provision, namely, a legislative change in the seat of government, is a matter clearly beyond the range of ordinary legislation, affecting in an opposite manner the interests of different localities within the State, and there was manifest reason for requiring that a larger representation of local interests should take part in such action than would be requisite to constitute the minimum quorum.

Another instance of this class occurs in the Constitution at Sections 1 and 3, Article XV. Section 1 provides for the amendment of the Constitution by means of legislative action, submitted to, and ratified by, the qualified electors of the State at large. Section 3 relates to the calling of a Convention for the purpose of amending the Constitution. both of these Sections it is required that legislative action on such subjects should be taken by a vote of "two-thirds of the members elected to each House," as expressed in Section 1, and "two-thirds of the members elected to each branch of the General Assembly," as expressed in Section 3. This language cannot receive its proper interpretation without limiting Section 14, which confers power to legislate on a quorum of a mere majority. The expression "members elected" is a common mode of denoting an intent that members having the right to participate are

*465

to be *counted with reference to a division by two-thirds, though not present nor as part of the quorum. It will be observed that the matters of legislation to which these provisions relate are highly exceptional in their nature. The instances cited from Section 12, Article II, and Sections 1 and 3, Article XV, are closely related to a common purpose clearly indicated by the Constitution. All these Sections propose to allow action to be two-thirds of both branches of the whole rep- taken by the Legislature, with a view to

change the fundamental law, in the case of Section 12, Article II, as it regards the location of the seat of government, fixed by the Constitution, at Columbia, and in Sections 1 and 3, Article XV, as it regards the general power of amending the Constitution. It is, therefore, easy to conclude, from the necessary import of the language employed, the nature of the subject treated of and the obvious relation between the subjects involved, that it was intended to create exceptions, in those cases, to the provisions of Section 14, Article II, fixing the quorum.

Turning, then, to the clauses of the Constitution under immediate consideration, we find nothing in their language or intent, nor in the object in view, that necessarily precludes the full operation and effect of Section 14. Article II, in so far as it fixes the active constitution of the legislative body. Unless there is such a conflict, the expression "two-thirds of the members of each branch of the General Assembly" must, on the principles already stated, be held to relate to such body as organized in the manner provided in Section 14, Article II, namely, by the presence of a majority of the members elected to each House. As to the direct meaning of the terms "members of each branch of the General Assembly," it must be borne in mind that they are employed as a means of estimating the number of votes requisite in each House for the passage of a Bill authorizing the creation of public debt. In ascertaining the number involved in this expression, the question arises, is the whole number of persons entitled to sit in the legislative body, or the number constituting the different branches of the General Assembly at the time the vote is taken, that is to be considered. The time when this language begins to speak effectively in relation to any particular Bill is when a vote is taken upon it in either branch of the General Assembly. At that moment such branch is organized, under the Constitution, upon the basis of a certain number of votes. That number of votes is, for the time being, the actual basis of its organization, as upon it depends its

*466

legal right to legislate. It is *very clear that, without doing violence to the terms employed, they may be read as either relating to the possible number of votes or the actual number participating, our interpretation being the result of assuming the Constitution to speak of the General Assembly according to its general constitution, and the other as assuming that it speaks with reference to the actual state of its organization at the time the clause in question becomes practical and operative. The expression being thus indifferent, as it regards the choice between these modes of interpretation. the general considerations already developed must determine their proper sense,

The first of these considerations arises from the observation that in other parts of the Constitution, where it was intended to interfere with the power of a mere majority to legislate as a competent quorum, that intent was expressed by clear and unmistakable language, and that such language is omitted in the present instance. The inference is that the omission was intentional. This inference is strengthened to a strong probability when it is considered that the effect of introducing words having the force of those omitted would be to render inoperative another portion of the Constitution performing the important function of organizing the branches of the General Assembly for actual and practical purposes. This probability is converted into a certainty, if we can find that the object that was in view in the adoption of this measure can be fairly attained without destroying the constitutional authority of the majority as a quorum.

We have already adverted to that object as the securing of a sound deliberative judgment on the matter, unaffected by mere accident, and resting upon the relative strength of the opposite convictions that divide the legislative body. As a question of the effect of forms of proceedings upon the results of deliberation, it has nothing to do with the members constituting the Assembly, but with the ratios according to which it divides. A division by two-thirds, as applied to a body consisting of any number, is generally regarded as a fair test of the solid judgment of such body. It renders it necessary that the portion of the body having strong convictions in favor of a measure requiring a two-thirds vote should draw to their support the class of minds who, whether from temperament or their relation to the measure, are hesitating and doubtful, in order to receive favorable action. Of course the result is not absolute but approximate. Still it is regarded as desirable under the general

*467

*view that is entertained of the play of elements that enter into deliberative bodies. It is very obvious that if this is the object in view, counting in the result persons who have taken no part in the discussion, and can exercise no legitimate influence on its conclusions, involves a mere technicality or arbitrary principle, having no real bearing on the objects to be attained, by dividing the body in the ratio of two to one.

On the whole, the reason of the rule appears to be with the statement of it made by Cooley, and makes that rule practicable, judicious and reasonable, instead of a mere empirical and arbitrary test, with no other argument in its favor than the fallacy, very commonly indulged, that obstructing the course of legislation tends to keep it within its proper channels, even though the obstruc-

tion has no explanation in the principles governing the course of legislative action.

It must, therefore, be concluded that a vote of two-thirds of the members present at the time the vote was taken satisfies the requirements of the Constitution. The respondent's objections in this respect are not well taken.

We have now considered all the objections urged by the respondent, involving the question of the constitutionality of the five Acts of Legislature set forth in the relators' petitions, and find that they present no just ground of objection to the validity of either of such Acts.

We will next consider the various objections raised by the respondent to the validity of the bonds in suit, other than the constitutional objections just considered. The objections must be regarded as confined to the five bonds set forth in the several petitions of the relators, as those bonds constitute the only ground of right presented to this Court by the relators in respect of which judicial action can be demanded. This subject will be more fully considered hereafter in connection with the discussion of the remedy by mandamus.

The respondent's objections involve the inquiry, whether the bonds in suit are void. The question comes before us in the nature of a demurrer to the respondent's return, admitting all material facts properly pleaded, and taking issue upon their legal insufficiency to arrest the proceeding by mandamus.

The first objection to be considered relates to the bonds set forth in petitions Nos. 1, 2

*468

and 3, and is as follows: "That by *the Act of the General Assembly, ratified August 26, 1868, under which said bonds purport to have been issued, it was expressly provided that the bonds authorized by said Act should be 'sold at the highest market price, by the Financial Agent of the State in the city of New York, and not less than for a sum to be fixed by the Governor, Attorney General and the Treasurer,' and this respondent is informed, and so charges the fact to be, that the said bonds were not sold in conformity with these requirements of the law."

The force of this objection depends upon the constitutionality and operation of an Act entitled "An Act relating to the bonds of the State of South Carolina," approved March 13, 1872, 15 Stat., 278. This Act recites that bonds had been issued from time to time to a large amount under the provisions of certain Acts of the General Assembly, recited by their titles, and including the five several Acts set forth in the petitions of the relators; that doubts had arisen whether said issues were in strict conformity to the provisions of such Acts; that it was the true intent and meaning of such Acts "that such issue of bonds or obligations should be made in the manner in which the same have

been made as aforesaid." It also recites that "doubts have been raised as to the validity of some of the bonds mentioned in the said annual report of the State Treasurer for the fiscal year ending with October 31, 1871, although money has been borrowed by or realized out of said bonds on account of this State," and that "the credit of this State has been affected thereby." Section 1 declares that "the said bonds and obligations issued on behalf of this State, as mentioned and set forth in the report of the Treasurer of this State to the General Assembly, dated October 31, 1871, were duly and lawfully issued in conformity with the true intent and meaning of the several Acts of General Assembly hereinbefore set forth by their respective titles." Section 2: "That the acts of the officers of the State authorized under the provisions of the laws of this State, and of the several Acts hereinbefore referred to, to the extent of all issues of bonds or obligations enumerated and set forth in the said report of the Treasurer, be, and are hereby, in all things, ratified, confirmed and established." Section 3: "That each and all the bonds named in the annual report of the Treasurer for the fiscal year ending with October 31, 1871, be, and the same are hereby, declared to be legal and valid bonds of the State of South Carolina, for the payment of

*469

*which the faith, credit and funds of the State have been and are pledged: Provided, That no bonds be included which are not registered in the Treasury at the time of the passage of this Act, as provided by Section 14, Article IX, of the Constitution, relating to finance and taxation." The foregoing extracts from this Act, commonly known as the "validating Act," sufficiently set forth the object and intent of the Act.

It is averred by the relators, and not controverted by the respondent, that each of the five bonds set forth in the relators' petitions were issued under the Acts covered by the validating Act, prior to the passage of that Act, and that they are set forth and included in the report of the State Treasurer above referred to. They are, therefore, subject to the operation of the validating Act.

The question under discussion involves the five bonds in suit, and the discussion of the question will be confined to the effect of the validating Act on these bonds.

It is indisputable and undisputed that, if the validating Act is entitled to have the full force and effect intended by it, then the bonds in suit are validated, although the officers who issued them failed to conform to the several Acts authorizing the issue.

said issues were in strict conformity to the provisions of such Acts; that it was the true intent and meaning of such Acts "that such issue of bonds or obligations should be made in the manner in which the same have

substance, that the Act was not passed in | inal validity of the obligation sued upon. conformity to the requirements of the Constitution already considered, so as to authorize the creation of public debt, and it could neither sanction the creation of a new debt nor impart validity to that which had no legal existence as debt at the time of its passage. It appears that the validating Act was not passed by a two-third vote, as required by Section 7, Article IX, in the case of an Act to authorize the creation of public debt. will be conceded, therefore, that if the authority under which the bonds in suit were originally issued was constitutionally insufficient, such constitutional authority could not be afforded by the validating Act, for want of conformity to the constitutional requirements.

The only aspect of the respondent's proposition that need be discussed involves the idea that, assuming that the bonds in suit were not legal obligations at the time of the passage of the Act in question, inasmuch as it is claimed that, under that Act, they became a valid debt, such debt must be regard-

ed as dating from the passage *of that Act, and, therefore, must be considered as new debt in the sense of the Constitution. proposition just stated is here put in the form that appears to be most favorable to the respondent's position, and most fully bringing to light the real elements of the immediate question. Following the line of this assumption, that the bonds depended for their legal validity on the provisions of the validating Act, may they not still be regarded as standing on the footing of an issue under the original Acts, so that these Acts would be the test of the sufficiency of the constitutional authority under which they issued?

It is clear that it was no part of the intent of the validating Act to create a new debt or authorize its creation. Its design, so far as the present question is concerned, was to act exclusively on obligations deriving their constitutional sanction from antecedent acts of legislation.

It is a familiar principle, constantly applied in practice, that when an objection to the validity of an existing obligation in due legal form, is waived, such waiver acts back to the original contracting of such obligation. It is not regarded as bringing into existence a specifically new obligation. Thus, in an action brought upon the instrument containing such obligation, you may count directly on the obligation, as there stated, and the act of waiver need not be set forth as the foundation of the plaintiff's right. If the defect goes to the validity of the obligation, it is the proper subject of a plea. If it is of a proper nature to be waived, by matter of which the Court will take notice, such waiver acts by way of estoppel to shut out the bar, and the action proceeds on the idea of the origical claimed by the respondent to have been em-

This is not a rule of form merely, but covers a substantial principle, tending to support the bona fides of dealings, in harmony with the requirements as to form demanded for the sake of certainty.

The objection under consideration, so far as it rests on technical grounds, is met by this technical view. As it involves a question of substantial rights, it remains to be considered. The true question is, then, had the Legislature constitutional authority to waive the objection to the bonds stated in the respondent's return and already quoted? The substance of this objection is, that, by the Act in question, the bonds should have been sold for the best prices attainable, while, in fact, they were disposed of in a different manner. It is clear, from the pleadings and

*471

the recitals of the validating Act. *that the State received some consideration for the bonds in suit, but what consideration does not appear. It is not alleged that any fraud was committed in the issue. The objection is want of compliance with statute requirements, as to the mode of disposing of the It is not alleged in what precise manner the bonds in suit were originally disposed of, but, assuming, for the sake of placing respondent's argument in the strongest light, that they were hypothecated upon a loan of moneys to the State, and the inquiry arises: Was the Legislature competent to waive such a want of compliance with its requirements?

The Constitution does not prescribe the mode in which money shall be obtained, whether by borrowing on securities created for that purpose, or by the sale of securities. Such matters are left to the legislative discretion. Section 14. Article IX. provides: "Any debts contracted by the State shall be by loan on State bonds, of amounts not less -." While it cannot be assumed that this provision was intended to make it necessary that all such transactions should take the exact form of a loan on bonds, so that selling bonds in the open market, to the highest bidder, would be a failure to comply with the Constitution, yet it is clear that it must be, in substance and effect, a loan on bonds. If, then, the Legislature had authorized the bonds to be issued, by way of security upon a loan of borrowed money, it would not only have been a substantial compliance with the requirements of the Constitution, but it would be, in point of form, a transaction more strictly conformable to the expressions of Section 14 than a sale in open market to the highest bidder would have been. It appears, therefore, that the Legislature possessed authority in the first instance to authorize the mode of disposition

we have all the elements requisite to the application of the ordinary rule of waiver, so familiar that it need not be stated at large, nor fortified by authorities. The Legislature had undoubted authority to waive want of conformity as to a matter purely within its own discretion, and such was the subjectmatter of the respondent's objection, now under consideration. This is the idea of justice that, under the form of law, the State imposes upon citizens, as the test of rectitude in their mutual dealings, and it can claim for itself the benefit of no other code of morals or rules of fair dealing than such as it makes a part of its legal and judicial system.

*472

*An objection is taken to the bonds set forth in petitions 4 and 5, as follows: "That a large portion of the bonds issued under said Act have been returned to the State Treasury upon the substitution in their stead of other bonds of the State, and this respondent is informed, and so charges the fact to be, that the bonds so returned, and thereby redeemed and paid, have been re-issued without warrant of law." This averment, as it stands, is immaterial. It is not alleged that the bonds set forth by the relators are affected by the fact alleged. As the pleadings stand, the relators have no interest in the matter pleaded, because, as matter of pleading, they have not been connected with it by respondent's allegation. Assuming that the fact, as alleged, should stand as admitted, it would not in law affect the relator's right to the remedy he asks, because the law cannot supply the defect of the pleading, namely, an averment that the bonds in suit were so paid and unlawfully re-issued. It is a misapprehension to suppose that the rules of law are to receive some peculiar and unusual exposition when matters affecting the interest of the State, or transactions affecting incidentally many persons, are brought before the Court for adjudication. The opposite fact constitutes a chief recommendation of a government of laws. The pleadings of the Attorney General, in behalf of the State, must be judged by the same rules that govern the humblest citizen, nor does such equality work hardship to a State with resources ample to advance and protect its interests before the Courts.

The objection urged by the respondent to the validity of the bonds set forth by the relators being found insufficient, this Court is bound to regard the bonds as valid; and the next question presents itself, whether the relators are entitled to any remedy, and, if so, whether the remedy demanded is appropriate.

The only remedy that is appropriate is that by mandamus. Have the relators shown a case proper for the issue of that writ? To

ployed in the case of the bonds in suit. Thus the entitled to the writ, the relators must show that the respondent is bound to the performance of some specified duty imposed by law, of a ministerial character, and in the performance of which the relators have a legal interest. This Court has had frequent occasion to consider the nature of this remedy and the grounds upon which it can be claimed, and it will not be necessary to review the general doctrines on this subject or the authorities by which they are enforced. It will only be necessary to examine the various objections made by the respondent as to the question whether this case can be brought within the terms of the rule governing the issue of the writ.

*In examining the various objections, it must be borne in mind that, as we have already found, the intent of the Constitution was to secure an exhaustive exercise of the legislative power in an Act authorizing the creation of public debt, so that nothing should be wanting in order that annual interest may be paid on such loan. But what could be attained by the performance of a mere ministerial act that might be compelled by the Court? This clear intent is not all that is necessary to complete relators' title to the writ. It must also appear that this purpose of the Constitution has been substantially carried out; otherwise it might happen that the intent of the Constitution might fail, on the ground that, not being in itself selfexecuting, the Legislature had failed to furnish the means necessary to its efficiency. We have already held that the five Acts are to be construed as having accomplished what the Constitution intended, as it regards the communication of authority to levy a tax for annual interest. So far, the relators' position is sustained. It remains to be seen whether the laws fixing the duties of the Comptroller General and the standing tax laws, prescribing his line of duty in the case of a levy of a tax, devolves a clear and certain specific duty upon him, which, if performed, would accomplish the intent of the Constitution and the five Acts authorizing the creation of public debt stated in the relators' petitions. If such is found to be the case, and it shall appear that such duty is of a ministerial character. as affecting the relators, then the claims of the relators to the writ in some form will be perfect.

A duty imposed by law is specific when a case or state of circumstances exists proper for its discharge. A specific duty may arise in two ways. It may be imposed directly, as when a public officer is directed by statute to execute a particular conveyance to a person by name, or it may arise out of a general duty imposed by law, as where a case or state of circumstances has arisen such as was in the contemplation of the law imposing such general duty as the object and occasion of its

specific the moment a proper occasion arises for its exercise.

A duty is certain, when, by law, it must be absolutely performed, and the occasion, mode and term of its exercise are fixed so that nothing remains subject to the discretion of the officer. The fact that a reasonable doubt exists as to some necessary fact on which the duty of performance depends does not inter-

fere with the *certainty of the duty where the ascertainment of such fact is the proper subject of judicial inquiry, for in that case the officer, if doubtful as to the fact, may put the party demanding performance to proof of such fact in a proper judicial proceeding, as in mandamus. It is proper to remark, although it may not be material as bearing on the present case, that where, as is sometimes the case, a public officer or a public body is clothed with power to determine conclusively the existence of any fact as bearing on the performance of a public duty, a discretion on the part of the officer may exist interfering with the certainty of the duty demanded, so that a Court might not be justified in treating such fact as a matter for judicial ascertainment, when the remedy seeks to enforce specifically such duty. Such a case sometimes occurs in regard to the duty of auditing public accounts.

A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual.

We come now to the application of these principles to the questions presented by the respondent's remaining objections to the remedy.

Respondent contends that the duty sought to be compelled is not his "clearly prescribed ministerial duty." The first proposition stated in support of this objection is that "the authority to ascertain and determine the rate or per centum of taxation is delegated by the Constitution to the General Assembly, and not to the Comptroller General or to any other State officer, while the duty of the respondent, in this regard, is solely to give notice annually, on or before November 15th, of the rate or per centum so by the General Assembly ascertained, determined and authorized."

There are two distinct propositions involved in the foregoing. The first is, that under the Constitution the ascertainment of a rate or per centage to be applied to the assessed value of the taxable property must be completed by the General Assembly, and cannot be devolved on any other official. It would certainly be unaccountable, if the Constitution had rendered it necessary that a mere arithmetical computation should be made by the General Assembly, and should discharge of its important duties, it is incum-

exercise. In either case the duty becomes | deprive that body of the authority to direct such computation to be made by some subordinate officer. To furnish to the executive officer the necessary data for making the computation, and to leave to him the duty of

*475

ascertaining the *result, is the constant practice of legislative bodies. In order to ascertain the rate or per centum to be applied to the value of taxable property, two things are necessary—first, to ascertain or fix the aggregate amount of money intended to be raised by the tax; second, to ascertain the aggregate assessed value of the taxable property of the State. When these data are obtained, by dividing the latter by the former the rate or per centage of the tax is arrived at. Under the tax laws the aggregate value of the personal property has usually been ascertained after the passage of the law authorizing the levy. Since 1869, the Legislature has given the rate to be levied instead of fixing a gross sum to be raised, as was done in the last mentioned year. The consequence is that in the ascertainment of the rate for the various tax levies since 1869, the Legislature was compelled to assume, approximately, the aggregate value of taxable property from data afforded by preceding years, inasmuch as the basis of the tax ordered could, under the tax laws, be ascertained only as the result of an assessment that was to take place subsequent to the enactment fixing the rate. If the Legislature had deemed it most convenient to indicate the sum to be raised, and left it to the executive officer to ascertain the rate after the assessment was completed and the aggregate value of taxable property known, as was done in 1869, there is no good reason why they should have been precluded from so doing, unless, as respondent says, the Constitution forbids it. The nicest scrutiny of the Constitution fails to discover any clause or expression looking towards any such result. That instrument is absolutely silent on the subject in question. If such a construction arises at all, it must be from all or some of the Sections of the statute already quoted, while there is not in them the least ground for such a construction. The Legislature possesses full authority to resort to either mode of arriving at the result, as they may judge most expedient.

It is not unusual for an executive officer to assume that the habitual practice of his office is the true exponent of the Constitution, nor would the existence of such a supposition devolve upon the Court the duty of entering at large upon the fallacy involved; but when, as in the present case, the point is urged by the Attorney General with great apparent confidence, and the construction contended for tends to strip the Legislature of a choice of modes of action essential to facilitate the

*476

see whether it *springs from an appreciation of the principles and practices of government that underlie the Constitution, both historically and logically, or whether it has been discovered as the result of a technical research, inhering, in the language of that instrument, as one of the accidents of expression often occurring and readily eliminated if approached in a constitutional spirit.

The second proposition associated with that just considered is based upon the language of the general tax Act, prescribing the duties of the State Auditor, these duties having, since the passage of that Act, been devolved by law upon the respondent as Comptroller General. The provision of law referred to is found in the General Statutes, at page 71, (Section 72,) and is as follows: "The State Auditor shall also, on or before November 15th, annually, give notice to each County Auditor of the rates or per centum authorized by law to be levied for the various State purposes, which rates or per centum shall be levied by the County Auditors on the taxable property of the County, and charged on the duplicate with the taxes required to be levied and collected for other purposes. The respondent is correct in regarding this clause as covering the only duty that can be enforced by mandamus in the present case. But the respondent is clearly incorrect in assuming, as the proper inference to be drawn from it, that his only duty is to communicate to the County Auditors a rate or per centum already fixed in terms by some Act or Joint Resolution of the General Assembly. If this was its only office, it would be entirely superfluous, for the County Auditors could, with equal certainty and convenience, get that information from the terms of the legislative Act. On the contrary, it will appear, on close examination, that under this clause it becomes his duty to ascertain that rate by computation, when it has not already been fixed in terms by the Legislature, but the data for such computation are afforded.

It is clear that this clause makes it the duty of the respondent, in his instructions. to communicate a rate or per centage to the County Auditors, but, according to its true construction, is he only bound to make such communication when such rate has been fixed in terms by the legislative body? In other words, may he lawfully refuse to take the necessary steps in order to provide means by taxation for the purposes of the State Government, unless the Legislature has cast its authority into a particular form and has stated the exact rate to be levied, notwith-

*477

standing that rate may be obtained *by calculation from data given by the Legislature for that purpose?

bent to look carefully into the proposition to struction to be given to the words "the rate or per centum authorized by law to be levied for the various State purposes."

A rate ascertained as the result of that which is enacted may be regarded as authorized by law, as well as a rate declared in terms. The authority of the law communicated by a statute must be regarded as covering not only the matter immediately treated of, but as extended to, and covering, all that naturally and properly should flow as a consequence or result of such matters. Had the statute used the words "declared by law," instead of "authorized by law," it would afford some evidence of an intention on the part of the Legislature to communicate legal authority to impose taxes in the form of the declaration of a rate to be imposed, although in that case, the word "declared" might be read by the context as equivalent to "authorized." There being, then, two senses that are equally within the ordinary meaning of the terms "authorized by law," the one embracing all matters directly expressed by the statute and the other all other matters properly consequent upon, or resulting from, such expressed matters, we must resort to the object and intent of the Act, in order to ascertain whether there is anything that renders it necessary or proper that the words in question should be taken in the narrower sense.

The general tax law, in which this language occurs, contains provisions for ascertaining what property is subject to taxation, for the appraisal of the value of such property, for ascertaining the amount due from each tax-payer, and for the collection of the taxes and accountability of the various officers discharging the duties imposed by it. The clause in question occurs after the provisions that have regard to the ascertainment of the aggregate value of taxable property and before the provisions in regard to making up the record of taxes imposed, or duplicates, as they are called by the Act. The tax lists are made by the respective County Auditors, in accordance with the ratio or per centage directed by the respondent. Assuming that the respondent is to ascertain the rate by dividing the aggregate valuation by a gross sum to be raised, then the convenient time for giving directions would be exactly that fixed by the statute. The time when this act is to be performed, so far from affording any indication of an intent to exclude the respondent from

*478

this *duty, actually arranges the order of procedure, so as to facilitate its performance on his part.

The immediate object of the clause in question was to provide the means by which the County Auditors should obtain information requisite to enable them to make complete The answer to this depends on the con-statements of the sums imposed as taxes. This object is equally obtainable, whether, that the rates required to be imposed at that the rates are declared by the Legislature or computed by the respondent. There is nothing in the Act tending to limit the sense of the words in question from taking effect according to the broadest sense.

The same General Assembly that adopted the general tax law, at its next session, gave a particular construction to the words in question by directing the Auditor of State to raise and collect "a sufficient per centum of taxes to raise the necessary amount of moneys upon the assessed valuations of the property of the State to meet the appropriations enumerated in this Act: Provided, There shall not be assessed and collected, under the provisions of this Act, an amount exceeding one million of dollars." This is a clear instance of contemporaneous exposition, in harmony with the view just presented, placing beyond reasonable doubt the construction that it is competent for and the duty of the respondent to ascertain and declare the requisite rate of percentage when either a fixed or ascertainable sum is authorized by law.

The next objection is, that "neither the rate nor per centum necessary to pay the interest due and to become due upon the bonds referred to in the petitions, nor the rates or per-centum to be levied for the various State purposes on or before November fifteenth next, have been ascertained and authorized by the General Assembly, and the respondent is, therefore, without the authority requisite to the performance of his duty in the prem-· ises."

So far as this objection depends on the idea that the rate must be computed by the Legislature, it has already been disposed of. But there are other matters in it that call for notice. It must be confined to the question whether a writ of mandamus can issue requiring the respondent, on the fifteenth of November next, to communicate to the County Auditors the amount required to pay the interest due or to become due on the five bonds mentioned in the petitions. amount requisite to pay the interest on the bonds in suit is ascertainable from the bonds themselves, and its correctness can be checked by the registry in the State Treasurer's

*479

office. In order to get at the *requisite data, all that is required is an arithmetical computation, based on the aggregate value of taxable property, as ascertained under the provisions of the general tax law. That law provides that such aggregate valuation shall be ascertained prior to the fifteenth day of November next, and we must assume that the requirements of the Act will so far be complied with at that time as to enable respondent to ascertain and add to any and all other rates the requisite rate for the purpose ferent idea may have prevailed when that contemplated by this proceeding. The fact writ issued out of the royal prerogative, for

time for all other State purposes are unascertained is altogether unimportant, as it will be the duty of the respondent to add to the rate required in this case whatever may be the rate required for other purposes.

The respondent charges "that a large number of the bonds issued in pursuance of the Acts referred to in the relators' petitions have been returned to the State Treasury and there redeemed by the substitution of other bonds of the State, so that the number of bonds outstanding is unknown to this respondent and cannot be ascertained without inquiry and the exercise of discretion, which do not pertain to the office or the duty of this respondent; and this respondent submits that if the duty of ascertaining the rate or per centum, as demanded by the petitioners, was devolved upon him by law, he would be without the data requisite to its performance." If in ascertaining the rate it became necessary to fix it with reference to all outstanding bonds of the classes indicated, it would be necessary to ascertain the various matters to which the proposition has reference. In that case, it would still be a question whether the matters to be ascertained were not a state of facts proper for judicial inquiry rather than one to be solved by the legislative or executive authority. der the view taken of this case, that consideration is altogether unimportant. As has already been said in regard to another objection of the same character, it cannot be held as directly affecting the validity of the bonds in suit, for it is not alleged that they were among those referred to, such an allegation being indispensable in order to raise a material issue touching the validity of the bonds. The objection assumes that, under the relators' petitions, this Court is bound to take into consideration all bonds of the various classes issued under the five Acts set forth by relators, and that the mandamus, if issued, must provide the means of paying interest on all such bonds. That this is an incorrect conclusion will appear from what follows.

The nature of the remedy and the charac-*480

ter of the particular *relief demanded limit the case to the ground or claim specifically set forth. The whole ground, of right, is covered by the five bonds in suit. Looking, then, to the nature of the remedy, we should bear in mind that the judicial department of the government has no general duty or mission to see that the incumbents of other offices perform their duties. It is not any right lodged in the Court or Judge, as such. to demand a due performance of public duties by others; that is the foundation of the jurisdiction in cases of mandamus. A difthe King had a direct right to require all might be wisely exercised if it became the public officers to perform their duties. But, at all events, since the writ has taken its place as a special remedy, proceeding according to the course of the common law, it is subject to the principle that it is the right of the party, and not of the Court, on which judgment proceeds. The whole duty of the Court is to speak the law according to the fact, as may be demanded by the rights of parties appearing before it. When the State is a real party, its right to compel particular action on the part of a public officer is a proper subject for judicial action. If, in the present case, the public authority should be properly represented before us, demanding the performance of a general duty on the part of a public officer, the question would present very different characteristics from those involved in the proceeding as it stands. The case belongs to a class in which the State is merely a nominal party, lending its name to relators, as a means of maintaining their individual rights. The measure of our duty is not the right of the State to compel specific action, but of the relators to demand such action as bearing on their rights in controversy.

It is true that sometimes an individual party may draw into controversy the rights of others in conjunction with his own. This is when his individual rights appertain to a class of right held by a number of persons having a common interest in some particular remedy. In such cases, necessity and convenience sometimes lead to the allowance to such party of a qualified power of representing the class of which he is a member. This is done in equity, where the modes of proceeding are elastic and admit of the consideration of right and equities as existing among the individuals who, together, form one of the contending parties to a suit, as well of the matters in contest between the leading contending parties. Whether it is possible to introduce this feature into the

practice, under a common *law remedy, by mandamus, need not be considered here, for the relators do not assume to represent class rights or interest, nor do they ask any remedy in respect of rights other than their own. It follows that, inasmuch as the remedy must be measured by the right of the relators to demand it, and that right is limited by the rules of pleading to whatever may be essential to the specific matters alleged by them, we must confine our judicial action to the case made on the five bonds set forth in the petitions.

If the case were otherwise, it is not clear that any judgment that we might pronounce affecting the title of parties not before the Court could conclusively bind them. The Court, under this writ, can exercise a certain discretion in refusing it, and that discretion fusal of the respondent to perform this duty

means of withholding us from pronouncing a judgment ineffectual for the purpose intended by it.

The remedy demanded by the relators will not render it necessary for the respondent to undertake the duties to which the objection relates, and it must, therefore, be regarded as irrelevant.

The respondent objects "that the notice of the rates or per centum authorized by law for the current fiscal year, having been already given by the respondent, there is no authority for the notice of any other rates during the current fiscal year." Respondent's position is, in substance, that the annual tax for the current fiscal year has already been levied and collected, and that he has no authority, and is under no obligation, to impose an additional tax, embracing the matters in question, to be levied and collected as part of the taxes for the current fiscal year. His position is, in this respect, correct. We can only command that which he would be bound to do without our command. He certainly would not be bound to give notice to the County Auditors of a rate to be levied prior to the 15th of November next, for there exists no legal means by which such a tax could be effectively imposed. The imposition of a tax is the result of a series of efficient acts performed by various public officers having different classes of duties and perorming them at the times fixed by law. Without the aid of the Legislature, this machinery could not be put into motion at a time in respect to which no active duties are demanded by the statute, or where duties of an inconsistent character are demanded. It would not, therefore, be competent for the Court to order such duties to be performed.

*482

*Respondent alleges "that if the rates or per centum for the fiscal year to commence November 1, 1873, are ascertained and authorized by law, the petition for mandamus to require the respondent to give notice thereof to the County Auditors before the 15th day of November is premature, and, according to established practice, cannot be granted." The result of this objection, considered with the one last noticed, would, according to the idea of the respondent, be, that prior to the 15th day of November it would be too early for the fiscal year commencing on that day, and after that day too late for the fiscal year that closed on the day previous. This would destroy the remedy for all useful purposes. Technical rules are valuable where they advance remedies or prevent their abuse, but it is not their province, or within their power, to destroy the remedy itself. The rule contended for would lead to a mere mockery of justice. Giving to the statute and the rules of law a reasonable construction, a reeven before the 15th day of November must the remedial means for the payment of interbe considered as equivalent to a total want of performance for all remedial purposes, inasmuch as the 15th day of November was fixed, not as the day proper for the doing of the act, but as a period to mark the default of the respondent, should it remain unperformed; and, therefore, as he may perform on a previous day, refusal on such day to perform altogether is evidence of a default as affecting the right of a party to a civil remedy. If the respondent, in his return, had either denied the fact of refusal alleged in the petition or alleged his willingness to perform, that would, if undisputed, have ended the case. The matters set forth by the return must be regarded as equivalent to a statement on the record that he does not mean to perform the act demanded, leaving to us simply the question whether he is bound to perform it.

The objection of the respondent that the writ would be ineffectual without an appropriation by the General Assembly of the moneys to be collected by the tax demanded, so as to enable the relators to receive the product of such tax, is not well taken. If the want of an appropriation would, under any circumstances, defeat the right to the remedy demanded, still that could not affect the present case, for as we have seen, the moneys arising from taxes of the class to which the one sought belongs are appropriated effectually by the Constitution itself.

The next objection is, "that by the provi-

*483

sions of the Act of the *General Assembly approved March 23, 1872, referred to in paragraph two of the said petition, a registration of all the bonds and stocks of the State is authorized and directed to be made, and it is in terms declared that the State Treasurer and Financial Agent of the State in the city of New York shall not pay interest on the said bonds and stocks until they have been registered according to the requirements of the said Act. That this respondent is not informed whether the bonds referred to in the petition have been, and he here charges that they have not been so registered, and he submits that until such registration be complete the judgment of this Court requiring the levy of a tax to pay interest thereon would be nugatory and void."

If the duty of the Treasurer, as it regards the disposition of moneys derived from a tax laid for the purpose of paying interest on the bonds in suit, depended wholly on such action as the Legislature may take, even after the bonds had passed into the hands of private owners, it might happen that such moneys could not be disbursed until some requisite, like that of the legislation referred to, had been complied with. But in the present case, as we have already seen, these duties are fixed by the Constitution as part of

est, entering into the contract for the payment of such interest, and, therefore, any legislation tending to impose on the creditors of the State conditions other than those stipulated in the contract as prerequisites to payment in the mode and manner contracted would clearly tend to impair the obligation of such contract and would be ineffectual.

The respondent objects that mandamus cannot be allowed ordering a levy to pay a debt until such debt shall first have been ascertained by the judgment of a Court and the payment refused therefor; and as in no case can judgment be rendered against the State, no foundation can exist for the issuing of the writ. No such practice prevails in Courts having original jurisdiction to issue the writ, and in cases of the nature of the present, though such a rule obtains in the Circuit Courts of the United States, arising from their want of original jurisdiction by mandamus: but they use the writ merely in aid of their other powers. In the present case it is not a judgment that is the proper foundation of the relators' demand, but it is the allegation of the refusal of an official act enjoined by law, of such a nature as to be capable of enforcement, and the non-performance of which constitutes a wrong as affecting the rights of the relators. The objection is, therefore, without force.

*The objection to levying a rate as to the bonds in suit, without authorizing a rate as to the interest on the entire residue of the bonded debt of the State, has already been disposed of and need not again be noticed.

The objection that, under the Act of March 13, 1872, provision was made for ascertaining the true amount of the public debt, affords no ground for refusing the mandamus, as it rests on the idea that the question of the validity of the obligations of the State properly belongs to the Legislature. A more complete view of the proposition of the respondent, in this respect, is found by considering the next objection with that last noticed. It is as follows: "That by the Constitution of this State the power to contract a public debt, and to provide for the mode and manner of its payment, is delegated exclusively to the General Assembly; that the time at which, and the mode in which, provision shall be made for its payment involve questions and considerations of public policy which can only be determined, in law and right, by the General Assembly; that any interference therewith by the Judicial Department of the government is expressly prohibited by the Constitution.

Doubtless, if the Constitution had not stamped a different character from that stated on the class of rights brought into view by the relators' case, the parties before the Court would have stood as general creditors of the State, and, so far as it regarded the means to which they would be compelled to look for payment, the proposition involved in the respondent's objections, just stated, would have been in the way of any appeal to the judicial arm of the government. The Constitution, however, as we have elsewhere seen, intended to impress a different character on rights of this particular class, as it regards a certain limited remedy, and it is only to the extent of affording such limited remedy that this Court can go. We are as much bound to conform to the special intent of the Constitution in the given case as to conserve the principles and rules that mark the ordinary distinction between the great powers of the State—executive, legislative and judicial.

The objections interposed by respondent have been examined and are found to afford no sufficient ground for refusing the writ. It must issue, and an order therefor will be made.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *485

*STATE v. CHAIRMAN COUNTY CAN-VASSERS.

(Columbia. April Term, 1873.)

[Mandamus = 74.]

The special Act "to refer to the qualified voters of Barnwell County the location of the County seat," provided "that in all respects the county sear, provided "that in all respects the said election shall be held, conducted and determined as is now provided by law for the holding of elections of State and County officers," and "that upon the canvassing of the votes given at such election the Commissioners of Election shall certify to the Board of County Commissnall certify to the Board of County Commis-sioners the number of votes given for each lo-cality, and the locality having the greater num-ber of votes shall thenceforth be the County seat." The election was held and conducted as the special Act and the general election law provided, except that the Chairman of the Board of County Canvassers did not forward to the Governor and Secretary of State "the returns, poll lists, and all papers appertaining to the election," under a provision of the general election law: Held, That it was the duty of the Chairman of the Board of County Canvassers to forward to the Governor and Secretary of State "the returns poll lists and all papers are State "the returns, poll lists, and all papers appertaining to the election," in this, as in other cases of election, and that mandamus would lie to compel him.

[Ed. Note,—Cited in State v. Walker, 5 S. C. 264, 266; Ex parte Mackey, 15 S. C. 332.

For other cases, see Mandamus, Cent. Dig. § 150; Dec. Dig. \$\infty 74.]

[Mandamus \$\iffill 187.]

The Supreme Court has jurisdiction under the Code of Procedure to hear an appeal from an order of the Circuit Judge discharging a rule to show cause on a petition for mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 429; Dec. Dig. 🖘 187.]

[This case is also cited in Glenn v. County Com'rs of York, 6 S. C. 424, without specific application.]

Before Maher, J., at Chambers, Barnwell, April, 1873.

This was a petition for mandamus by Charles E. Lartigue and M. F. Malony, against William A. Nerland, Chairman of the Board of County Canvassers for Barnwell County.

The case is fully stated in the opinion of the Circuit Judge, which is as follows:

Maher, J. This was a motion for mandamus, heard at Chambers, upon the petition of the relators, and the return of the respondent to a rule which had been issued against him, and upon full argument of counsel. There being no controversy as to the facts, it is not considered necessary to set forth the allegations contained in the petition and return. The following is a brief statement of the

By an Act of the General Assembly, approved 12th February, 1873, (15 Stat., 333,) the location of the County seat, County offices, and place for holding the Courts in Barnwell County, was referred to the qualified voters of said County. The first Section of the Act directs that the Governor, within ten days from its passage, issue his proclamation requiring the Commissioners of Elections for said County, on a day therein to be named, not exceeding thirty days from the date thereof, to open the polls at the various election precincts in said County, "for the pur-*486

pose of holding an election to *determine the will of the people as to the location of the County seat of said County."

The second and third Sections are. in terms, as follows:

"Sec. 2. That at such election the voting shall be by ballot, each qualified voter of the County being entitled to one vote, upon which shall be written or printed, or partly written and partly printed, the name of the locality at which he desires the County seat to be located: Provided, That in all respects the said election shall be held, conducted and determined as is now provided by law for the holding of elections for State and County officers.

"Sec. 3. That, upon the canvassing of the votes given at such election, the Commissioners of Election shall certify to the Board of County Commissioners for said County the number of votes given for each locality, and the locality receiving the greater number of votes shall thenceforth be the County seat of said County, at which place the public offices shall be established, and the Courts thenceforth shall be held."

The remaining Sections provide for the construction of the necessary public buildings, and for a sale of the Court House building in Blackville, and the disposition of the proceeds thereof, in the event that the removal of the County seat should be "determined upon."

the Governor issued his proclamation; the Commissioners of Elections caused the polls to be opened on the appointed day, 22d March, 1873; the election was held, the votes counted, and certified statements of the result at the several precincts were made by the Managers, and delivered, with the boxes and poll lists, in due time, to the Commissioners of Elections, who met at the County seat on the following Tuesday, the 25th March, and upon the certified returns of the Managers canvassed the votes given at said election, and aggregated the same. A protest, supported by affidavits, was presented before the Board of Canvassers, impugning the correctness and validity of the returns from certain precincts. The Commissioners of Elections, upon the canvassing of the votes by themselves, as County Canvassers, certified, in due form, to the Board of County Commissioners of said County the number of votes given at said election, as follows: For the locality, "Barnwell," one thousand eight hundred and ninety-five votes; for the locality, "Blackville," one thousand eight hundred and sixty-six votes; and for the locality, "Allen-

dale," two *votes. The respondent was Chairman of the County Board of Canvassers. He failed to forward to the Governor and Secretary of State, after the final adjournment of that Board, the returns, poll lists, and all other papers appertaining to this election, conceiving, as appears from his return, that this duty was not imposed upon him by the terms of the Act under which the election was held; and that the provisions of the fourth Section of the Act of 1872 (15 Stat., 171,) were not applicable. Formal demand was made upon him to forward the papers, as required by the Act last referred to, but he refused to comply, and hence this application for the writ of mandamus to compel him to do what so was demanded of him.

The position taken on behalf of the relators is, that by the plain terms of the proviso to the second Section this election was to be, in all respects, not only held and conducted, but also determined in the manner prescribed by the general election laws; that such determination, therefore, could be legally made only by the State Board of Canvassers; and, accordingly, that it was the clear legal duty of the respondent to forward to the Governor and Secretary of State the returns, poll lists and all other papers appertaining to the election, in order that the said Board might organize and proceed to canvass the votes, hear the protest, and finally determine the result of the election; that until this action and determination by the State Board, the Commissioners of Elections had no power or authority to certify to the Board of County Commissioners the number of votes

In pursuance of the provisions of this Act | certificate heretofore delivered to that Board was premature and nugatory-"a pretended certificate," in the language of the petition. The relators represent that they, in common with other citizens and tax payers, are injured and aggrieved by the action of the Commissioners of Election, since their protest has been disregarded; and, by the refusal of the respondent to forward the papers, they have been prevented from establishing the grounds of said protest, and from obtaining from the State Board of Canvassers a final certificate of the result of the election, as required by law. They present, as a further grievance to themselves and others, as tax payers, that, by reason of the filing of the said "pretended certificate," certain County officers have removed, or are removing, their offices from Blackville, "the lawful County seat," to Barnwell, "the pretended County seat" of Barnwell County.

*488

*The question, therefore, is upon the proper construction of the Act authorizing this election, and, particularly, of the second and third Sections thereof.

If the terms of the second Section be considered independently of the subsequent provisions of the Act, the meaning is very clear. The nature of the election required some specification as to the form of the ballot by which the voter should signify his choice, but in all other respects the general law was, by reference, incorporated in the Act, and was to govern, as well in determining as in holding and conducting the election. A sound interpretation of the word "holding," in the clause "as is now provided by law for the holding of elections," &c., would give it a sense large enough to include all that is embraced in the terms "conducted and determined;" and this to effectuate the manifest intent indicated by the immediate context. And so, too, if the third Section be read without reference to the proviso in the second, there could be no question as to the true intent and meaning of its terms.

The Commissioners of Elections, from whom the certificate is to emanate, are the same individuals who constitute the County Board of Canvassers, and the words "upon the canvassing of the votes," would be taken as referring to the action of that Board, not only for the reason that, ordinarily, if not universally, an official certifies from his personal knowledge, but from the nature of the certificate required by this Act, which is to set forth the result of a canvassing proper, and not a determination, in the technical sense, of the result of the election.

To construe the words, "upon the canvassing of the votes" as referring to the action of the State Board, when the certificate of the result of the canvass is to be made by the County Board of Canvassers, would, it given for each locality; and hence, that the seems to me, do violence to the common-sense meaning of the words as they stand with the two proceedings—canvassing and determincontext. But the Sections must be read to- ing-as distinctly defined as if they were congether, and, if possible, the construction must ducted by separate Boards. Each terminates be such as to give effect to both provisions. in a certificate. It is contended for the relators that the terms of the proviso are imperative, and that the statement of aggregated votes received by election must be determined in all respects as each candidate; and then there is the ceris provided by the general law; and the State Board alone being invested with jurisdiction to determine, the words "upon the canvassing of the votes," can be referred only to the final canvassing by the Board which holds the power to determine. But for the clause of the proviso requiring the election to be deter-

*489 mined, in all respects, as *the general law provides, it is conceded that the action of the State Board would not be invoked. It is, then, that the election may be determined according to law, that this application is made to compel the forwarding of the election papers. But it would, I apprehend, be difficult to find warrant in any approved canon of construction to justify the liberty which must needs be taken in dealing with the terms of the third Section in order to sustain this theory. The certificate upon which the Act is to operate and take effect is to issue "upon the canvassing of the votes." Is a determination of the election, by the State Board, comprehended in the canvassing of the votes, so that, when the canvass is completed, the result of the election is determin-Clearly not. The canvassing of the votes is a merely ministerial act, beginning at the close of the polls, when the Managers canvass the ballots, (A. A. 1868, Sp. Ses., p. 141, Secs. 20-1-2) continued by the County Board of Canvassers, when the returns of the Managers are canvassed, and completed, ordinarily, by the State Board of Canvassers, when the certified statements of the County Board are canvassed. But the determination of the result of an election, including the hearing and decision of a protest, is a judicial act. (Vide State v. Acting Board Aldermen of Charleston, 1 S. C., 30; Cooley Lim., 622.) The action of the State Board of Canvassers is as follows: Upon the certified copies of the statements sent up from the Board of County Canvassers, the State Board makes a statement of the whole number of votes given at the election for the various officers and for each of them voted for. They then certify these statements to be correct, and subscribe the same with their proper names. This is the end of the canvassing. Upon such statements the Board then proceed to determine what person has been, by the greatest number of votes, duly elected, and in this connection they decide any protest or contest that may arise. Finally, they make and subscribe, on the proper statement, a certificate of their determination, and deliver the same to the Secretary of State. (Gen. St., p. 29, Secs. 24, 25, 26.) Here, then, are the

There is, first, the certificate upon the tificate of determination designating the per-

*490

son elected. If, now, the papers *appertaining to this election must go to the State Board in order that a determination may be had, in all respects conformable to the general law, is it not remarkable that the certificate required by the third Section of the Act is to issue at a stage of the proceeding short of that determination, in the pursuit of which the papers are forwarded? It is upon the canvassing of votes that the certificate is delivered to the County Commissioners. If this be done at once, as the language imports it should be, the Act forthwith establishes the County seat as the certificate indicates; and yet, after this, the State Board (which may adjourn from day to day for ten days-G. S., 30, Sec. 27) might determine the election differently from the result shown by the statements of the canvass and the certificate issued in conformity thereto; or, upon considering the grounds of protest, the determination might be that the election itself was invalid. Are we at liberty to assume that the certificate must be deferred. though the canvassing has been completed, until the election is regularly determined? This would certainly be doing violence to the text, for not only is it provided that the certificate shall be made "upon the canvassing of the votes," but the document itself is precisely such as would be required to exhibit the result of a canvass, and is not such as would be proper to show the determination of the final result of the election. It is just such a certificate as the State Board makes upon the completion of their canvassing, viz: a certified statement of the number of votes, in the aggregate, received by each person voted for, and entirely different from that which certifies that a certain person, having received the greatest number of votes, was duly elected. If the Act had directed that, upon the determination of the election, the Commissioners of Elections should certify the result, there would be stronger ground to contend that a determination by the State Board was necessary; though the objection to this construction would still remain, that the certificate is required to be given, not by that Board, but by the inferior Board. But there is, in my judgment, an insuperable obstacle in the way to the construction contended for in behalf of the relators, in this: that while the papers must go to the State Board, only for the sake of a proper determination of the election, the certificate issues upon the canvassing merely, and sets forth only the prop-

perfectly clear, from a just construction of all parts of the statute, that the returns were to be canvassed by the State Board, the direction to certify "upon the canvassing of the

*491

votes." read in *connection with the terms of the proviso requiring the election to be determined as provided by the general law, might, by a liberal interpretation, be taken to mean "upon a determination of the election," Still it would seem extraordinary that the Legislature, with its mind fully upon the provisions of law as to the mode of determining the results of elections, should fail to direct the proper certificate of determination, which, in general elections, is of such essential importance; and, on the contrary, should direct a certificate which, upon its face, imports that the canvassing only had been completed, and that the election remained undetermined. But the question in the case is, whether the State Board have jurisdiction under this Act, and in exploring for the intention of the law makers, it is proper to consider the contradictions and inconsistencies which may grow out of the construction contended for. If the character of the certificate required by the Act is, as it seems to me to be, so remarkable, in view of the hypothesis that determination in due course by the State Board was intended, it is no less surprising that the Commissioners of Election, after having parted with the papers of the election, and thus, as in ordinary cases, fully discharged themselves from their official connection with the same, should be made, not, indeed, merely the medium through which the decision of the higher Board is communicated to the public, but the certifiers of the result. As long as the papers remain in their possession, the material is in hand which enables them to give the certified statement required by the Act. But it is urged here that the papers must have been sent up through the Chairman of the Board. In no instance, under the general law, do the papers thus forwarded ever find their way back to the County Board. There is no retrograde movement from the canvassing at the polls to the final certificate in the Secretary of State's office. Nor is there any case where a certificate comes down, in due course of law, to any official or Board. Certificates go along with and accredit returns and statements, in their progress upwards, to the ultimate determination. Nor does this Act provide any means whatever by which the Commissioners of Election may be officially informed of the result of the action of the State Board, which result, nevertheless, must, from the necessity of the case, be authenticated to them in some proper shape before they can be placed in a position to certify, as if of their own knowledge, the number of sioners were to certify upon the canvassing

er results of a canvass. If, indeed, it were votes given for each locality. It is said that *492

> the *State Board would send down their certificate, and that the Commissioners could, upon the faith of this, themselves certify. Is it likely that the Legislature would have failed to provide, in terms, that such certificate should be sent down, if so circuitous and unusual a mode of certifying the result of an election had really been contemplated? Would this important matter have been left to mere inference? Here is a clause importing into this Act, as it is said, all the general provisions of the existing law in regard to elections. It is argued that this clause has a controlling influence over subsequent provisions, as it expresses the primary intent of the Legislature in this enactment: that the determination of this election in the regular mode was prominent in the mind of the law makers; and that the utmost liberality should be used in the effort to conform all provisions looking to any other kind of determination to this express declaration of the legislative intent. Now, when the State Board determine the result of an election, they evidence their decision by a certificate endorsed upon the certified statement of the result of the canvass. This certificate they are expressly required to deliver to the Secretary of State. They are not authorized to make any duplicate certificate for delivery to any other officer or person. It is the Secretary of State who gives certificates to the candidates elect. Can it be believed that the Legislature would have failed to give the proper direction to this final certificate of the State Board, and to provide that it be sent either direct to the Board of County Commissioners, or to the Election Commissioners, if, for any reason, it was deemed proper that they should certify? Is it not reasonable, at least, to suppose that, having their attention directed not only to the matter of determination, but, also, and most especially, to the certificate upon which the Act itself was ultimately to operate, they would have made some provision for authenticating, in proper form, the result to the Election Commissioners? But why introduce the Commissioners into the Act at all in connection with the certificate? Why not have let the certificate of the State Board take its usual course to the office of the Secretary of State, where the original Act is on file, and then have directed the Secretary to certify the result to the County Commissioners, as he would, in ordinary cases, certify to the successful candidate?

> All this would have been obvious enough if it was contemplated that the election should

> > *493

be determined by the State Board. But, *on the contrary hypothesis, that the Commis-

of the votes by the County Board, we are re- | stage of this process-at the precincts, at the lieved of the difficulties which attend the opposite view, and are not put to the necessity of importing into the Act important provisions, the absence of which, as they could not have been overlooked, is significant of the true intent of the Legislature. However unreasonable it might seem to have required the Commissioners of Election to certify the result of the canvassing by the State Board, still if the words of the Act admitted of no other sensible interpretation, it would be the duty of the Court to uphold and enforce it according to its terms. But when it is seen that so much essential matter is to be brought into this Act by implication, merely to support, in their most comprehensive sense, the words of the proviso, it is well to pause and inquire whether the words in question may not admit of a more limited signification, which will serve to harmonize the apparent conflict between the Sections, thus avoiding what can be justified only by the most urgent necessity-the interpolation into the text of the Act of other important provisions.

The object of the Act was to ascertain the will of the people of the County in respect to the location of the County seat, and to establish the same at whatsoever place they should determine. The means provided for ascertaining the will of the people was the ordinary way. (A. A. 1872-'73, 15 Stat., 411, 442.) An election by the qualified voters, and, with the necessary exception as to the form of the ballot, the provisions of the general law were to govern, touching the holding, conducting and determining of this election. This general intent is expressed in the proviso to the second Section. But special provision was still to be made in one important particular, viz: The condition upon which any certain locality was to become, by virtue of the Act itself, the County seat, and place for holding the Courts. The process of determination, under the general law, may, with propriety, be said to begin at the close of the polls, when the Managers canvass the ballots and cast up the results at various precincts. First in order are the certified returns of the Managers, then the canvassing of these returns by the County Board of Canvassers, by which the aggregate votes are ascertained. and the result certified. (G. S. 28, Section Then the canvassing by the State Board of Canvassers of the certified statements of the County Board, and these being incorporat-

ed into a statement, duly *verified by the proper certificate, the canvass is completed. This final statement, like the final statement of the County Board, shows the number of votes given for each candidate in the aggre-Then comes the determination of the result of the election, which involves the hearing of any protest sent up with the other County canvassing, and at the State canvassing, the last being final, and, in ordinary elections, indispensable. But the election now under consideration was for a special purpose -that of fixing the locality which, by force and virtue, not of the election itself, but of the Act, was to become the County seat. And if the Act indicates clearly that the election therein authorized should be determined in a manner which, though in general conformity with the election laws, varied therefrom in any particular or "respect," there can be no question that the words of the proviso, "in all respects," must yield to the extent required to give effect to the special provision. The latter must be treated as an exception from the general provision, as much so as if the language of the proviso had been "in all respects, save as hereinafter provided." (Potter's Dwarris, 117, 272-3.)

A construction, however, is to be preferred which expunges no word from the text, and gives effect to every expression in the statute. I think the Act itself defines the manner in which this election was to be determined: and, if this be so, then the general words of the proviso must be construed as referring to the mode thus indicated; for the terms of a statute are always to be understood as having regard to the subject-matter, as that is always in the eye of the framer of the law, and all his expressions are directed to that end. (Dwarris, 210.) Looking to the general law, we find that the canvassing is determined by aggregating the votes for each person voted for, and that the determination of the result of the election is made by ascertaining, upon the final statement of the canvass, the person who received the greatest number of votes. The Act in question makes the first kind of determination the subject of the certificate upon which it is to go into effect. The result of the election is not to be certified, but merely the result of the canvass, and the Act fastens upon the locality which appears from the certificate to have received the greater number of votes, and, proprio vigore, makes it thenceforth the County seat. Is not, then, the election as completely determined, for the purposes of the statute, as it

*495

would have *been if the canvassing, a merely ministerial act, had been completed by the State Board? And then, when it is remembered that the Commissioners of Election are to certify, and that, as County Canvassers, they have all the information needed to enable them to certify, why should the words, "upon the canvassing of the votes," be construed to mean a canvassing by the State Board, thus bringing about the necessity of importing new provisions into the Act to uphold the construction? The State Board canvass upon the statements of the County papers. There is determination at every Canvassers, but these statements are, in all

particulars, complete enough to satisfy the used in this proviso, means the determination tificate which the Commissioners are to make. It seems to me a reasonable construction to hold that the election was determined in the precise manner contemplated by the Act, and that the general words of the proviso are satisfied, if they are construed, as they must be, with reference to the subject-matter, since, in all respects, the election has been determined as is provided by law for the election of State and County officers, so far as the provisions of that law are applicable to an election, which, by the express terms of the Act, was to terminate in a certificate exhibiting the result which a canvass of the votes determined

If the Commissioners of Election were authorized and required by the Act to certify, as they have done, upon the completion of the canvassing of the vote by the County Board of Canvassers, the Act took effect upon the filing of that certificate, and the Board of State Canvassers, having no official duty to perform in relation to this election, it was not incumbent on the respondent, as Chairman of the County Board, to forward the returns, poll lists, and other papers appertaining to the election, to the Governor and Secretary of State. Being clearly and firmly of opinion that the certificate was properly made and filed, and the Act operated, by its own terms, upon the delivery of said certificate to the Board of County Commissioners to establish Barnwell, the locality appearing from the certificate to have received the greater number of votes, as thenceforth the County seat of Barnwell County, my conclusion is that the motion for a mandamus must be denied.

And it is, therefore, ordered, That the rule against the respondent be, and hereby is, discharged.

The relators appealed.

Bellinger, for appellants:

*The appellants, in common with others. deem themselves wronged and aggrieved by the results, as shown by the returns of the Managers; and, also, on account of illegality practiced at certain precincts. To remedy this wrong a protest was entered, and the respondent requested to perform the duty sought to be enforced by the mandamus in this case.

For every wrong the law provides a remedy, and the remedy in this case was clearly pointed out by the Act under which the election was held, (15 Stat., 333.) The second Section of this Act provides, by way of proviso, that the said election should "be held, conducted and determined in all respects as is provided by law for the holding of elections for State and County officers." It is contended, by the Court below and by the counsel for the appellee, that "determined." as determined "as is provided by law for the

requisitions of the Act in respect to the cer- of the number of votes cast, as shown by the Managers' returns; but we apprehend that words, when used by the lawmaker, must be construed to have their most general meaning, unless such construction would do violence to the sense. An election is said to be determined when all the requisites of the law have been complied with, and the final certificate of the State Board of Canvassers has been given. This we conceive to be the determination meant in the Act. But the Court below holds that the certificate required by the Act (15 Stat., 333,) is merely a certificate of the result of the canvassing, and not a determination of the result of the election. This, then, would seem to leave the result of the election still undetermined, and that determination being by the State Board, the appellee would be compelled, even in this view, to forward the papers as required of him, in order that there should be a final result. It is said that if the construction contended for by the appellants be allowed, the result would be that the Commissioners of Election would be required to certify a fact not within their personal knowledge, as they have to act upon the certificates of the State Board. There is no greater reason why they should not certify to this fact than why the Secretary of State should not certify to a fact not within his knowledge, and this he is expressly required to do by the 32d Section, General Statutes, p. 30.

The Commissioners of Election might well certify the results as certified to them by the State Board. But, says the appellee, no certificate of an election ever comes down. There never has been held suck an election

*497

as this, and the necessity of a certificate *coming down is apparent. If it were not necessary for the County Commissioners to be informed of the result, no certificate would go but simply to the Secretary of State. certificate must needs go to them, and the officers of election, so to speak, are made the channel through which it goes.

It is admitted that, if the second Section of the Act stood alone, the construction contended for by appellants would be correct; but the third, says appellee, changes the meaning of the first, and the Court below holds that the proviso of the second Section is the same as though it read "shall be held, conducted and determined, in all respects, &c., save as is hereinafter provided." But such a construction can only be resorted to in cases in which a literal construction would violate the sense. To say that the canvassing spoken of in the third Section meant the canvassing by the State Board, can in no way violate the sense: and, even granting, for argument's sake, that it meant a canvassing by the Commissioners of Elections, still the election would not be holding of elections for State and County offi-it was well that the general election laws cers," until passed upon by the State Board. I can see no violence to sense when we contend that the election must be determined as the Act itself provides. The Act is to determine the locality of the County seat by the will of the people. If the returns of the Managers showed one result, and a certificate were given to County Commissioners, and then the State Board, upon protest or otherwise, determined that another result was proper, as evidenced by the will of the people, is it contended that the first result must still be held to be the true one? Suppose five hundred persons from an adjoining County voted at a precinct, polling a solid vote for one locality, and the returns of Managers showed that locality ahead by fifty votes, a protest is entered, and the State Board decide that the five hundred votes must be thrown out, would it be contended that the will of the people was expressed in the returns of Managers, and the first locality must be the County seat?

But, says appellee, the State Board has no authority to pass upon the question. Then our wrong against which we protest, and which we prove by affidavits, must go unredressed, and we imposed upon. The respondent, however, contends that no protest is allowed us, because none is provided for in the Act. The proviso in the second clause is enough to cover the protest, and by the twenty-sixth Section, General Statutes, page 29,

it is made the duty of the State *Board of Canvassers to hear and determine all protests, when the power to do so does not, by the Constitution, reside in some other body. Even upon general principles, a protest would be allowed if the election was illegal, and a fortiori when provided for. The respondent contends that he cannot be required to forward the papers, because he is functus officio. To hold that the Act is mandatory, which requires him to forward these papers in ten days, would be to allow him to defeat every election which did not please him, by simply retaining the papers beyond the ten days; whereas, if it is contended that this construction would enable him to keep the papers an indefinite time, we answer that we compel, by mandamus, the duty required of him.

What is the duty which respondent is required to perform? "To transmit to the Governor and Secretary of State the returns, poll lists, and all papers appertaining to the election." This is the duty required of him by the proviso in question, and which we seek to enforce.

To arrive at the true construction of an Act, we must consider the subject concerning which it is enacted, and the intention of the Legislature, reviewing all the words of the Act, and giving them their proper meaning. The subject of this Act was an election, and

should govern. The intention of the legislator can only be arrived at from the words which he uses. What are the words used here? That this election should be held, conducted and determined; and what do these words mean? That the election shall be held, conducted and ended, or concluded, as by law other elections are held, conducted and concluded; and all elections are concluded by the certificate of the State Board. The proviso means, if all its requisites are not complied with, the election will be invalid. It is this proviso that gives life to the Act and effect to the election. If it is violated the election will be illegal.

The special provisions of the proviso control the general word "canvassing," in the third Section, and make that canvassing mean the canvassing by the State Board. Otherwise, the certificate may be given by the Commissioners of Election, and afterwards, when the election is "determined," the State Board may find that the majority of legal votes were given for another locality.

A construction which will work injustice and open the door to fraud will never be given to an Act when another construction,

*equally sensible, and which will obviate both difficulties, can be resorted to. The grossest fraud, such as stuffing ballot boxes, illegal conduct of Managers in making ignorant parties vote to please them, &c., may be practiced without any redress, if the appellee's construction of the Act be correct. But no such practices can be carried on under our construction. This seems to me the most sensible construction of the Act, and the most sensible will always be resorted to.

Whether the result of a canvassing by the State Board will avail the appellants any advantage or not, makes no difference; if it was their right, it was incompetent for the appellee, by his conduct, to deny them that right. The appellants are entitled to be placed in a position in which they may contest the validity of the election, as the Acts of Assembly provide that they may so contest, and the election in question must be subject to the general law of elections, under the proviso.

It would be a double wrong and hardship to preclude them from establishing, if they can, the illegality of the election-a right from which they are prevented by the nonperformance, by the appellee, of a duty enjoined by law.—State v. Acting Board, &c., 1 S. C., 30-46.

The Act of 1871-72, (15 Stat., 171,) provides that all general and special elections shall be held pursuant to its provisions. It is this Act which defines the duty of the appellee; the election in question is a special election; the terms of this Act must govern it, and especially so when they are expressly incorporated into the Barnwell Act by the words of the proviso.--Dwar., 228; 1 East, 64.

Elliott, Chamberlain, for appellants:

Briefly stated, the position of the relators and appellants is, that the second Section, as above quoted, requires the Chairman of the Board of Count Canvassers to conform to the provisions of the 4th Section of the Act of March 12, 1872, which is in the following words:

"Sec. 4. After the final adjournment of the Board of County Canvassers, and within the time prescribed in this Act, the Chairman of said Board shall forward, addressed to the Governor and Secretary of State, by a mes-

*500

senger, the returns, poll lists, and all *papers appertaining to the election. The said messenger to be paid his actual expenses upon a certificate to be furnished him by the Secretary of State. Said certificate shall be paid out of the funds provided for the payment of Commissioners and Managers of Elections."

They maintain, with confidence, that the words of the proviso of the second Section of the Barnwell Act, to wit: "Provided, That in all respects the said election shall be held. conducted and determined as is now provided by law for the holding of elections for State and County officers," incorporate into said Act all the provisions of law regulating the holding, conducting and determining of State and County elections; and, consequently, that it was the duty of the respondent, as Chairman of the Board of County Canvassers, to forward the returns, poll lists, and all papers, including, of course, the protest referred to, appertaining to the election, to the Governor and Secretary of State, to be laid before, and be acted upon by, the Board of State Canvassers.

The respondent maintains, in opposition to the above view, that the third Section of the Barnwell Act contemplates only a canvassing of the votes by the Board of County Canvassers, and, hence, that that Section is in the nature of an exception to, or limitation upon, the second Section, and results in making the action of the Board of County Canvassers final and conclusive of all questions connected with this election.

It seems important, if not essential, to our argument, to look, first, at the provisions of law for the holding of elections for State and County officers, in order that we may see how much force is properly due to the express language of the second Section of the Barnwell Act.

Those provisions will be found in an "Act providing for the general elections, and the manner of conducting the same," passed March 1, 1870, (Vol. XIV, p. 393,) and now forming part of the General Statutes of the State, (pp. 26, 31,) and in an amendatory Act passed March 12, 1872, (Vol. XV, p. 170).

Sufficiently stated, for the purposes of this discussion, those provisions are: that the elections shall be held and managed, at each election precinct, by a Board of three Managers, appointed by a Board of three Commissioners of Election for each County, who, in turn, are appointed by the Governor; that

*501 at the close of election, *the Managers shall publicly count the votes, "and make such statement of the result thereof as the nature of the election may require," and, within three days from the close of the election, the Chairman, or one of the Board, shall deliver to the Commissioners of Election "the poli list, the boxes containing the ballots, and a written statement of the result of the election in his precinct;" that the Commissioners of Election shall meet at the County seat on the Tuesday following the election, and organize as a Board of County Canvassers, proceed to count the votes of the County, and "make such statement thereof as the nature of the election shall require," and, within ten days of the time of their first meeting, as a Board of County Canvassers, "forward, addressed to the Governor and Secretary of State, by a messenger, the returns, poll list, and all papers appertaining to the election;" that the Secretary of State shall convene the Board of State Canvassers, "for the purpose of canvassing the vote of all officers voted for at such election;" that the Board, when organized, "shall, upon the certified copies of the statements made by the County Canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for," and shall certify such statements to be correct, and subscribe the same, (Sec. 24, p. 29, Gen. Stat.); that "they shall make and subscribe, on the proper statement, a certificate of their determination, and shall deliver the same to the Secretary of State," (Sec. 25, p. 29, Gen. Stat.); that "upon such statements they shall proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them; and they shall have power, and it is made their duty, to decide all cases under protest or contest that may arise, when the power to do so does not, by the Constitution, reside in some other body;" that the Secretary of State shall record in his office "each statement and determination which shall be delivered to him by the Board of State Canvassers;" that he shall transmit "a copy of such certified determination to each person thereby declared to be duly elected, and a like copy to the Governor, and cause a copy to be published in one or more newspapers, and shall record in his office the names, etc., of all County officers elected, (Secs. 29, 30, 31, 32, p. 30, Gen. Stat.)

The foregoing provisions of law constitute the substantial features of the election law of this State as it stood at the time of the passage of the Barnwell Act, and the election held on the 22d day of March last.

*502

*The relators claim that the second Section of the Barnwell Act expressly incorporates these provisions of law into the law governing the election in question, by the force of the words: "Provided, That, in all respects the said election shall be held, conducted and determined, as is now provided by law, for the holding of elections for State and County officers."

They then proceeded at length to maintain their construction of the Act, and cited Potter's Dwarris on Stat., 218, 219, note 11, 123; Rex v. Justices of Surry, 2 T. R., 504; Fitzgib., 194; Bac. Ab., Tit. Statute; Townsend v. Brown, 4 Zab., (N. Y.,) 80; Minis v. United States, 15 Pet., 423; Wyman v. Southard, 10 Wheat, 1-30; Sedg. on Stat. and Const., 62; Potter's Dwarris on Stat., 144; Hart v. Cleis, 8 Johns. R., 44; 1 Black. Com., 60; People v. Utica Ins. Co., 15 Johns. R., 358, 360; Sedg. on Const. and Stat. Law, 238, 260.

James T. Aldrich, for respondents:

I. The decision herein is not the subject of appeal or review. State Const., Art. IV, Sec. 4; 1 Rich. R., New Series, 1, 114; A. A. 1868, Sp. Sess., 12; Code, Sec. 349, p. 500; Laws of 1859, N. Y. Ch., 174, Sec. 3; 2 Whittaker's Pr., 795; 18 N. Y. Rep., 497; Voorhees Ann. Code, 532, note b; 3 Howard, 165; 10 Wend., 30; 2 John's Cases, 2 Ed., 217, 63 in note; 2 Crary's Pr., 84.

II. A saving clause or proviso in a statute is to be rejected when it is repugnant to the body of the Act. The last words of an Act, like the last words of a will, must prevail where there is repugnancy.—1 Kent Com., 5 Ed., 463; Smith v. Bell, 6 Pet., 68; same case in 10 Vol. Decis. Sup. Ct. U. S. by B. R. Curtis, 73; Felder v. Felder, 5 Rich., 509 to 515; 12 Rich. Eq., 361 to 366, case of Priester v. Priester.

III. Appeals are not to be allowed except in cases where they are expressly granted by law. Same rule in regard to right of protest, except in elections to office.—Broom's Leg. Max., 729; Carnan v. Wall, 1 Bail. Law, 209; Acts of 1872 and 1873, p. 411; Cooley's Con. Lim., 619 to 622; Ibid, 623, 624; Sec. 27 of Act of 1870, p. 396; Broom's Leg. Max., 146, 147; Potter's Dwarris, 216.

IV. There is determination, at every stage of this election, beginning at the close of the polls, when the Managers canvass the ballots.

—Act of 1868, Sec. 26, p. 139; Act of 1870, Secs. 15 to 18, p. 395; Act of 1872, Sec. 3, p. 171.

*503

*V. The incongruity of requiring this special election to be "determined" in all respects as the State elections are "held," is very suggestive.

VI. The special purpose of this election was to fix the locality which, by force and virtue, not of the election itself, but of the Act, was to become the County seat.

VII. This election has been held, conducted and determined (for the purposes of the statute) in the very manner prescribed by the statute. The vice of the opposite reasoning consists in pressing on and passing by this determination made by the Act, and invoking another, by the State Board, not contemplated by the Act.

VIII. A certificate is a writing by which an officer, or other person, bears testimony that a fact has or has not taken place.—1 Bouvier's Law Dict., 230; 2 Phil. Ev., 1046; Cow. and H. Notes.

IX. "Upon canvassing the votes;" meaning of the word "upon."

X. The words, "under the Constitution," and "special elections," as employed in the 1st Section election Act of 1872, p. 170, clearly refer only to the elections mentioned in the Constitution (State and County officers,) and special elections to fill vacancies therein.

XI. Where the writ of mandamus would be vain or useless, the Court will stay its hand.—State v. Acting Board Aldermen of Charleston, 1 S. C., 30.

XII. If necessary, the Court should rather strike out from the proviso the words "conducted and determined," than do greater violence to the statute by adopting the construction of the relators.

Aug. 28, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. This case arose by a petition for a mandamus to compel the Chairman of the Board of County Canvassers of Barnwell County to "forward, addressed to the Governor and Secretary of State, by a messenger, the returns, poll list and all papers appertaining to the election," as provided by the fourth Section of the Act of the General Assembly, approved March 12, 1872. By an Act of the General Assembly, approved February 12, 1873, entitled "An Act to refer to the qualified voters of Barnwell County the location of the County seat of said County, County offices, and the place for holding the Courts of said County," an election was held on the 22d day of March, 1873, that the "qualified" voters of the said County might determine, by ballot, the location of the Coun-

*504

ty seat *of said County, County offices, and the place for holding the Courts of said County.

By the second Section of the last mentioned Act this election was to be in all respects "held, conducted and determined as is now provided by law for the holding of elections for State and County officers." It is admitted that this election was held and conduct-

ed as is now provided by law for the holding | make duplicate statements, and such stateof elections for State and County officers, but that it was not determined as such elections are determined, for the reason that the Chairman of the Board of County Canvassers did not, and refused to, send to the Governor and Secretary of State the returns of the said election, together with a protest presented by the relators, and all other papers appertaining to the said election: and in consequence of such refusal on the part of the said Chairman of the Board of County Canvassers, the relators complain "that by reason of the said refusal and neglect of the said Chairman of the Board of County Canvassers, your petitioners are wronged, aggrieved and deprived of their legal rights, in that the said protest has been disregarded and a pretended certificate of the final results of the said election has been made by the said Board of County Canvassers to the Board of County Commissioners of said County, whereby your petitioners are prevented from contesting the validity of said election, from establishing the allegations made in said protest, and from obtaining from the Board of State Canvassers a final certificate of the result of said election as required by the law of said State."

Under our form of government the right of appeal cannot be denied, and hence tribunals have been established, so that all who desire may be heard, by complying with certain prescribed and established rules; and as the people are the sovereign power of the State, and the right of franchise a very sacred right, it is as equally important that the right to present a protest in an election case, and be heard upon the same, should be equally preserved, and the General Assembly, in its wisdom, established a tribunal for that purpose, known as the "Board of State Canvassers," which has power, "and it is made their duty, to decide all cases under protest or contest that may arise, when the power to do so does not, by the Constitution, reside in some other (Section 26, p. 32, Revised Statutes.) Now, as there is no other body that is, by the Constitution, vested with the power of pro-

*505

tests and contests in elections of *this kind, it is made the imperative and especial duty, by the Section of the Act above quoted, of the "Board of State Canvassers" to decide all such cases.

By Section 16 of the Act, (General Statutes, p. 31,) it is made the duty of the Board of County Canvassers to count the votes of the County, and "make such statements thereof as the nature of the election shall require, within ten days of the time of their first meeting as a Board of County Canvassers, and shall transmit to the Board of State Canvassers any protest and all papers relating to the election;" and by the seventeenth Section of the same Act they are required to

ments they are required to "file in the office of the Clerk of the County; and if there be no such duly qualified, according to law, then in the office of the Secretary of State." cording to the Act of the General Assembly, approved February 12th, 1873, entitled "An Act to refer to the qualified voters of Barnwell County the location of the County seat of said County, County offices, and the place for holding the Courts of said County," there is an extra duty imposed upon the Commissioners of Election, (who are the Canvassers,) but no real variance or material change. That duty is, that after the canvassing of the votes given at the election, held by virtue of the said Act, they are required to certify to the Board of County Commissioners for Barnwell County "the number of votes given for each locality" for the County seat. The certificate of the Commissioners of Election cannot be regarded as "nugatory," inasmuch as that certificate is a mere statement of the number of votes given for each locality and must correspond with the statement to be filed as provided by the seventeenth Section of the general Act; and it cannot be regarded as "premature," as there is no special time fixed when such certificate should issue, save "upon the canvassing of the votes given at such election."

The action of the Board of State Canvassers cannot change the statement of the votes which may be filed in the office of Clerk of the County, or as may be in the office of the Secretary of State. But after hearing the protest in this case, they might determine that the County seat should be located at a different place from that which the statement of the County Canvassers or certificate of the Commissioners of Election would leave it, as, in many cases, those who get a majority of the votes for certain offices do not get the offices.

*506

*By section 24 of the general Act it is made the duty of the Board of State Canvassers, upon the certified copy of the statement made by the Board of County Canvassers, to make a statement of the whole number of votes given at each election for the various officers, and for each of them voted for; therefore, it appears that the Board of State Canvassers is simply to scrutinize the statements made by the Board of County Canvassers, and to see that such statements are correct, as stated, as separate statements are required to be made. Such statements they are to certify as being correct as it came from the County Canvassers, "and subscribe the same with their proper names." According to the twenty-sixth Section of the same Act they "then proceed to determine and declare what persons, by the greatest number of votes, have been duly elected to such office, or either of them."

ment as received from the Board of County Examiners or Canvassers, and subscribe the same as being correct, as that, according to the number of votes cast, such and such persons have been elected to certain offices. Then they proceed and hear any protest or contest that may have been sent, and determine which of the parties voted for is entitled to the office, and declare the same, and subscribe, "on the proper statement, a certificate of their determination, and shall deliver the same to the Secretary of State."-Section 25, p. 32, Revised Statutes. This certificate is the final one, which not only should contain the number of votes given for each person voted for, but should state which of such persons is entitled to the office, as determined by the Board of State Canvassers.

It then becomes the duty of the Secretary of State, "without delay, to transmit a copy, under the seal of his office, of the certified determination of the Board of State Canvassers to each person thereby declared to be elected. and a like copy to the Governor." Section 30, p. 33. Revised Statutes.

This being a special election, and for the location of the County seat of Barnwell County, and the said County being a corporation, the representatives of which are the County Commissioners, it would become the duty of the Secretary of State to transmit a copy, under the seal of his office, of the certified determination of the Board of State Canvassers to the County Commissioners of Barnwell County. Thus full force and effect is given to both statutes, and to each part of *507

the same touching this case, enabling *all sections to stand and operate in reason and right and secure to all who feel "wronged and aggrieved" the right to be heard.

As to the other question relative to the jurisdiction of this Court to review, upon appeal, an order from a Circuit Judge discharging a rule to show cause in mandamus. The Code of Procedure is divided into two parts: "The first relates to Courts of justice and their jurisdiction, and the second relates to civil actions in the Courts of this State."-§ 8, p. 424, 14 Stat. at Large.

The jurisdiction of this Court, so far as reviewing upon appeal is concerned, is conferred by Part I of the Code of Procedure.

By an Act of the General Assembly, approved August 20, 1868, the writ of error was introduced in this State and applied to cases in mandamus and prohibition. By Section 463 of the Code of Procedure, the writ of error in all cases is abolished. That Section is as follows: "No writ of error shall be hereafter issued in any case whatever. Whenever a right, now existing, to have a review of a judgment rendered, or order or decree made, before the first day of January, 1871, such review can only be made upon an appeal | the Court.

Thus, it is seen, they simply make a state- taken in the manner provided by this Act; but all appeals or writs of error heretofore taken from such judgments, orders or decrees which are still pending in the appellate court, and not dismissed, shall be valid and effectu-But this Section shall not extend the al. right of review to any case or question to which it does not now extend, nor the time for appealing." The 475th Section of the Code of Procedure has no reference to the manner of reviewing a judgment or order, but only relates to the mode of procedure in cases of mandamus and prohibition, and is intended to retain the mode of procedure established by 9 Ann, C. 20, 2 Statutes at Large, p. 568. This statute is of force in this State, with certain modifications, established by the Code of Procedure.—Revised Statutes, p. 547.

The order in this case has heretofore been given.

WILLARD, A. J. I concur with the foregoing as it regards the duties of the Canvassers of Barnwell County, and as to the jurisdiction of the Court.

MOSES, C. J. I concur in so much of the opinion as refers to the jurisdiction of this Court, but I do not agree with so much of it as prescribes the course to be pursued under the particular Act, and, therefore, do not concur in the order directing the issuing of the writ prayed for.

4 S. C. *508

*TERRY v. CALNAN.

(Columbia. April Term, 1873.)

[Corporations =265.]

An action by a single creditor of an in-solvent banking corporation against the Receiver of the corporate effects, and a number of in-dividual stockholders, demanding judgment dividual stockholders, demanding judgment against the Receiver for the amount of the debt, and against each of the other defendants for a sum equal to twice the amount of his shares of the stock—a provision of the charter declaring the stockholders individually bound to that ex-tent—is an action for equitable relief, and is defective for want of parties plaintiff. Such an action must be brought by the plaintiff on behalf of himself and all other creditors of the bank who may choose to come in and contribute to the expenses of the suit.

Note.—For other cases, see Corporations, fEd. Cent. Dig. §§ 1101, 1104; Dec. Dig. \$\infty 265.]

Before Melton, J., at Columbia, -Term, 1872.

This was an action brought by Harvey Terry, plaintiff, against Michael J. Calnan, as Receiver, and Sarah Wallace and others, as stockholders of the Commercial Bank of Columbia, South Carolina, defendants.

The case is fully stated in the opinion of

Chamberlain. plaintiff.

McMaster & LeConte, Carroll & Janney, Rion, Melton, & Clarke, for defendants.

[As the only point decided is one of pleading and practice, and is fully discussed in the opinion of the Court, it is deemed unnecessary to report the arguments, which were mainly directed to a point upon which no opinion was given by the Court.]

Aug. 28, 1873. The opinion of the Court was delivered by

MOSES, C. J. The plaintiff, by his complaint, alleges that the Commercial Bank of Columbia, South Carolina, was a corporation organized under an Act of the General Assembly, passed December 13, 1831. That, by Act of 16th December, 1852, it was re-chartered for the term of twenty-one years from the 21st day of December, 1853. That the fourth Section of the Act renewing its charter provides "that in case of the failure of the said bank, each stockholder, copartnership or body politic, having a share or shares in such bank, at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her or their shares." That *509

*under proceedings by virtue of an Act passed March 13, 1869, (14 Stat., 212,) the Commercial Bank, which, some time previous to 1st December, 1869, failed to pay its bills of credit, known as bank bills, and continuing so to fail up to the said last date, was held amenable to its provisions; and Michael J. Calnan, on the 22d day of December following, was, by the proper Court, duly appointed the Receiver of its assets and property. That the said bank is indebted to the plaintiff in the sum of \$56,855 for its bank bills or notes, of which he is the holder. That, on 25th April, 1870, he demanded their redemption, both of the said Receiver and those who were last President and Cashier thereof, which was refused; and on the 27th of May, of the same year, permission was given to the plaintiff by the Judge of the Fifth Circuit to bring his suit for a remedy in this behalf against the said Michael J. Calnan, as Receiver of the said bank; that before the 1st day of March, 1865, the said bank had failed, and that in consequence thereof, under the fourth Section of its charter, (herein already set forth,) the stockholders holding shares, or who had been interested therein within twelve months previous to its failure, incurred the liability prescribed by it. The complaint then sets forth the names of various parties, whom it makes defendants, as the holders of certain shares, with their par value, and demands judgment against the said Calnan, as Receiver, for the amount of \$56,-

Seabrook & Dunbar, for | 855, no part of which, it alleges, has been paid, and against each of the other defendants for a sum equal to twice the amount of his, her or their share, shares or interest The defendants, who are charged therein. by the plaintiff with a liability by reason of their ownership of or interest in stock of the said bank, submit two grounds of demurrer: First, "That the complaint does not state facts sufficient to constitute a cause of action against them;" and, second, "that there is a defect of parties plaintiff in the omission of all the creditors of the bank who, after due notice, may choose to avail themselves of the proceedings by the plaintiff." The action having been brought to trial upon the issues of law joined, it was ordered by the Court "that the second ground of demurrer be sustained, but with leave to the plaintiff to amend his complaint so as to include as parties plaintiff all creditors of the bank who, after due notice, may choose to avail themselves of the plaintiff's proceedings;" and, secondly, "that the first ground of demurrer be overruled. but with leave to the defendants, upon the

*510

complaint being amended, as *hereinbefore specified, to withdraw the said first ground of demurrer, and to file their answers to the complaint." Terry, the plaintiff, appeals to this Court from so much of the "decree" as sustains the second ground of demurrer, and the defendants, who had demurred, also from so much of it as overrules their first ground of demurrer. As the judgment of the Court sustains the second ground of demurrer, it will express no opinion on the point made by the appeal of the defendants from so much of the action of the Court below as overrules their first ground stated as cause of demurrer. This involves the whole merits of the case, and to decide now whether the facts alleged by the plaintiff constitute a sufficient cause of action might virtually affect the interest of those parties who should be before the Court with the same opportunity of presenting their claims as the plaintiff seeks by his complaint. It is true that no judgment, if now rendered, could directly deprive them of their rights as creditors of the bank or extinguish the liability of the stockholders in their behalf, if any such liability exists; yet, as they are materially interested in the subject-matter of the suit, they should be made parties, that they may occupy the same position and advantage that the plaintiff demands by his suit; at any rate, so far as he claims satisfaction through the property and assets of the bank, which is a common and general fund for the benefit of all its creditors. To hold that there is a defect of parties because all the creditors of the bank who, after due notice, may choose to avail themselves of the proceeding, and then to pass upon the facts stated, on which the plaintiff before us rests his right of action, would not only be inconsistent, but contradictory. If the pleadings are incomplete because of a defect of parties, the case is not ready for final adjudication. We shall, therefore, proceed to consider the second ground of demurrer brought here by the appeal of the plaintiff.

The authorities which have been referred to in the learned argument of the counsel of the appellant, on the question now before us, to show that where the individual stockholders of an incorporated company are liable to the amount of their stock for the debts of the corporation, or where the words of the charter impose a several and not a joint liability on the stockholders, an action may be maintained against an individual stockholder, and a recovery had to the extent of the amount for which he is so made responsible, have no application to the case here. Such is

*511

not the character of the action *of this plaintiff. He has not, as in the case cited by his counsel, sought a remedy by an action against a several stockholder, but, on the contrary, has included, in one suit, a large number of persons, who, he asserts, "were the holders of shares, within twelve months previous to the said failure, of the respective amounts set opposite to their names," and demands a separate judgment against each, "for a sum equal to twice the amount of his, her or their share, shares or interest therein." If it is to be considered an action at law against all who were stockholders at any time within twelve months previous to the failure of the said bank, must not the judgment conform to the action? And how can a several judgment be the consequence of a joint action? The proceeding including all the stockholders averred to be liable, it would be difficult, and certainly inconsistent with any form of pleading of which we are cognizant, to frame a joint judgment on an assumed separate liability. Nor would the task be more easy of accomplishment to frame a several execution on such a judgment. It is assumed to be an undertaking by each for a separate amount, varying in proportion to the number of shares individually held, and yet all are joined in one common suit, as if each was responsible for the whole. The form of the complaint as to the parties is not reconcilable with any claim to relief but such as can be granted through the equitable jurisdiction of the Court. There is another view of the proceeding which precludes it from being regarded as one at law. The Receiver of the bank is made a defendant, and judgment demanded against him in that character for the whole amount of the indebtedness claimed by the plaintiff. In the event of a judgment, is he to be included with the other defendants? He only represents the property and assets of the bank, and is only liable to an account for such as he has received and for what may have been lost by his neglect. The plaintiff

could in no event make him answerable for more, nor is an action at law maintainable against him at the instance of a creditor of the bank. If he holds funds he cannot appropriate them without the authority of the Court, which has the right to administer them. A judgment at law could not operate on any property in his hands by virtue of his office, so as to subject it to sale under an execution without the order of a Court having competent jurisdiction in that regard. He is here a proper party, because the assets of the corporation, in his hands, must be applied in aid of the stockholders to diminish,

*510

to the *extent they may avail, whatever liability the charter may have imposed on them, on the equitable principle that, if the stockholders are liable for the debts of the corporation, its property is to be administered in their aid to lighten the burden which may fall upon them. Regarding the proceeding, then, as one addressed to the equitable jurisdiction of the Court, it remains to be considered whether it is defective for the want of proper parties, according to the rules which pertain to that jurisdiction, for one who asks its aid must comply with the rules which it has prescribed for its regulation.

It would be a vain and useless task to refer to the many authorities, both in the text books and decided cases, to ascertain the principle upon which a Court of Equity acts in regard to the parties which it requires to be brought before it, as necessary and proper in the matter upon which it is to pass judgment, after the complete and comprehensive statement of Mr. Justice Story, in West v. Randall, 2 Mason, 181-190 [Fed. Cas. No. 17,424], and his full reference to the authorities upon which he founds it. His careful examination, aided by the sound and able judgment which he was enabled, by its possession, to bring to all questions before him. induced his conclusion in the following language: "It is a general rule in equity that all persons materially interested, either as plaintiffs or defendants, in the subject-matter of the bill, ought to be made parties to the suit, however numerous they may be. The reason is that the Court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain that no injustice shall be done either to the parties before the Court, or to others who are interested, by a decree that may be grounded upon a partial view only of the real merits."

The reasons upon which the learned Judge founds his judgment finds ready application to the case here. All the creditors of the bank have "a material interest" in the fund in the hands of the Receiver, which is "the subject-matter of the bill." In fact, "a complete decree" cannot be made and "future

litigation" prevented, or "a multiplicity of mon or general inferest of many persons, suits" avoided, but by making all who may be creditors of the bank parties. Suppose the whole fund in the hands of the Receiver shall prove insufficient to pay the claim of the plaintiff, if established—then the deficiency must be contributed by the other de-

*513

fendants. And how are the proportion*ate amounts thus required to be ascertained through the machinery of a Court of law? Suppose the fund should not be adequate to meet the alleged claim of the plaintiff, and the stockholders should prove insolvent, is he to have the whole benefit of it, to the exclusion of all other creditors? Or, suppose that the relation in which the stockholders, under the statute, stand to each other will carry with it the right and claim to contribution-how is this to be effected through a Court of law? Still more, if the liability of the stockholders, as insisted on in the argument, is individual, and each several creditor might bring a separate suit against each stockholder, though the number of all of these, as in the case before us, might not fall far short of a hundred, equity might well interpose, if but to prevent a multiplicity of suits.

Nor do the provisions of the Code of Procedure now in force vary the rules which, before its adoption, regulated the practice of the Courts of Equity in regard to parties. Section 145 Gen. Stat., 597, provides as follows: "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court must cause them to be brought in." The Sections of our Code in regard to parties are identical with those of the New York Code, and in McKenzie v. Lammauriceaux, 11 Barb., 516, the judge delivering the opinion of the Court said: "So far was the Legislature from intending any change in the rule on this subject, that in making the great changes contemplated by the adoption of the Code it was careful to preserve this convenient practice of the Court of Chancery. * * * The Section 'and when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole,' was therefore, inserted." The said Section in the New York Code is the 119th, and in the same language is the 142d of our Code.

The Section is permissive, so far as it allows "one or more to sue or defend for the benefit of the whole." Those so suing are substituted on the record in place of the whole, and "when the question is one of com-

or when the parties are very numerous and it may be impracticable to bring them all before the Court," they are accepted as rep-

*514

resenting the *whole and suing in their behalf." In Wallace & La Tourette v. Eaton et al., 5 How, Pr. R., 100, Justice Mason said: "The present Code of Procedure has adopted, with some slight modifications, the rule in relation to parties which has heretofore obtained in Courts of Equity; and in Hallenbeck v. Van Valkerburg, Ib. 284, Parker, J., said: "The former chancery practice is now adopted as to making parties." The jurisdiction of equity was asserted by the New York Courts, to entertain suits by one or more creditors against all the stockholders of a corporation; in Slee v. Bloom, 19 John., 456, where the charter declared that "for all debts of the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the company," and in Briggs v. Penniman, 8 Cowen, 387, where the liability was of a like character under the same statute. Chancellor Walworth, in Van Hock v. Whitlock, 5 Paige, 416, said: "The complainants had a remedy, though I admit a very difficult and imperfect one, by action at law against the several stockholders for the amount which each was liable to contribute towards the payment of the respective debts due from the corporation."

The decisions of our Courts are in conformity with the principle which, as already stated, Mr. Justice Story announced in West v. Randall, as the general rule on the subject in question. In Trescott v. Smyth, 1 McC. Ch., 303, it is laid down that to bills for relief all persons interested must be made parties, and in Johnston v. S. W. R. R. Bank, 3 Strob. Eq. 329, in some aspects resembling the case here, so far as the plaintiff was regarded as a general creditor of the bank, it was held "that all the creditors interested in the fund should be represented." The property and assets of the bank in the hands of the Receiver constitute a fund for the benefit of all creditors-it is a "subject-matter in which they are materially interested," and the plaintiff has no special right, to the exclusion of all occupying the same position, which he holds in relation to it.

Mr. Morse, in his work on "Banks and Banking," at page 438, says: "General principles would lead, without doubt, to the conclusion that the creditors ought properly to seek their remedy in equity. Unless the phraseology of some special statute should authorize a divergence from these principles, clearly the creditors ought to share equally the funds which must be contributed by the shareholders."

*The case before us strikingly shows the value of the principle. Here one creditor claiming a debt of \$56.855 includes in his suit nearly a hundred persons, who, he avers, are liable, under the charter of the bank, to over a half million of dollars, while all he asks is the payment of his demand. An adherence to the rule is commended by every consideration which induced it, and there could not be a case in which its application would be more appropriate.

While the motion of the plaintiff is dismissed, the order of the Circuit Court must be modified: and it is, therefore, ordered that the plaintiff have leave to amend his complaint by stating that it is brought on behalf of himself and all other creditors of the said bank who should afterwards seek to come in on the usual terms. The case is remanded.

WRIGHT, A. J., and WILLARD, A. J., concurred.

4 S. C. 515

LEVY v. WILLIAMS.

(Columbia. April Term, 1873.)

[Infants = 108.]

A decree in which infants were interested, made upon the pleadings, and unsupported by any state of facts established by proofs, set aside.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 309; Dec. Dig. € 108.]

[Judgment 5 87.]
Where it is attempted to sustain a Circuit decree, as made by consent, the consent must appear on the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 143-145; Dec. Dig. © 87.]

[This case is also cited in De Leon v. Barrett. 22 S. C. 416, as to facts.]

Before Graham, J., at Charleston, July Term. 1872.

Jacob Barrett, the testator in the cause, died on the 13th day of November, 1871, leaving a last will and testament, dated the 21st day of September, 1870, and codicil, dated the 10th day of January, 1871. He left a considerable estate, real and personal, which he devised and bequeathed to his widow, children and grand-children, all of whom survived him. The executors nominated by the will, who qualified and acted, were George W. Williams, H. H. DeLeon and C. T. Lowndes.

The action was brought by the children of the testator, all of whom were adults, against the executors and the widow, and also against the grand-children, who were all minors, and its object was to obtain a settlement of the estate according to a certain construction of the will and codicil. which was suggested in the complaint.

*516

*The executors answered and amongst other things, that they had not felt warranted in giving to the will and codicil the construction placed thereon by the plaintiff, as set forth in the complaint, and they submitted both the construction of the will and codicil, and their rights and duties as executors, to the judgment of the Court.

The widow, by her answer, admitted the construction put upon the will and codicil by the plaintiffs, and consented to the relief prayed for. Formal answers, on behalf of the infant defendants, were put in by their guardians ad litem.

The complaint and answers were all verified, but no proofs were taken either under an order of reference or by the Circuit Judge.

The following is the decree of the Circuit Court:

Graham, J. On hearing the pleadings read and argument in this case, and it appearing that all the parties now living who are interested under the will of the said Jacob Barrett are properly represented before the Court, and that all who are really intended to be beneficially interested thereunder by the said will and the codicil thereof are willing and anxious that the construction of the said will and codicil prayed for in the complaint may prevail, and it being apparent to the Court that such a construction would be consistent with the real intention of the testator, viz.: To provide for the support of his widow and his children and grand-children during the life of his said widow and of his children from the income of his estate, while leaving the absolute property eventually to go to his grandchildren, after the death of each child; these grand-children, however, not taking per capita, but as representing the share of each of their respective parents, as he or she may die, with cross remainders over in case of the death of any one of the children without children. No harm, it seems to this Court, could ensue from allowing the construction contended for by the complaint to prevail, and no person, either now living or hereafter to be born, could be prejudiced or injured thereby; but, on the contrary, the confusion and uncertainties from the words of the will and codicil, which now prevail to such an extent as to render the true construction of said will and codicil doubtful, would be avoided, and complete and absolute justice to all the parties be accomplished, while the real will and inten-

*517

tions of the testator would *still remain, so far as it can be ascertained, with certainty and without confusion.

It is, therefore, ordered that the said exec-

and codicil so far as the legacies to the congregation of Hasel street and to the Hebrew Orphan Society, and also so far as the same concerns the provisions made for the widow, Mrs. Hetty J. Barrett.

And it is further ordered that G. Lamb Buist, Esq., counsellor at law, be appointed a Referee for the purpose of ascertaining, from testimony or otherwise, the cash value of the different pieces of real estate left to each of the children, so as to equalize the share of each, and that upon such value being found, the said Referee report to this Court such values, in order to effect an equalization, and that upon such report being made and confirmed, each party shall enjoy the real estate left to him or her by said will under the terms thereof, and the executors shall hold the balance of said estate in trust, to pay over to each of the parties so much of the income of the same as has accrued and shall hereafter accrue as the same arises, as will equalize, according to the report of the said Referee, all the parties, and shall continue to pay such portions of the income to such parties for their natural lives, and after the death of any one or more of them, the portion to which he or she may be entitled to, be paid to the child or children of the said party so dying.

And, whereas, it has been represented to the Court that a question may arise between Laura, the wife of Charles F. Levy, and the other children of Jacob Barrett, as to the disposition to be made of the share which would have been disposed of if Isaac Barrett had survived his father, and as all parties are desirous to test the questions without encumbering this decree with the same.

It is further ordered that the executors, in dividing among the children, divide the property into eight instead of seven parts, and that they retain the eighth part and the income arising from the same, subject to the further order of this Court.

And it is further ordered that after the expiration of ten years from the death of the said testator, a full, fair, and equal partition of the balance of the estate held by the trustees shall be made between the parties interested according to the terms of the said will, which partition shall be made in such manner as will insure a fair and just partition of the same, and for the purpose of making such partition, either party shall have leave

*518

to apply to this Court at the *foot of this decree for a writ of partition or for a sale, or for such other and proper and necessary order as may to the Court appear requisite to effect such partition, and, also, that in the meantime any party to these proceedings shall have leave to apply to this Court under which may be necessary and proper to carry | tion of the will, for the reason that the cause

utors do first proceed to carry out the will out any or all the provisions of this decree, and for the protection and preservation of the estate.

> And it is further ordered that the executors do pay the costs of these proceedings, and a reasonable counsel fee, to be reported by the Referee to each of the solicitors engaged in the cause.

> The executors of the will appealed from the decree, on the following grounds:

> First. That according to the will and codicil of the testator, the rest and residue of his estate, including the income thereof, is to be invested and kept by his executor for the space of ten years after his decease, the period fixed for the final division of his estate.

> Second. That according to the will and codicil of the testator, the property specifically devised is to be taken at the valuation fixed by the testator.

> Simons & Seigling, for appellants, submitted their views as to the construction of the will and codicil.

> Cohen, with whom was Campbell, Porter & Connor and Duryea, contra, contended that the decree was by consent and no appeal lies. —Dan. Ch. Pr., 990, 1179, 1602. The decree depends upon facts heard by or admitted before the Circuit Judge, who stands in the place of a jury, and entire responsibility devolves on him.--Alexander v. Maxwell, Rich. Eq. Cas., 302. None but an aggrieved party can appeal.—Code of Procedure, § 351. The decree protects the executors, and they consequently are not aggrieved.—Red. on Wills, Part I, 492-3; Perry on Trusts, § 928; Tucker v. Horeman, 4 DeG., M. & G., 395; Reeves v. Tucker, 5 Rich. Eq., 143; Perronneau v. Perronneau, 1 DeS., 520.

Sept. 6, 1873. The opinion of the Court was delivered by

WILLARD, A. J. It will not be necessary to look into the complicated provisions of the will of J. Barrett at the present time. The exact situation of the estate, and the circum-

stances affecting *the various parties, particularly the infants entitled under the will, are not brought before us, so that the bearing of the various provisions of the will, upon their interests, can be determined.

The decree of the Circuit Court materially modifies the dispositions made by the testator. If such modifications could, under any circumstances, be made, it would be in view of a full disclosure of the situation of the estate, and of circumstances tending to render the intentions of the testator inoperative upon the construction primarily due to the language and expressions of the will. intend to express no opinion as to the merthis decree for any further or other order its of the question raised upon the construcis not mature and in readiness for such a decision

It is evident, as appearing by the statements of the decree, and the representations of counsel, that the Circuit Judge was largely influenced in pronouncing the decree, by the supposition that all the parties before the Court were desirous that the decree should be entered in the form in which it appears before us. Whatever may be the fact in this respect, and whatever force the Circuit Court would be justified in ascribing to the consent of the adult parties, and the representatives of the infants, the decree cannot be held by us as made upon consent of all parties bound by it, for the record before us shows no such binding consent. For all that appears on the record, the appellants are at liberty to dispute the provisions of the decree.

The decree not being sustainable, as a consent decree, will have to be vacated as unsupported by any state of facts, established by proofs, justifying a departure from the primary force of the language of the will.

The decree must be set aside, and the cause remanded for further proceedings.

MOSES, C. J., and WRIGHT, A. J., concurred.

4 S. C. *520

*STATE v. COUNTY TREASURER.

(Columbia. April Term, 1873.)

[Constitutional Law &== 26, 106.] No provision of the Constitution of the United States or of the State inhibits the Legislature of the State from passing an Act de-priving the citizen of his existing remedy by pro-hibition to stay the collection of taxes illegally assessed upon his property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 30, 186, 212, 238–245, 252–257, 259; Dec. Dig. ⊗=26, 106.]

[Statutes \Leftrightarrow 121.]

A provision that "the collection of taxes shall not be stayed, or prevented, by any injunction, writ or order, issued by any Court or officer, except as provided for in this Act, and in the Act to provide for the assessment of property." is included in one general subject exerty," is included in one general subject expressed by the title of an Act entitled "An Act to amend an Act entitled "An Act to provide for the assessment and taxation of property."

[Ed. Note.—Cited in Trenholm v. Gaillard, 12 S. C. 75; State ex rel. National Bank of Newberry v. Cromer, 35 S. C. 227, 228, 14 S. E. 493.

For other cases, see Statutes, Cent. Dig. § 174; Dec. Dig. € 121.]

[Constitutional Law 55.]

The provision in Section 15, Article IV, of the Constitution of the State, that the Courts of Common Pleas "shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect." does not inhibit the Legislature of the State from ex-

cluding the theretofore existing remedy by prohibition in a particuar case.

[Ed. Note.—Cited in State ex rel. Douglas Jackson v. Gaillard, 11 S. C. 309, 312, 315, 318; Grant v. Grant, 12 S. C. 31, 32 Am. Rep. 506; Chamblee v. Tribble, 23 S. C. 70, 79; Ware Shoals Mfg. Co. v. Jones, 78 S. C. 214, 58 S. E. 811.

For other cases, see Constitutional Law, Cent. Dig. § 58; Dec. Dig. &= 55.]

Before Graham, J., at Charleston, June Term, 1872.

These were applications to the Circuit Court of Common Pleas for writs of prohibition-one by the South Carolina Society, and the other by the Hebrew Orphan Society, against William M. Gurney, County Treasurer, and Samuel L. Bennett, County Auditor.

The facts of the case and the points of law raised are fully stated in the opinion of the Circuit Judge, which is as follows:

Graham, J. These cases were brought before me by suggestions praying for writs prohibiting the defendants and their successors in office from collecting taxes assessed and charged against the relators on the books of the County Treasurer for the years 1868, 1869, 1870, and 1871.

Rules were thereupon issued in each case against the defendants, requiring them to shew cause why the prayer should not be Returns were made accordingly, granted. and the causes argued on the 5th instant, the Attorney General appearing for the defendants, and Havne & Son and J. N. Nathans for the relators.

The relators allege in their suggestions that the societies named are institutions of purely public charity, and that all their property is used exclusively for the maintenance and support of said institutions. Affidavits were also submitted in support of the suggestions.

And the relators claim that such property is exempt from taxation by clause 9, Section 6, Chapter XII, Title III, of the General Statutes, and that the assessment and taxation of said property is therefore illegal and erroneous, and the defendants should be restrained and prohibited from attempting to collect the same.

*521

*The allegations of the relators are not denied by the defendants, who, in their returns to the rules, say-"That the writ of prohibition ought not to be granted: first, because Section 62, Chapter XII, Title III, of the General Statutes, declares that 'the collection of taxes shall not be stayed or prevented by any injunction, writ or order, issued by any Court or Judge thereof;' and, second, because the relators are not exempt from taxation of their property, and are in law and duty bound to pay the taxes charged against them as aforesaid."

The first point to be determined, then, is

whether this Court has jurisdiction of the subject-matter, so as to grant the relief asked for, or whether it is deprived of such jurisdiction by the legislative inhibition relied on by defendants.

The questions now raised have already been presented to the Court in another form, and it is necessary to refer to the conclusion then arrived at. The present relators, by their attorneys, and the Attorney General, on behalf of the defendants, agreed upon a case to be submitted without controversy.

The facts were agreed upon, and the questions submitted for adjudication were substantially the same now made by the suggestions and returns. The points made were fully argued before me. The Attorney General contended then, as he does now, that this Court has no jurisdiction of the subject so as to grant the relief asked for. That, although the taxes assessed and charged against the relators have been illegally and erroneously assessed and charged against them, yet this Court cannot restrain or prohibit the defendants from collecting the same, such interference having been forbidden by Act of Assembly. That the only remedy open to a person or corporation illegally and erroneously assessed and taxed is to pay the tax and bring suit to recover back the money. And that, even if the Court had jurisdiction, it ought not to grant the prayer, because the relators are not institutions of purely public charity.

On behalf of the relators it was contended, then and now, that this Court is invested by the Constitution with power to issue a writ of prohibition in a proper case; that prohibition is the proper remedy to prevent the collection of taxes illegally assessed, and charged against any person or corporation; and that the Legislature cannot take away, limit or restrain the constitutional power of the Court in regard to such writ.

*522

*The points made, as I have stated, were elaborately argued when the cases were first before me. I came to the conclusion then that the relators are institutions of purely public charity, within the meaning of the Act, and that their property was by law exempt from taxation, but I was not prepared to declare that the Legislature had not the power to prohibit this Court from staying or preventing the collection of taxes. Conceiving it to be a duty of a Circuit Judge to sustain the constitutionality of an Act, except where it is clearly and manifestly repugnant to the Constitution, I, in the case before me, decided in favor of the Act relied on by the Attorney General, and that this Court had no jurisdiction of the subject-matter so as to grant the relief asked for. Having so decided, it was unnecessary to give any opinion on the other points presented, and I, accordingly, expressed none.

The relators appealed from my decision and the cases came before the Supreme Court. The appeal was dismissed, but the opinion rests upon a ground which does not apply to the case now presented. The Court say "the Circuit Judge refused the application for the prohibition for want of jurisdiction. He has not set forth the reasons which induced his conclusions, and we are, therefore, left to determine for ourselves how, as the Judge of a Court, invested by the Constitution with power to issue writs of prohibition. he did not regard himself authorized to consider the point made by the proposed case before him." After referring to the course of practice heretofore prevailing in this State in regard to prohibitions, and pointing out that the parties to the case, then before them, had resorted to a different form of practice—one provided for in the Code—and that the form of procedure in relation to the writ of prohibition remains as it stood before the Code, the Court conclude that as they "are not furnished with the view which controlled the decision of the Circuit Judge, if it is apparent, as it must be conceded it is, that though invested with power to grant a writ of prohibition, he can only exercise it in a case actually pending before him, and that the form in which these parties presented this issue was not appropriate to the remedy selected, how can they undertake to say, in the face of the express exception in the Code, that this conclusion is erroneous." The Supreme Court, apparently, therefore, sustain the Circuit decision solely upon the ground that "the form in which these parties presented the issue was not appropriate to the remedy selected," and intimate that the form now presented is according to the course of practice heretofore prevailing in the Courts of this State.

*523

*It is proper to remark that the ground upon which the Supreme Court sustains the Circuit decision was not presented to me when the case was heard, nor did it occur to me when I decided the case. My decision was based solely upon the inhibition contained in the Act cited by the Attorney General, which I believed to be a constitutional exercise of power on the part of the Legislature.

The questions before submitted are now again before the Court, without the technical objection to the form of procedure pointed out by the Supreme Court. I have carefully considered the opinion of the Supreme Court, and can come to no other conclusion than that it is a clear intimation from that Court that "as the Judge of a Court invested by the Constitution with power to issue writs of prohibition," it is my duty to entertain jurisdiction of the subject-matter before the Court.

The Court has not, in express terms, decid-

ed the point, but their opinion clearly indicates, I think, that the Circuit decision was sustained alone upon the technical ground above mentioned. A proper respect, therefore, to the judgment of that Court requires me, contrary to my former decision, to entertain jurisdiction of the case now made, the technical objection no longer existing. I may be mistaken in regard to the true intent and scope of the decision of the Supreme Court, but I have the satisfaction of knowing that the Court may review my decision, and correct the error, if any; and that, in no event, can any permanent injury be sustained by any one.

are when we speak of distributing funds in public or private charity. It is almost impossible to say which charitable institutions are public and where testators have no particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor housekeepers, is of this kind. So in Attorney

Having thus arrived at the conclusion that this Court has jurisdiction of the subject-matter, it remains to state my reasons for concluding that the pleadings and proceedings in these cases present a proper case for the exercise of the power to grant the writ prayed for. This question turns upon the proper construction to be put upon the phrase "institutions of purely public charity," as used in the Act referred to, and relied on by the relators.

It is conceded that the South Carolina Society and the Hebrew Orphan Society are bodies corporate by the laws of this State; that they have, from time to time, and from various sources, been endowed with and hold property for the purposes which are designated in their charters, and in their by-laws, made in pursuance of said charters; that these purposes are the relief of such indigent persons, and the maintenance and education of such poor and helpless orphans and indigent children, as they shall judge proper

*524

objects *of charity. It is also conceded that all the property belonging to these societies is used exclusively for their maintenance and support, in accordance with their charters and by-laws. If, therefore, the objects of the societies are such as constitute a purely public charity, all their property is clearly exempt by law from taxation, and has been illegally and erroneously assessed. The intention of the Act is, I think, to exempt propc"ty used by any institution for objects of purely public charity, whether the institution itself be public or private. Hence, in determining whether these societies are institutions of purely public charity, we must look to the objects or class of persons who come within the scope of the charity contemplated by their charters and by-laws; in a word, whether the funds are distributed in public or in private charity. If these objects are public, within the meaning of the Act, then is the charity public likewise. In Nash v. Morley, 5 Beav., 183, the Court say: "The expressions 'public' and 'private' are not used in precisely the same sense, when we speak of public and private institutions, as they possible to say which charitable institutions are public and which are private in their nature; and where testators have no particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor housekeepers, is of this kind. So in Attorney General v. Lawes, 8 Hare, 32, a direction by will to pay unto a certain bank a yearly sum of £100, for the sole use and benefit of any of the ministers and members of the churches now forming upon the Apostolic doctrines brought forward by the late Edward Irving, who may be persecuted, aggrieved, or in poverty, for preaching or upholding these doctrines," was declared to be a public charity. And in this case, the Vice Chancellor said that the bequest was not the less a charitable bequest from the fact that it was given to a limited class of persons; that it was not the number of objects which made the distinction between a public and a private charity; that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances and not to the class at large.

*525

*Now, the objects of charity contemplated by the charters and by-laws of the "South Carolina Society" and the "Hebrew Orphan Society," are certainly sufficiently extensive to bring them within the foregoing definition of the term "public," as applied to charities, and it remains only to consider whether the distribution of the fund is for charitable purposes. The term charity, as used in the Act, embraces, I think, such charities as are within the letter and spirit of the Statute of 43d Eliz., Ch. 4. If the charity is such an one as may be enforced by the State as parens patrix, through the intervention of its Attorney General or other law officer, should those having control of the funds abuse or misuse them, it is, I think, a public charity, within the meaning of the Act.—Story's Eq. Jur., §§ 1160, 1190, 1191. Information by the Attorney General to enforce charitable donations, where the gift is within the Statute of Elizabeth, are very common in England, and the same practice is recognized in America. But where the gift is not a charity within the Statute of Elizabeth, no information lies in the name of the Attorney General to enforce it.—Story's Eq. Jur., § 1163; Beatty & Richie v. Kwitz et al., 2 Peters, 566 [7 L. Ed. 521]. In this case, a lot in the original plan of an addition to Georgetown, D. C., had been

marked for the Lutheran Church as a place v. McKenzie, 2 S. C., 86; State v. The Columof burial from the dedication, and on it had bia and Augusta Railroad Company, 1 S. C. been erected a school house, but no church. The Supreme Court of the United States held this to be a dedication of the lot to the public and pious uses, which might be enforced by the intervention of the Government through its Attorney General or other law officer. I am of opinion, from the authorities cited, that the public has such an interest in the charities contemplated by the societies in question that in case of abuse or misuse of the funds the State might intervene, by its Attorney General or other law officer, to enforce the charity. They are, therefore, I think, public charities. All the property belonging to the societies is used exclusively for their maintenance and support. This being the case, they are institutions of purely public charity, as I interpret that phrase, and all the property belonging to them is, by law, exempt from taxation, and has been erroneously and illegally assessed and charged with the taxes referred to in the suggestions: therefore, it is

Ordered, That the prayer of the relators be granted, and that a writ of prohibition issue from this Court directed to the defendants, Wm. Gurney, County Treasurer, and *526

Samuel L. Bennett, County *Auditor, restraining and prohibiting them, and their successors in said offices, from proceeding to collect taxes erroneously and illegally assessed and charged against the above named relators or any of them.

The defendants appealed.

Chamberlain, for appellants, contended that the remedy by prohibition to restrain the collection of taxes did not exist at common law; that it was an anomalous practice peculiar to this State; and that there was nothing in the Constitution of the United States or of this State which forbid the Legislature of the State from taking it away and providing another, which had been done by the statute mentioned in the opinion of the Circuit Judge. He cited, on this point, 3 Shars. Bl. 112; Com. Deg., Tit. Prohibition; 2 H. Bl. 533; 2 Chit. G. Pr., 355; Burger v. Carter, 1 McM., 410; State v. Carew, 13 Rich., 498.

Hayne, Nathans, contra, contended that Section 15, Article IV, of the Constitution of the State vested the Courts of Common Pleas with jurisdiction to issue writs of prohibition to restrain the collection of taxes; that the jurisdiction existed when the Constitution was adopted, and could not be taken away by Act of the Legislature. They cited State v. Addison, 2 S. C., 500; Cooley on Con. Lim., 36, 87; Waring v. Clarke, 5 How., 455; The Belfast, 7 Wal., 636; Briscoe v. Bank of Kentucky, 11 Pet., 317; Coleman v. Maxey, 1 McM., 503; Commissioners of New Town Cut v. Seabrook, 2 Strob., 564; Alexander ing the Section under consideration, no con-

Sep. 6, 1873. The opinion of the Court was delivered by

WILLARD, A. J. The first question to be considered in this case is whether the Circuit Court had authority to grant a writ of prohibition to stay the collection of taxes levied for State and County purposes, as affecting the relators, on the ground that property of relators not subject to taxation had been illegally taxed.

This question depends on the force and effect of Section 5 of the Act entitled "An Act to amend an Act entitled 'An Act to provide for the assessment and taxation of property," approved February 28, 1870, (14 Stat., 367.) If this declaration of the legislative authority carries the force of law, then the prohibition in the present case was improperly granted, and must be set aside.

*527

*The Section in question is as follows: "The collection of taxes shall not be stayed or prevented by any injunction, writ, or order, issued by any Court or officer, except as provided for in this Act and in the Act to provide for the assessment and taxation of property." There is nothing in either of the Acts referred to that creates any exception to this general language in favor of the proceedings by prohibition. The language employed plainly excludes the use of the remedy by prohibition as a means of staying the collection of taxes.

The will of the Legislature must prevail in this respect, unless there is something in the Constitution of the United States or of the State that deprives it of the force and effect of law. Where the sense of a statute is made out in conformity to established rules of construction, we know of no means of depriving it of the force and effect of law but those afforded by the Constitution of the State or of the United States.

Is there, then, anything in either of these instruments that operates to prevent the execution of the declared will of the Legislature in question?

It is argued that Section 5 is void under Section 20, Article II, of the Constitution of this State, which declares as follows: "Every Act or Resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." Much discussion and contrariety of opinion has been elicited in regard to similar provisions in the Constitutions of some of the other States, with reference to the question whether a disregard of its requirements in the passage of an Act renders such Act nugatory. It will not be necessary to pass upon this question, for, under the view taken of the Act contain-

The Act of 1870, according to both its title and the substance of its provisions, is amendatory of the Act of 1868, (14 Stat. 27.) The Act amended is entitled "An Act providing for the assessment and taxation of property. In order to ascertain what is the proper subject of these Acts, within the sense of the Constitution, to which Section 5 must be referred, in order to test its harmony with the Constitution, it is necessary to consider the Act of 1870 as if its provisions were incorporated in and solidified with those of the Act of 1868, so as to make one system of means for the accomplishment of the objects embraced within the title of the Act of 1868. *528

*The proper subject of the Act of 1868 is, the proceedings for the ascertainment of property subject to taxation, for the rateable distribution of the sums required to be raised for public purposes among the tax payers, according to the value of the property legally bound to contribute, for the ascertainment of the sums chargeable to each individual tax payer by way of assessment, for the correction of the assessments, as it regards taxes illegally or erroneously imposed or omitted, and for the enforcement and collection of such taxes. Sections 6, 7 and 8 of the Act of 1870, undertake to ascertain and regulate the remedies for illegal assessments which may be obtained by means of an action at law, materially increasing the efficiency of such remedies.

Are provisions of law defining the remedies incident to the abuse of the taxing power fairly within the subject opened by the title of the Act of 1868? If so, then a provision excluding a remedy previously allowed is as strictly within that subject as one giving a new or modifying an old remedy.

The object of the Act of 1868 is the regulation of the taxing power of the State. Its subject, embracing, as it does, all proceedings properly incident to the exercise of such taxing power, must be regarded as commensurate with all the means by which the object of the Act can either be promoted or defeated. Under such a view, ordinary remedies in the Courts of justice must be considered as included, especially such as tend to arrest proceedings instituted under the authority of the Act. Although the State cannot be impleaded in its own Courts, yet its agents and servants derive no immunity from this fact, where acting without the sanction of law. The effect of a remedy taken against a public officer charged with duties incident to the assessment and collection of taxes may operate upon the State directly, as where the action of the officer is stayed or public funds are tied up in his hands.

The question of remedies against public officers becomes a matter of interest to the recognizes the obligation of such a contract

flict with such constitutional requirement ex- / State, as affecting the efficiency of its means for raising money by taxation, and, therefore, the regulation of such remedies is the proper subject of a systematic arrangement of the modes of procedure by which the power of taxation is to be exercised.

> The term "subject," as employed in the Constitution, must receive a liberal interpretation, not only as employed in imposing limitations to the legislative authority, but in

furtherance of the particu*lar object disclosed by the Section in which it occurs. Its object is in part to secure a systematic treatment of matters for legislation, by drawing whatever appertains to either a particular or general subject into consideration, separate and apart from all other matters not appertaining to such subject, experience having shown that neglect of such systematic treatment exposes the legislative body to imposition by the surreptitious introduction of irrelevant matters, and tends to impair the completeness of their work.

A general subject like that of a system of regulations controlling the exercise of one of the great powers or functions of the government must be considered as equally within the language of the Constitution as a particular subject embracing a few matters of limited interest.

It is clear that the Section under consideration is properly a part of the general subject treated of and embraced in the title of the Act, under the general designation of the class of powers to which the Act relates.

If the Section in question could be regarded in no other light than as destroying an existing remedy, rather than as modifying it with a view to greater efficiency and less detriment to the public interests, still the Act would not be open to objection, unless such destruction contravened some definite clause or limitation of the Constitution. The only clause that has usually been referred to in the general discussion of the powers of the Legislature over remedies is that contained in the Constitution of the United States, as well as of this State, forbidding the passage of laws impairing the obligation of contracts.

That provision is wholly inapplicable here, unless every right that a citizen enjoys under the laws is to be regarded as having its foundation in a contract, as that term is used in the Constitution. That provision contains an important principle. It recognizes the right of two or more citizens to bind themselves by the terms of a contract to a course of action which, if not inconsistent with the law of the land at the time the contract is made, becomes to them a law of as high sanction as that which proceeds from the legislative authority of the State. It

as entitled to be placed beyond the legisla- risdiction, in itself, place the remedy contive control or interference.

In the present case, the right of the relator to a writ of prohibition, as it existed prior to its repeal, stood on the foundation of a concession by the Act of the law alone, con-

tained in its general *remedial provisions, and was, in no sense, caused by the obligation of a contract, as that term is used in the Constitution.

But the Section under consideration, although it denies a remedy theretofore taken in a particular form, yet it affords one in another form equally as efficient, as we must assume, in the judgment of the Legislature. No one has yet questioned the right of the Legislature to mould and change the forms and characteristics of remedies, even where these remedies are the means of enforcing the obligation of contracts clearly within the protection of the clause of the Constitution under consideration.

It has been said that the terms of the Constitution, fixing the jurisdiction of the Circuit Court, preclude the Legislature from taking away the remedy by prohibition, in the case of illegal taxation, on the ground that such a repeal of an existing remedy would tend to destroy in part a jurisdiction conferred by that instrument.

The clause in question is in Section 15, Article IV, which Section reads as follows: "The Courts of Common Pleas shall have exclusive jurisdiction in all cases of divorce, and exclusive original jurisdiction in all cases and actions ex delicto which shall not be cognizable before Justices of the Peace, and appellate jurisdiction in all such cases as may be provided by law. They shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect."

The questions to be considered are: first, whether the grant of jurisdiction conferred under the expression, "power to issue writs of * * * prohibition," &c., operates, in itself, considered as a grant of jurisdiction, as authority for the Court to employ that remedy in all cases in which it had theretofore been employed, independently of an exercise of legislative authority intended to prevent the employment of such writ as a remedy in a particular case; second, whether the terms of the Constitution admit of an interpretation giving them a greater effect than that of a grant of mere jurisdiction, and equivalent to a declaration that the remedies to which the jurisdiction of the Court extends shall remain inviolate, both as it regards the nature and effect of such remedies, and the cases to which they shall be applied. In other words, is the language of the Constitution more than a mere grant of jurisdiction, and, if not, does the grant of juferred beyond the power of the Legislature to *531

declare that it shall not be *employed in a certain case in which it has theretofore been employed? These questions will be considered in the order above stated.

The first proposition to be considered is, that the possession of full jurisdiction by a Court is consistent with authority in the Legislature to establish, change or abolish any remedy or form of procedure in the Courts, to determine the nature, force and effect of all remedies, and the cases to which they shall be applied. In considering this proposition, it is assumed that the words "power to issue writs" import a grant of jurisdiction merely. If the opposite of this proposition be true, then it would follow that the Courts of England and of this country never had full jurisdiction, for their control over remedies has always been subject to the right of the Legislature to modify or repeal them. The legal idea of jurisdiction has been formed in view of such ample powers residing in the Legislature. The idea of jurisdiction is embraced within that of judicial power, but, when appropriately used, carries with it the recognition of limit to that power in a particular direction. When we are considering judicial powers, in reference to the cases in which it may properly be exercised, we use the term jurisdiction in preference to power, as more exact and descriptive. The idea, then, of jurisdiction is that of power exerted in a given case. Wherever there is a proper case presented for judicial action, there must, of necessity, be, as among parties amenable to the law, a relation recognized by the law as imposing certain obligations, and a state of facts disclosing a want of conformity to such obligations on the part of some of the parties concerned. If, then, the law has declared as the consequence of such a state of things, that the party in fault shall perform some act, either in direct satisfaction or compensatory for its non-fulfillment, or that he shall abstain from some threatened act of wrong, a Court having jurisdiction may so declare, and enforce its declarations by proper means. Now all that is implied by the idea of jurisdiction is the right to declare the proper legal conclusion from the state of facts presented, with authoritative and, under certain circumstances, conclusive effect. The nature and force of the obligation involved, and the consequences of want of conformity to it, are all fixed by the law-making authority, either by direct enactment or by its sanction of the unwritten law of the land. In neither of these particulars does the proper course of judicial action depend upon the *532

will of the judicial body. The fact *that, in declaring the unwritten law in a doubtful case, a Judge is liable to mistake the inclina-

law, only illustrates the importance of keeping the true nature of the judicial action clearly and constantly before the judicial mind. Inasmuch, then, as all the elements of every judicial question arise out of the expressed will of the law-making authority, except those that depend on the conduct of the parties, the judicial act can by no possibility impose a limitation upon the freedom of the legislative will. Judicial jurisdiction may be perfect, and yet the legislative power may be free from all constitutional restrictions, as is the case in England. It follows that there is nothing in a grant of judicial jurisdiction that tends in any way to affect the limits of legislative power, beyond what may be accomplished by placing the Constitution of the Court beyond legislative control as it regards the right to exercise such jurisdiction.

If, then, Section 15, considered as a mere grant of jurisdiction, cannot operate to limit the legislative authority over remedies, can the terms of that Section be regarded as indicating an intent, beyond that of lodging jurisdiction, equivalent to a declaration that the remedy by prohibition shall remain forever unchanged as theretofore existing?

This Section must be construed, if possible, as allowing full force and effect to Section 1, Article IV, vesting the full legislative power of the State in the General Assembly. Implied limitations of legislative power are only admissible when the implication is necessary, as when language conveying a particular intent cannot have its proper force without the allowance of such limitation. It cannot be successfully contended that Section 15 will be shorn of the effect due to its terms if construed as a grant of jurisdiction strictly. On the other hand, to enlarge its sense will have the effect of introducing consequences clearly not intended by the Constitution. Whatever Section 15 intended as to the grant of jurisdiction in the case of prohibition must be considered as applicable to all branches of jurisdiction named in that Section. If the power of the Legislature to repeal the use of prohibition in a particular case must be regarded as taken away by that Section, then the same result must follow as it regards writs of mandamus, scire facias, and all other writs essential to carrying out fully the powers of the Circuit Court. must also apply to all cases of divorce, and all cases and actions ex delicto, and to matters of equity, provided for in the sixteenth

*533

*Section. Such a construction would be equivalent to a declaration that the Legislature is stripped of all power to take away a remedy when existing and allowed by law at the adoption of the Constitution. Inasmuch as the Legislature of this State has always enjoyed this power, in common with of the Judiciary to stop assumptions of juris-

tion of his own mind for the dictates of the all other legislative bodies of a similar character, it will be, in effect, radically changing the balance of power between the Legislature and the judiciary, on no higher ground than that of a doubtful implication. If the Legislature cannot be trusted with control over remedies, then it is for the people, who have the right to subject that body to limitations, to interpose, by the expression of a clear intent, to effect such limitation. It is not the province of the Courts to devise means of keeping legislative authority within proper bounds. To raise out of Section 15 an implication of such a character could only be regarded as an attempt on the part of the Court to devise limits to legislative authority not clearly imposed by the supreme legislative power. A greater misfortune could not befall a State than legislation springing from distrust of the judiciary, and judicial action prompted by distrust of the legislative au-Whatever abuses may exist in eithority. ther of these branches of the government, to preserve the true constitutional balance between these great functions of the government is the first duty of the judiciary looking to their reform.

There is nothing in the Constitution showing an intent to give any new character or definition to judicial jurisdiction. The Circuit Court is not a new creation of the Constitution, without antecedents from which its characteristics can be judged. It was and is a Court of record, of original jurisdiction, proceeding according to the course of .the common law, but with general equity powers added. Unless we are forced by clear language to a different conclusion, we must assume that it was the intent of the Constitution to put that Court on the same footing occupied by its predecessors. There is nothing in the terms employed that compels any other conclusion in the present case.

The present case illustrates most forcibly the inconvenience of the construction contended for. Under the existing laws, the duties imposed on the officers charged with the imposition and collection of taxes are purely political duties of an administrative character. There is no recognized precedent, either at common law or in the practice of the Courts of Equity, for the Court, by any writ or process, to lay its hands upon and *534

stop the motion of the political ma*chinery of the government. The law generally holds the party guilty of an abuse of political power responsible for the consequences of that abuse, but it never, without disregarding the principles of sound government, undertakes to stop by the hands of one branch of the government the exercise of political powers by another branch. The writ of prohibition, as used at common law, never fulfilled this function. It issued from the higher branch

diction by judicial bodies of limited powers. stayed or prevented by any injunction, writ Its operation was entirely confined within the judicial system itself. The remedy by prohibition in the case of an illegal tax was allowed in this State formerly, but it was recognized as exceptional. Its allowance cannot be satisfactorily accounted for, unless it proceeded upon the ground that the imposition of taxes was an exercise of judicial or at least quasi judicial power.

Whatever may have been the reasoning that induced its allowance under the then existing state of the law, it is clear that to employ that writ at the present time for the purpose claimed is to require the judiciary to do that which, according to the principles of the common law, they could not do, namely, lay hold of political powers in the hands of an administrative officer and mould their exercise according to the judicial idea of their proper use. The practice of England and of the other States is against the allowance of interference of that character. We have not outlived the hardy wisdom of our ancestors, although we may claim to ourselves more art in carrying into operation the principles of law which they understood so well. To hold that the Legislature may not repeal the use of this remedy is to hold that they have not power to avail themselves of the experience and practice of other States in regard to the most important class of powers on which the organization of the means of continuing efficiently the exercise of governmental functions depends.

No sufficient ground has been shown for denying to the Section of the statute the authority of law, and the relator's application should have been dismissed by the Circuit Court.

The proceeding below must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., dissenting. A writ of prohibition to restrain the Treasurer and Auditor of the County of Charleston from the collection of taxes, alleged to be erroneously as-

*535 sessed and charged *against the relators, was, in due form, issued by the presiding Judge of the Court of Common Pleas of the First Circuit. An appeal has been taken to this Court to reverse his judgment: 1st. For want of jurisdiction to issue the writ in tax cases; and, second, whether, admitting the jurisdiction, the respondents are entitled to the relief sought, as within the exemptions from taxation provided by law.

The first ground involves the validity of Section 5 of the Act of the Legislature of 28th February, 1870, "to alter and amend an Act entitled 'An Act to provide for the assessment and taxation of property," Gen. Stat., Sec. 62, Ch. 13, p. 96, which declares or order, issued by any Court or Judge thereof." If this provision does not conflict with the Constitution of the United States or the State, by affecting powers granted by the latter to any other co-ordinate department of the government, virtually destroying their exercise, it must operate as the expression of the legislative will, in a matter over which it had full and unreserved control.

While it is not impugned by reason of any repugnance to the Constitution of the United States, it is alleged to be in conflict with the 15th Section of the 4th Article of the Constitution of the State, which confers on the Courts of Common Pleas power to issue writs of prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect; that it thus by statute attempts to deprive the Judicial Department of the government of a jurisdiction expressly conferred upon it by the Constitution, and is, therefore, void and of no effect.

It is not to be denied that, at and long before the adoption of the Constitution of 1868, prohibition was recognized as an appropriate remedy for the stay of the collection of taxes erroneously imposed. Its long use in practice for such proposed object in South Carolina was as well understood as its more restricted purpose at common law. In Carter v. Burger, 1 McM., 418, the question was directly made, and Judge O'Neall, delivering the opinion of the Court in regard to the objection that the writ would not lie to restrain the enforcement of a tax execution, said: "I concede that if we were obliged to resort for authority in this respect to English precedents, we could not sustain this proceeding, for according to them, the writ of prohibition only lies to prohibit the enforcement of the judgment of an inferior jurisdiction, where it has proceeded without juris-*536

diction, or where, having jurisdic*tion, it has exceeded it. But in this State it has had a wider operation. For the want of a better remedy, it has been allowed to restrain the enforcement of tax executions. How this practice began, it is difficult as well as unimportant to ascertain. * * * The practice is well established, has never before been questioned, has operated to the protection of the citizens, and, so far as our experience or information extends, has effected no injury, and produced no inconvenience." So well has the practice been understood, that it has not since been questioned, and as late as April, 1871, in the case of the Hibernian Society v. Addison, 2 S. C., 500, the same mode of procedure was followed, without any intimation of objection.

When the Constitution vested the Circuit Courts with the power to issue writs of pro-"that the collection of taxes shall not be hibition, it must be understood as extending it to the writ as then accepted and recognized in South Carolina. If it had been here applied to cases in which in England it would not have been considered a proper remedy, the use of the term in the Constitution must be received in the import which attached to it at the time of its adoption. There is nothing expressed or implied, by which its operation, as then understood, can be contracted or diminished. A legal definition of it had been given by the Courts of the country. It was to have effect in the community for whose government and protection the Constitution was ordained and established, and its use in that instrument must be referred to the acceptation in which it had theretofore been received. Modifications, in the form and application of actions, both ex contractu and ex delicto, as they prevailed at common law, had been made in our Courts prior to 1868, and when such actions are referred to in the Constitution no change was intended, to conform them to the common law in the particulars from which they had departed. "A Constitution is not the beginning of a country nor the origin of appropriate rights. It is not the fountain of law nor the incipient state of government. It grants no rights to the people, but is the creature of their power—the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers they possessed before the Constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought." See Cooley on Con. Lim., 37. It is said in 2 Story on Constitution, Sections 424-6, that "where a power is granted in general terms *537

*the power is to be construed as co-extensive with the terms, unless some clear restriction upon it is deducible (expressly or by implication) from the context." In Waring Clarke, 5 How., 454 [12 L. Ed. 226], it was held that the judicial power of the Courts of the United States, in cases of admiralty and maritime jurisdiction, was not restricted to the same jurisdiction as it existed in England when the Constitution of the United States was adopted. Mr. Justice Wayne, delivering the opinion of the Court, on page 445, says, "those who framed the Constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction than was allowed in England, from the interpretation which was given by the common law Courts to the restraining statutes of Richard II and Henry IV." In the case of The Belfast, 7 Wall, 636 [19 L. Ed. 266], Mr. Justice Clifford says: "Judicial power to hear and determine controversies in admiralty, like other judicial power, was conferred upon the Government of the United States by the Federal Constitution, and by

the express terms of the instrument it extends to all cases of admiralty and maritime jurisdiction, which, doubtless, must be held to mean all such cases of a maritime character as were cognizable in the Admiralty Courts of the States at the time the Constitution was adopted."

Unless the Constitution otherwise declares by express words or necessary implication, pre-existing laws are not repealed, and its various grants of power must be construed by the lights which they afford. On this principle proceeded the case of White v. Kendrick, 1 Brev., 469, and it was more distinctly enforced in Coleman v. Maxcy & Arthur, 1 McM., 501, in which it is said, referring to the words, "law of the land," "by analogy, it has been held in this State that the same terms used in our Constitution, (1790,) must embrace the common law as then adopted here, and the statutes of Great Britain and of this State made of force and in operation at that time." The same view was recognized in Commissioners of New Town Cut v. Seabrook, 2 Strob., 565. To these authorities may be added the case of Alexander v. Mc-Kenzie, 2 S. C., 81, decided by this Court, in which it was held that "Section 4, Article IV, of the Constitution, declaring that the Supreme Court shall always have power to issue writs of mandamus, quo warranto and habeas corpus, was not inserted in that instrument for the purpose of perpetuating a mere form, but for the purpose of vesting the Court with jurisdiction in that class of cases where the

*538

writ of quo war*ranto was the proper remedy at the time of the adoption of the Constitution." Our Associate, Mr. Justice Willard, delivering the opinion of the Court, looking to the use of the said terms in the Constitution, at page 86, says: "The writs of mandanius, quo warranto and habeas corpus are referred to as a convenient and usual means of marking out the limits of jurisdiction intended for the Supreme Court. In legal parlance, the writ or form of action is allowed to personate and stand for the jurisdiction to which it relates, to avoid inconvenient particularization. It is in this sense that the terms are here used. Such writs were then in common use and furnished the common forms of expression for conveying the sense thus intended by this Section. To separate the expression 'shall always have power to issue writs,' &c., from the context, might create a doubt whether the conservation of the writ or the extent of the powers of the Supreme Court was the object in view, but, read by the context, it is clear that the technical value of the writs, as remedial means, was not the subject of consideration; but substantial rights, to be protected by lodging certain judicial powers in the Supreme Court, was the single end contemplated."

If the power to issue the writ in question

its adoption, it was the recognized remedy for the purpose claimed by the suggestions now before us, can the Court be deprived of its jurisdiction by the action of the Legislature? If it can, then the powers of the Court granted and prescribed by the Constitution, and to be enforced through a separate and co-ordinate division of the government, independent of all other of its branches, does not depend upon the judgment of those to whom alone it is confided, but is at the change, direction and control of another of its departments. from which it was intended to be forever distinct. If subject to the interference of the Legislature in the exercise of its legitimate functions, then the Legislature become the judges of the force and validity of the very laws which they themselves enact. This would not be in harmony with the long prevailing notions of a Republican government. The judicial power of the State is vested in the Courts, and the Constitution requires "that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other." The judicial branch is a restraint on that portion of it invested with the law-making power, and if it can enforce its own legislation by

*539

depriving the Courts of the *authority to test its action by an inquiry into its sanction by the Constitution, then the protection intended for the citizen in "his life, property and character," through a resort to the Courts, would be a mere mockery and delusion.

But it is said that, notwithstanding the general grant of power in regard to this writ, the Legislature may, nevertheless, determine in what cases, and under what circumstances it may issue. This concedes an unlimited control to the Legislature of the whole judicial magistracy of the State, which, in the end, might be so exercised as to suppress its entire authority. If it can declare in what cases a particular form of action shall be a remedy for an alleged complaint, and ignore its application to other cases, in which, at the adoption of the Constitution, it was employed as a medium through which a wrong was to be redressed, may it not, step by step, disarm the Courts of all their authority, and at last leave it but a tribunal to carry out the behests and mandates of the legislative will? The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional limitations. To tie up the hand that can alone resist its unlawful encroachments would not only render uncertain the tenure by which the citizen holds his property, but would make it tributary to the unrestrained demands of the Legislature. The prohibition is without qualification. As denial, and speedily without delay."

was conferred by the Constitution on the Cir- if to leave no opportunity for any legitimate cuit Court, to be exercised in cases where, at test of its exactions, it declares that "the collection of taxes shall not be stayed or prevented by any injunction, writ or order, issued by any Court or Judge thereof." No matter how excessive or unjust the requisition of the Treasurer, however unreasonable or extravagant, the remedy, which, at the adoption of the Constitution, was the ready means to which the citizen could resort to test the validity of the demand, and which in terms is included in the grant of powers by that instrument conferred on the Courts, is withdrawn and destroyed. In support of this legislation it is said that in lieu of the one forbidden another has been substituted by allowing "an action or proceeding against a County Treasurer for the purpose of recovering taxes alleged to have been erroneously assessed and collected." This is a remedy of entirely another character, and to attain a different end, and one which before appertained to the citizen, if he was forced to pay an unlawful tax. The object of the writ of prohibition is to restrain the collection of the tax. In Reed et al. v. Tyler et al., 56 Ill. R.,

*540

*292, it was held that a statute requiring the payment of redemption money and interest as a condition precedent to questioning the validity of a tax deed, was unconstitutional. Can it be reconciled with any principle of right or justice that the State shall say, notwithstanding your complaint and assertion of injustice against our demand, we will force you to pay it by preventing your resort to our own Courts and leave you to your action for its recovery? If the tax demanded should prove to be, not only beyond the competency of the Legislature in its imposition, but increased in amount by the extortion or cupidity of the tax officer, must the citizen be required to pay it, and deprived for an indefinite period of the enjoyment of the amount exacted, and left to a compulsory resort to an action for its recovery? Such a course appears to be at variance with the principles on which our government is founded.

It is the boast of the law that it affords a remedy for every wrong. Is not the enforcement of a tax, either excessive as to amount or not imposed according to existing legal requisitions, a wrong? and where is the remedy by which its payment can be resisted if that afforded by the Constitution is suppressed? Sir Edward Coke, referring to the emphatic words of Magna Charta, says in 2d Inst., 55: "Every subject, for injury done to him in bonis, in terris, vel persona, by any other subject, be he either ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any

It is a delicate duty to declare an Act of | the Legislature void. If, however, in the eral grounds, the fifth and last ground bejudgment of the Court, the enactment is without constitutional right, there is no alternative but to do so. As was most appropriately said by Judge Waties, in Lindsay et al. v. Commissioners, 2 Bay., 61: "In exercising this high authority, the Judges claim no judicial supremacy; they are only the administrators of public will. If an Act of the Legislature is held void, it is not because the Judges have any control over the legislative power, but because the Act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their Representatives, expressed in any law.'

Entertaining, on the question made, the views which I have herein expressed, I cannot concur in the judgment of the Court.

4 S. C. *541

*SHELTON v. MAYBIN.

(Columbia. April Term, 1873.)

[Appeal and Error \$248.]

Errors in the rulings of the Circuit Judge cannot be considered, except upon proper exceptions, taken at the trial.

[Ed. Note.-Cited in Powers v. McEachern, 7 S. C. 299.

For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. ⊗⇒248.]

[Courts \$=63, 75.]

Where, after the session of a Circuit is commenced, an Act is passed transferring the County to another Circuit and fixing a different time for holding the Courts therein, the jurisdiction of the Court to continue its session and hear and determine cases after the passage of the Act, is not affected—the Act containing no special provision on the subject.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 215, 247, 248; Dec. Dig. € 63, 75.]

Before Thomas, J., at Union, March Term, 1872.

Action for dower by Lucy Shelton, plaintiff, against A. G. Maybin, defendant.

The Term of the Court, at which the case was tried, commenced on the 6th March, 1872. On the 9th March, 1872, the Act entitled "An Act to amend sundry Sections of the Code of Procedure, relating to Circuit Courts," was passed. This Act transferred Union County from the Sixth to the Seventh Circuit, and changed the time for holding the Courts of Common Pleas of the County from the Wednesday after the first Monday of March to the Wednesday after the third Monday of that month. The action in this case was tried on the 13th and 14th days of March, 1872. The verdict was for the plaintiff.

The defendant gave notice of appeal on sev-"Because the judgment is void, the ing: Court being held at a different time and in a different Circuit, and by a different Judge than that prescribed by the Act of the Legislature."

Bobo & Moorman, for appellant. Wallace & Steadman, contra.

Oct. 27, 1873. The opinion of the Court was delivered by

WILLARD, A. J. A verdict was rendered on behalf of respondent as demandant of dower. The appellant asks that the verdict be set aside and a new trial granted. does not appear by the record that any exception to the rulings of the Circuit Judge was taken upon the trial. A single proposition appears to have been charged, and that was charged in conformity to the appellant's request. This Court has so often held that a verdict will not be disturbed unless some error in the ruling of the Circuit Judge is brought up, by a proper exception, that it is unnecessary again to refer to the subject.

*542

*The fourth ground of appeal may be regarded as based on an objection proper for a motion in arrest of judgment, and, therefore, may be considered. The proposition is, that the judgment is void, the Court having been held at a different time, in a different Circuit, and by a different Judge than that prescribed by the Act of the Legislature.

The term of the Court of Common Pleas for Union, at which the case was tried, commenced on the 6th of March, 1872, in conformity with the law as it stood at that time.

Three days after the session of the Court had commenced, and on the 9th day of March, a law was enacted transferring Union County from the Sixth to the Seventh Circuits, and changing the March Term of the Common Pleas for that County from the Wednesday succeeding the first Monday of March to the Wednesday succeeding the third Monday of that month. (15 Stat. 146.)

It is contended that the intent and operation of this statute was to render invalid all proceedings of the Court of Common Pleas in session, at its passage, on the two-fold ground that it was being held by the Circuit Judge of the Sixth Circuit, whereas, by law, as amended, the power of that Judge to sit in that County ceased on the passage of the Act, on the 9th day of March, and that the time of the holding of the March Term being changed to a later day, the Court, as organized at the passage of the law, was dissolved by its operation.

It will not be necessary to consider the

question whether the judicial authority of a less it be excepted to before the jury retire to Circuit Judge is circumscribed to such an extent that in the event of his sitting in the Court of General Sessions or Common Pleas beyond the limits of his proper Circuit, and without special statute authority therefor, all proceedings of such Court will be null and void; for we are satisfied that it was not the intent or operation of the statute in question to affect the organization or powers of the Court as it was sitting in Union at the passage of the Act.

The Court was organized and sitting at the time, under Section 16, Article IV, of the Constitution, which contains the following language: "The Court of Common Pleas shall sit in each Judicial District in this State at least twice in every year, at such stated times and places as may be appointed by law."

The Legislature, in accordance with this provision of the Constitution, had designated a time and place for the sitting of the Court

*in Union County, and the Court was, at the passage of the law, in the actual exercise of its constitutional authority conformably to such legislative designation.

As the law in question is in form and substance a general regulation of the various Courts of Common Pleas and General Sessions throughout the State, and as no intent is expressed, nor can properly be implied to give it any special or peculiar operation as affecting Courts already in session, we are constrained to hold that it did not intend any interference with the powers of the Court when in session at its passage. Whether the Legislature would have authority to dissolve the Court, either directly or indirectly, when convened and sitting in conformity with law and under authority specifically delegated by the Constitution, is a question that need not be considered, as we find nothing in the statute evidencing such an intent. The Court was duly sitting, and the verdict and judgment possess full authority.

The appeal must be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at the hearing, but concurred in the judgment.

> ____ 4 S. C. 543

FOX v. RAILROAD COMPANY.

(Columbia. April Term, 1873.)

[Trial \$\infty 255, 273.] An error of law in the Judge's charge to the jury cannot be made a ground of appeal un-

their room, nor can a failure to charge a par-ticular proposition of law be assigned as error unless the Judge, on request, declines so to charge.

[Ed. Note.—Cited in Powers v. McEachern, 7 S. C. 299; South Carolina R. Co. v. Wilming-ton, C. & A. R. Co., Id., 430; Coleman v. Hel-ler, 13 S. C. 49; Ancrum v. Wehmann, 15 S. C. 122; Sawyer, Wallace & Co. v. Macaulay, 18 S. C. 545.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627, 680; Dec. Dig. ⇐⇒255, 273.]

Before Graham, J., at Charleston, July Term, 1872.

Action by Lawrence Fox, plaintiff, against the Savannah and Charleston Railroad Company, defendant, to recover damages for an injury to the plaintiff as a passenger on defendants' road.

Evidence was given on both sides, and the Circuit Judge charged the jury upon the law of the case. The defendant made no exception to the charge, or any part of it, before the jury retired to consider their verdict, nor did it state any proposition of law, and request the Court so to charge.

*The jury returned a verdict of \$5,000 for the plaintiff, and thereupon the defendant gave notice that it excepted, and would move the Court for a new trial, and, failing in that motion, would appeal to the Supreme Court on certain grounds, which imputed error in the finding of the jury, and various alleged errors of law, as well in the charge to the jury as in the failure to charge certain propositions.

The motion for a new trial was refused, and the defendant appealed on the grounds stated in his notice.

Campbell, for the motion. Chisolm & Whaley, contra.

Nov. 14, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. The grounds of appeal submit errors of law, which, if they arise in the case, can only be heard in this Court when they are brought before it through the prescribed, and, therefore, appropriate course. When the objection is insisted on, as is done on behalf of the respondent here, the Court must necessarily regard it, if it is sustained by the authority of its own ruling and decisions. A party to avail himself of an error in law, made by the presiding Judge in his charge, must except to it before the jury retire to their room, and, so a failure to charge in a particular manner as to propositions of law, cannot be assigned as error, un- | Phœnix Fire Insurance Co., 1 S. C., 27, and charge.

The absence of these observances, when insisted on here, and interposed as an objec- consider the points submitted, tion to the appeal, if sustained by the fact, is fatal.

This has been the ruling of the Court in several cases, among which are Madsden v. curred.

less the Judge, on request, decline so to Abrahams & Son v. Kelley & Barrett, 2 S. C., 238.

As we do not regard ourselves at liberty to

The motion must be dismissed.

MOSES, C. J., and WILLARD, A. J., con-

255









ENTYERSITY OF CALIFORNIA LOS ANGELES



